FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 28, 2021

Christopher M. Wolpert
Clerk of Court

MARK E. SELLS,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 21-5014
(D.C. No. 4:20-CV-00323-CVE-CDL)
(N.D. Okla.)

**ORDER**

Before **McHUGH**, **KELLY**, and **BRISCOE**, Circuit Judges.

Appellant's petition for rehearing is denied.

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

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Appendix
A

FILED
United States Court of Appea
Tenth Circuit

April 23, 2021

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

MARK E. SELLS,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 21-5014
(D.C. No. 4:20-CV-00323-CVE-CDL)
(N.D. Okla.)

**ORDER DENYING CERTIFICATE OF APPEALABILITY***

Before **McHUGH**, **KELLY**, and **BRISCOE**, Circuit Judges.

Petitioner Mark Sells, an Oklahoma state prisoner appearing pro se, requests a certificate of appealability (COA) so that he may appeal the district court's order dismissing as untimely his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Because Sells has failed to satisfy the standards for issuance of a COA, we deny his request and dismiss the matter.

Appendix B

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I

A

On May 18, 2004, Sells was charged in the District Court of Washington County, Oklahoma, with two counts of shooting with intent to kill. On that same day, the state trial court issued a warrant for Sells' arrest.

On December 17, 2004, the state trial court scheduled an initial appearance for February 18, 2005, and noted that Sells was incarcerated at the Federal Correctional Institution in El Reno, Oklahoma (FCI-El Reno). On December 29, 2004, the state trial court, acting upon a motion filed by the State, issued a writ of habeas corpus ad prosequendum. For reasons unclear from the record, that writ was returned unserved and Sells did not appear for his scheduled initial appearance on February 18, 2005.

On April 26, 2005, the state trial court, acting pursuant to a second motion filed by the State, issued another writ of habeas corpus ad prosequendum. On that same day, the district attorney sent a letter to officials at FCI-Reno notifying them that Sells had pending criminal charges in Washington County and that the state trial court had issued a writ directing the sheriff to transport Sells to state court for an initial appearance.

On May 5, 2005, Sells was transported to Washington County and he made his initial appearance before the state trial court on May 6, 2005. Sells remained at the Washington County jail until June 2, 2005, when he was returned to FCI-El Reno.

On October 4, 2005, Sells filed a motion with the state trial court to dismiss the charges against him, arguing that the State violated two provisions of the Interstate

Agreement on Detainers (IAD) by sending him back to federal prison before his trial and by failing to commence the trial within 120 days of his first appearance in state court.

On October 5, 2005, the state trial court issued a writ of habeas corpus ad prosequendum in order to secure Sells' appearance at a preliminary hearing scheduled for October 13, 2005. At the preliminary hearing on October 13, 2005, the state trial court considered and denied Sells' motion to dismiss the charges against him. In doing so, the state trial court found that the State did not lodge a detainer against Sells with federal prison officials, and it in turn concluded that the IAD's provisions did not apply. At the end of the preliminary hearing, the state trial court found probable cause to bind Sells over for trial.

Sells was tried before a jury in November 2006. At the conclusion of the evidence, the jury found Sells guilty of one count of shooting with intent to kill and one count of assault with a dangerous weapon, and the jury recommended that Sells be sentenced to thirty-five years' imprisonment for the shooting with intent to kill conviction and eight years' imprisonment on the assault conviction. On December 20, 2006, the state trial court sentenced Sells in accordance with the jury's recommendations, and ordered that the sentences be served consecutively.

Sells filed a direct appeal with the Oklahoma Court of Criminal Appeals (OCCA) challenging his convictions and sentences. On March 31, 2008, the OCCA issued an unpublished summary opinion affirming Sells' convictions and sentences. Sells did not file a petition for writ of certiorari with the United States Supreme Court.

In late 2018, Sells purportedly became suspicious, after reading an article in a newsletter, that his rights under the IAD may have been violated prior to his trial. On May 15, 2019, Sells found a copy of the letter that the district attorney in his criminal case sent to federal authorities at FCI-El Reno on April 26, 2005, notifying them that Sells had pending criminal charges against him in Washington County, Oklahoma, and that the state trial court had issued a writ directing the sheriff to transport Sells to state court for an initial appearance. Sells concluded that this letter effectively served as a detainer for purposes of the IAD.

On July 1, 2019, Sells filed an application for state post-conviction relief asserting three claims for relief, all of which hinged, to one degree or another, on Sells' claim that his rights under the IAD had been violated when the state trial court allowed him to return to federal custody after his initial appearance and before his trial. The state trial court denied Sells' application on December 2, 2019, and the OCCA subsequently affirmed that denial in an order filed on March 2, 2020. Sells also alleged, in one of the claims, that the state trial court erred by refusing to call a mistrial after it was revealed during the sentencing proceeding that a witness who had been housed in the Washington County jail with Sells had provided the district attorney prior to trial with a written statement outlining the witness's failed attempts to obtain a taped confession from Sells while they were in adjoining jail cells. The OCCA concluded that Sells' claims were either barred by res judicata because he raised them on direct appeal or were waived because he failed to raise them on direct appeal.

C

On June 30, 2020, Sells initiated these federal habeas proceedings by filing a pro se petition for writ of habeas corpus and a supporting brief. Sells asserted four claims for relief in his petition. In his first claim, Sells alleged that the State violated certain provisions of the IAD before his trial, which in turn deprived the state trial court of jurisdiction over him. Sells alleged that the state trial court, by allowing him to be tried, convicted, and sentenced, violated his due process and equal protection rights. In his second claim, Sells alleged that he was denied the effective assistance of counsel because his trial counsel aided the State in violating the IAD by agreeing to a continuance on August 15, 2015, and by failing to adequately brief and argue the motion to dismiss the charges against Sells based on the IAD violations. In his third claim for relief, Sells alleged that his constitutional right to due process was violated because the district attorney withheld potentially exculpatory evidence, i.e., the written pretrial statement from the witness who was housed with Sells at the Washington County jail. In his fourth and final claim for relief, Sells alleged that he was denied fair and impartial hearings and a trial in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution. In support, Sells alleged that the district attorney intentionally lied under oath to the state trial court when he stated that no detainer had been lodged against Sells, and that this lie resulted in Sells being illegally tried and convicted.

Respondent moved to dismiss Sells' petition as time-barred under 28 U.S.C. § 2244(d)(1)(A). On January 21, 2021, the district court issued an opinion and order granting respondent's motion to dismiss and dismissing Sells' petition with prejudice.

The district court concluded that Sells' criminal "judgment . . . became final on June 30, 2008, when the time expired for seeking further direct review," and that his "one-year limitation period" under § 2244(d)(1)(A) "commenced the next day, on July 1, 2008, and expired one year later, on July 1, 2009." ECF No. 20 at 9. The district court in turn concluded that Sells' "application for postconviction relief, filed July 1, 2019, had no tolling effect on this one-year limitations period because [Sells] filed the application 10 years after his one-year limitation period expired." *Id.* The district court also concluded that the circumstances described by Sells did not "warrant equitable tolling from July 1, 2008," when the one-year limitations period "commenced, to May 15, 2019, when he discovered the purported detainer." *Id.* at 13. The district court explained that Sells' actions, when viewed in their entirety, did not establish that he "acted with the requisite diligence to support equitable tolling." *Id.* at 14.

In addition, the district court rejected Sells' argument that his petition was timely under § 2244(d)(1)(d) "because he could not prove his claims until May 15, 2019, when he discovered the purported detainer." *Id.* at 11. The district court noted that "the state district court found that the [S]tate did not lodge a detainer against [Sells]" and "[Sells] did not challenge that finding on direct appeal," and the district court in turn concluded that Sells failed to present clear and convincing evidence to establish that the state district court's finding was incorrect. *Id.* Further, the district court concluded that Sells "knew the factual predicate of his ground one claim in 2005, even if he did not discover evidence to support that claim, namely, the purported detainer, until May 15, 2019." *Id.* The district court also concluded that even if "the letter should be construed as a detainer,

the record show[ed] that a habeas petitioner exercising reasonable diligence could have discovered the purported detainer as early as 2005." *Id.* at 12.

Lastly, the district court rejected Sells' assertion that he was actually innocent of the charge of shooting with intent to kill. The district court noted that "the evidence [Sells] appear[ed] to rely on," i.e., "a portion of his sentencing transcript containing testimony about unfruitful attempts to obtain inculpatory evidence against [him] and the witness's written statement about the same, [wa]s not new." *Id.* at 15. Further, the district court noted that "the fact that [Sells] was present at his 2006 sentencing hearing and heard the witness's testimony about the written statement and the attempts to obtain a tape-recorded confession from" Sells "severely undermine[d] the credibility of [his] claim, asserted 14 years later, that the allegedly withheld written statement and audiotapes would prove his actual innocence." *Id.*

As part of its opinion and order, the district court denied Sells a COA. Final judgment in the case was entered on the same day as the district court's opinion and order.

Sells filed a notice of appeal on February 8, 2021. On February 16, 2021, Sells filed a pleading with this court that we shall construe as an application for COA.

II

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). "Federal law requires that he first obtain a COA from a circuit justice or judge." *Id.* (citing 28 U.S.C. § 2253(c)(1)). To obtain a COA, a state prisoner must make

"a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires the prisoner 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 v. Cockrell*, 537 U.S. 322, 336 (2003) (alteration in original) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). In other words, the prisoner must show that the district court's resolution of the claims was "debatable or wrong." *Slack*, 529 U.S. at 484. When a district court dismisses a § 2254 claim on procedural grounds, a petitioner is entitled to a COA only if he shows both that reasonable jurists would find it debatable whether he had stated a valid constitutional claim and debatable whether the district court's procedural ruling was correct. *Id.* at 484-85.

Sells first argues in his application for COA that the district court erred in addressing and rejecting his actual innocence claim. According to Sells, he is actually innocent because (a) "[t]he suppressed detainer . . . was evidence requiring all charges to be dismissed w/prejudice" prior to trial, and (b) "there is a 'reasonable probability' the withheld [Brady] evidence . . . would have convinced the Jury that" he was not guilty of shooting with intent to kill. App. at 4. What Sells fails to address, however, is the district court's conclusion that his claims of actual innocence rest not on newly discovered evidence, but rather on evidence that was available to him at the time of his

direct appeal. Based upon our review of the record on appeal, we conclude that reasonable jurists would not find this conclusion debatable.[1]

Sells next argues that the district court erred "when it considered applying 'Equitable Tolling' over 'Judicial Estoppel', as equitable tolling requires ongoing due diligence, whereas judicial estoppel does not." *Id.* at 8. We reject this argument. The doctrine of judicial estoppel "typically applies when, among other things, a party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 170 (2010) (quotation marks omitted). We conclude, based upon our review of the record on appeal, that the doctrine has no applicability to the question of whether his federal habeas petition was timely or not. As for the district court's ruling on the issue of equitable tolling, Sells makes no attempt to establish that reasonable jurists would find it debatable.

In the remainder of his application, Sells touches on the merits of the claims asserted in his habeas petition and argues that the district court's ruling was "'contrary to' the evidence presented . . . and both 'contrary to' and in 'an unreasonable application of'" Supreme Court precedent, "with this ruling being very debateable [sic] by reasonable

[1] We also note that Sells' first stated basis for actual innocence, which he alleges the district court overlooked, would not establish his factual innocence of the charged crimes, but instead would only amount to a technical defense to the prosecution. *See Bousley v. United States*, 523 U.S. 614, 623-24 (1998) (holding "that 'actual innocence' means factual innocence, not mere legal insufficiency").

jurists." *Id.* at 11. Notably, however, Sells does not discuss the remainder of the district court's procedural ruling, which analyzed the timeliness of his federal habeas petition, nor does he otherwise attempt to establish that his habeas petition was timely filed. Consequently, we conclude he has failed to establish that reasonable jurists would find the district court's analysis debatable.

The application for COA is therefore DENIED and the matter is DISMISSED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
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| MARK E. SELLS, Petitioner, v. SCOTT CROW, Respondent. | ) | Case No. 20-CV-0323-CVE-CDL |

## OPINION AND ORDER

Petitioner Mark Sells, a state inmate appearing pro se,[1] commenced this action by filing a 28 U.S.C. § 2254 petition for writ of habeas corpus (Dkt. # 1), on June 30, 2020,[2] asserting four claims. Respondent Scott Crow moves to dismiss the petition, alleging that petitioner's claims are barred by 28 U.S.C. § 2244(d)(1)'s one-year statute of limitations. Following review of the petition and brief in support (Dkt. # 2), respondent's dismissal motion (Dkt. # 11) and brief in support (Dkt. # 12), petitioner's response (Dkt. # 14), and applicable law, the Court concludes that respondent's motion shall be granted. The Court therefore dismisses the habeas petition, with prejudice, and denies as moot petitioner's motion (Dkt. # 10) for appointment of counsel.

Appendix C

[1] Because petitioner appears pro se, the Court liberally construes his pleadings. Gallagher v. Shelton, 587 F.3d 1063, 1067 (10th Cir. 2009).

[2] The Clerk of Court received the petition on July 6, 2020. Dkt. # 1, at 1. But petitioner swears, under penalty of perjury, that he delivered the petition to prison officials on June 30, 2020, and other evidence in the record supports his statement, Dkt. # 1, at 14, 21. The Court therefore deems the petition filed on June 30, 2020. See Houston v. Lack, 487 U.S. 266, 276 (1988) (holding that prisoner's notice of appeal was filed when prisoner delivered it to prison officials); Rule 3(d), Rules Governing Section 2254 Cases in the United States District Courts (incorporating prison mailbox rule for inmate filings in habeas actions).

## I.

Petitioner is in state custody pursuant to a judgment and sentence entered against him in the District Court of Washington County, Case No. CF-2004-239. Dkt. # 1, at 1.[3] In that case, the State of Oklahoma (the state) charged petitioner, on May 18, 2004, with two counts of shooting with intent to kill. Dkt. # 2, at 9; Dkt. # 12-2, at 3. The state district court issued a warrant for his arrest that same day. Dkt. # 12-2, at 3. On December 17, 2004, the state district court scheduled an initial appearance for February 18, 2005, and noted that petitioner was incarcerated at the Federal Correctional Institution (FCI)-El Reno, in El Reno, Oklahoma. Id. On the state's motion, the state district court issued a writ of habeas corpus ad prosequendum on December 29, 2004. Id. Petitioner did not appear on February 18, 2005, and the state district court entered a minute order indicating that the writ was returned "unserved," that the prosecuting attorney would "prepare and send a ten point letter," and that petitioner's next court date would be April 1, 2005. Dkt. # 12-2, at 4.[4] Petitioner did not appear on April 1, 2005, apparently because he was "in D.O.C."[5] and the state district court ordered him to appear on May 6, 2005. Id.

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[3] For consistency, the Court's citations refer to the CM/ECF header page number found in the upper right-hand corner of each document.

[4] Other entries on the state district court's docket sheet suggest that petitioner appeared in state district court on December 17, 2004, and February 18, 2005. Dkt. # 12-2, at 3-4. But the state district court clarified at petitioner's preliminary hearing, held in October 2005, that the Washington County sheriff did not obtain temporary custody of petitioner, and petitioner did not appear in state district court, until May 2005. Dkt. # 2, at 56-58.

[5] Though unclear, in context of the entire record, the state district court's reference to the "D.O.C." most likely was an attempt to indicate that petitioner was still in federal custody. Nothing in the record or the parties' briefing suggests that petitioner was held by the Oklahoma Department of Corrections at this time.

On April 26, 2005, the district attorney filed a motion for writ of habeas corpus ad prosequendum, and the state district court issued the writ. Dkt. #12-2, at 4. That same day, the district attorney sent a letter to officials at FCI-El-Reno. Dkt. # 2, at 31-32. The letter, signed by the district attorney and the Washington County sheriff, notified federal officials that petitioner had pending charges in Washington County and that the state district court had issued a writ directing the sheriff to transport petitioner to state district court for an initial appearance, identified the sheriff's deputies who would transport petitioner, indicated that petitioner likely would be returned to federal prison on May 9, 2005, and certified that the sheriff would "assume full responsibility" for petitioner's temporary custody. Id. Federal officials received the letter from the district attorney on April 27, 2005, and a "Federal Bureau of Prisons In-Transit Data Form," dated April 27, 2005, reflects that as of that date petitioner had no detainers lodged against him. Dkt. # 2, at 32, 66.

Pursuant to the writ issued on April 26, 2005, petitioner was transported to Washington County on May 5, 2005, appeared in state district court on May 6, 2005, and was held at the Washington County jail until June 1, 2005. Dkt. # 2, at 9; Dkt. # 12-2, at 4. Petitioner was returned to FCI-El Reno on June 2, 2005, and a writ of habeas corpus ad prosequendum was issued on October 5, 2005, to secure petitioner's appearance at his October 13, 2005, preliminary hearing. Dkt. # 2, at 9; Dkt. # 12-2, at 4-7.

On October 4, 2005, petitioner, through trial counsel, filed a motion to dismiss his charges, alleging that the state violated two provisions of the Interstate Agreement on Detainers (IAD) by

(1) sending petitioner back to federal prison before his trial and (2) failing to commence the trial within 120 days of his first appearance in state district court.[6] Dkt. # 2, at 37-41; Dkt. # 12-2, at 6.

At the beginning of petitioner's preliminary hearing, held October 13, 2005, the state district court considered and denied petitioner's dismissal motion. Dkt. # 2, at 53, 56-65. The state district court found that the State did not lodge a detainer against petitioner and concluded that the IAD's provisions therefore did not apply.[7] Id. at 58-64. At the end of the preliminary hearing, the state district court found probable cause to bind petitioner over for trial. Dkt. # 12-2, at 7.

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[6] The IAD is an interstate compact entered into by the compacting states with the consent of Congress. See Cuyler v. Adams, 449 U.S. 433, 438-42 (1981). As relevant here, "[t]he IAD, to which the United States and Oklahoma are signatories, protects a prisoner from excessive transfers through its anti-shuttling provision," found in Article IV(e). Miller v. Allbaugh, 798 F. App'x 224, 232 (10th Cir. 2020) (unpublished); see also OKLA. STAT. tit. 22, § 1347, art. IV(e). The anti-shuttling provision "is violated when a prisoner serving a sentence in a sending state is indicted by a receiving state; is transferred to the receiving state pursuant to a detainer and a request for custody; and is then returned to his original place of imprisonment before being tried on the untried indictment." Miller, 798 F. App'x at 232. The IAD's speedy-trial provision, applicable when the receiving state lodges a detainer against a prisoner who has untried charges in the receiving state and presents to the sending state a written request for temporary custody of that prisoner, provides that "trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." OKLA. STAT. tit. 22, § 1347, art. IV(a), (c).

[7] The IAD does not define the term "detainer" but the United States Supreme Court has described a detainer as "a legal order that requires a State in which an individual is currently imprisoned to hold that individual when he has finished serving his sentences to that he may be tried by a different State for a different crime." Alabama v. Bozeman, 533 U.S. 146, 148 (2001); see also United States v. Mauro, 436 U.S. 340, 359 (1978) (relying on language from congressional reports to describe the term "detainer" as "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction"). In Mauro, the Supreme Court held that a writ of habeas corpus ad prosequendum is not a detainer within the meaning of the IAD and, thus, does not trigger the IAD's provisions, but that the writ can constitute a written request for temporary custody if the receiving State has previously lodged a detainer against the prisoner. 436 U.S. at 349.

Petitioner's case proceeded to trial in November 2006. Dkt. # 12-2, at 14-18. The jury found petitioner guilty of shooting with intent to kill (count one) and assault with a dangerous weapon (count two) and affixed punishment for those convictions, respectively, at 35 years' imprisonment and eight years' imprisonment. Dkt. # 12-1, at 1; Dkt. # 12-2, at 17-18. Petitioner's sentencing hearing was held on December 20, 2006. Dkt. # 12-2, at 19. At the hearing, the state presented testimony from a witness who had been housed in the county jail with petitioner before petitioner's trial. Id.; Dkt. # 2, at 44-50. On cross-examination of this witness, trial counsel elicited testimony revealing that the witness provided a written statement to the district attorney, before trial, regarding the witness's failed attempts to obtain a taped confession from petitioner while they were in adjoining jail cells. Dkt. # 2, at 42, 45-49. Citing the district attorney's failure to provide the written statement to him before trial, trial counsel argued that the district attorney violated petitioner's rights under Brady v. Maryland, 373 U.S. 83 (1963), and moved for a mistrial. Id. at 50. The state district court denied the motion, imposed the sentences recommended by the jury, and ordered that the sentences be served consecutively. Id. at 52; Dkt. # 12-2, at 19.

Represented by appellate counsel, petitioner filed a direct appeal in the Oklahoma Court of Criminal Appeals (OCCA), raising seven propositions of error. Dkt. # 1, at 2; Dkt. # 12-1, at 1-2. In an unpublished summary opinion filed March 31, 2008, in Case No. F-2006-1319, the OCCA affirmed petitioner's convictions and sentences. Dkt. # 12-1, at 2-4. Petitioner did not file a petition for writ of certiorari in the United States Supreme Court. Dkt. # 1, at 2.

Over 10 years later, "in late 2018," petitioner read an article in a newsletter, "learned he may have been hindered" in his efforts to assert his rights under the IAD before his trial, and began researching whether the state had, in fact, violated his rights under the IAD. Dkt. # 12-4, at 6. On

May 13, 2019, petitioner submitted a written request to the Federal Bureau of Prisons, seeking information as to "the date that Washington County filed/notified Federal Authorities at FCI El Reno, of a detainer or charges against [him]," "the date that [he] requested a 'Fast and Speedy Trial' under the provisions of the IAD (Interstate Agreement on Detainers), while at FCI El Reno," and "the date that Washington County was notified that [he] had asked for/invoked [his] right to a 'Fast and Speedy Trial' under the IAD." Dkt. # 14-1, at 29. Two days later, on May 15, 2019, petitioner found a copy of the letter, dated April 26, 2005, that the district attorney sent to federal authorities at FCI-El Reno.[8] Dkt. # 2, at 7-8, 31-32.

Based on his belief that the letter "is clearly a 'Detainer'" that the state lodged against him on April 26, 2005, petitioner filed an application for postconviction relief in state district court on July 1, 2019, raising four claims.[9] Dkt. # 1, at 3; Dkt. # 12-3, at 3-15; see also Dkt. # 12-7, at 16. After receiving a response from the state, the state district court denied petitioner's application on December 2, 2019. Dkt. # 12-6, at 1-2. Petitioner filed a postconviction appeal, in Case No. PC-2020-0016, and the OCCA affirmed the denial of postconviction relief in an order filed March 2, 2020. Dkt. ## 12-7, 12-8. The OCCA concluded that petitioner's postconviction claims either were barred by res judicata because he raised them on direct appeal or were waived because he failed to raise them on direct appeal. Dkt. # 12-8, at 1-3.

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[8] According to petitioner, the letter was "buried in a 'transport/booking' packet used by the Wash[ington] Co[unty] Sheriff's Office to transport [him] in 2005." Dkt. # 2, at 7-8. It is not clear from the record how or where petitioner located the "transport/booking packet."

[9] Petitioner raised three claims in the application for postconviction relief and raised the fourth claim in a "motion to amend and supplement" his application, filed in August 2019. Dkt. # 12-6, at 1; Dkt. # 12-7, at 13.

Petitioner filed the instant petition for writ of habeas corpus (Dkt. # 1) and brief in support (Dkt. # 2) on June 30, 2020. He seeks federal habeas relief on the same four grounds that he raised in state postconviction proceedings. First, he claims that the state violated the IAD's speedy trial and anti-shuttling provisions before his trial and, as a result, prosecuted him without jurisdiction thereby violating his constitutional rights to due process and equal protection of the law. Dkt. # 1, at 5. Second, he claims that he was denied his constitutional right to the effective assistance of counsel because trial counsel aided the state in committing the alleged IAD violations by agreeing to a continuance on August 15, 2005, and by failing to adequately brief and argue the motion to dismiss his charges based on the IAD violations. Dkt. # 1, at 7; Dkt. # 2, at 19-25. Third, he claims that the State violated his constitutional right to due process because the prosecutor withheld evidence, in violation of Brady v. Maryland, 373 U.S. 83 (1963), and the state district court violated his right to due process by permitting the Brady violation. Dkt. # 1, at 9. Fourth, he claims that he was denied his constitutional right to fair and impartial judicial proceedings because the state district court relied on "perjured and false statements" and ignored the existence of a detainer to erroneously deny petitioner's motion to dismiss the charges based on the alleged IAD violations and to "illegally prosecute" him. Dkt. # 1, at 11.

In response to the habeas petition, respondent filed a dismissal motion, alleging that petitioner's claims are barred by 28 U.S.C. § 2244(d)(1)'s one-year statute of limitations. Dkt. ## 11, 12.

Petitioner contends that his claims are timely, under 28 U.S.C. § 2244(d)(1)(D), and, in the alternative, that he is entitled to equitable tolling, as to three claims, and application of an equitable exception based on "actual innocence," as to one claim. Dkt. # 1, at 5-13; Dkt. # 2, at 5-9; Dkt # 14.

## II.

The Antiterrorism and Effective Death Penalty Act (AEDPA) establishes a one-year statute of limitations for state prisoners to file a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. 28 U.S.C. § 2244(d)(1). The one-year limitation period "run[s] from the latest of" one of four dates, only two of which are relevant here: (1) "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," 28 U.S.C. § 2244(d)(1)(A), and (2) "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," id. § 2244(d)(1)(D).

Regardless of which provision applies, the one-year limitation period is tolled by statute for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." Id. § 2244(d)(2). Additionally, a federal court may toll the limitation period for equitable reasons, Holland v. Florida, 560 U.S. 631, 645 (2010), and may excuse noncompliance with the statute of limitations if the petitioner makes "a credible showing of actual innocence," McQuiggin v. Perkins, 569 U.S. 383, 392 (2013).

## III.

Respondent urges the Court to dismiss the habeas petition because (1) petitioner's claims are untimely under § 2244(d)(1)(A), (2) the record does not support petitioner's assertion that his one-year limitation period commenced at a later date under § 2244(d)(1)(D), (3) petitioner has not demonstrated any equitable reasons to toll the one-year limitation period, and (4) petitioner has not

presented a credible actual-innocence claim. Dkt. ## 11, 12. On the record presented, the Court agrees with respondent that the petition should be dismissed as time-barred.[10]

**A. All claims are untimely under § 2244(d)(1)(A).**

Petitioner appears to acknowledge, and it is clear from the record, that all four of his claims are untimely under § 2244(d)(1)(A). Under this provision, petitioner had one year from the date his judgment became final to file a federal habeas petition. 28 U.S.C. § 2244(d)(1)(A). The OCCA affirmed petitioner's judgment on March 31, 2008, and petitioner did not file a petition for writ of certiorari in the United States Supreme Court. Petitioner's judgment therefore became final on June 30, 2008, when the time expired for seeking further direct review. Gonzalez v. Thaler, 565 U.S. 134, 150 (2012). Petitioner's one-year limitation period commenced the next day, on July 1, 2008, and expired one year later, on July 1, 2009.[11] See Harris v. Dinwiddie, 624 F.3d 902, 906 n.6 (10th Cir. 2011) (applying anniversary method to calculate one-year limitation period); FED. R. CIV. P. 6(a)(1)(A) (excluding day of event that triggers a period that is stated in days or a longer unit of time). Petitioner's application for postconviction relief, filed July 1, 2019, had no tolling effect on this one-year limitation period because petitioner filed the application 10 years after his one-year limitation period expired. 28 U.S.C. § 2244(d)(2); Clark v. Oklahoma, 468 F.3d 711, 714 (10th Cir.

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[10] Petitioner appears to request an evidentiary hearing on the dismissal motion. Dkt. # 14, at 1, 10. Because the Court finds the existing record sufficient to adjudicate the dismissal motion, the Court denies petitioner's request for an evidentiary hearing.

[11] Respondent contends that petitioner's 90-day period expired on June 29, 2008, and that his one-year limitation period, under § 2244(d)(1)(A), commenced on June 30, 2008. Dkt. # 12, at 2. Because June 29, 2008, was a Sunday, petitioner had until the following Monday, June 30, 2008, to file a timely petition for writ of certiorari. See FED. R. CIV. P. 6(a)(1)(C). Thus, his one-year limitation period began to run on July 1, 2008.

2006). Thus, if § 2244(d)(1)(A) provides the commencement date for petitioner's one-year limitation period, all four claims asserted in the habeas petition are untimely.

**B. Section 2244(d)(1)(D) does not provide a later commencement date.**

Petitioner contends that the claims he asserts in grounds one, two, and four of his petition are timely under § 2244(d)(1)(D), because he discovered the April 26, 2005, letter that he believes is a detainer on May 15, 2019, and he is entitled to statutory tolling from July 2, 2019, through March 2, 2020, while his application for postconviction relief was pending in state court. Dkt. # 1, at 5-13; Dkt. # 2, at 5-9; Dkt. # 14.[12]

Under § 2244(d)(1)(D), the one-year limitation period for filing a federal habeas petition begins to run on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence." 28 U.S.C. § 2244(d)(1)(D). As a reminder, petitioner claims that he is entitled to federal habeas relief (1) because the state violated the IAD by moving him back and forth between federal prison and the Washington County jail before his November 2006 trial and by failing to commence that trial within 120 days of his first appearance in state court (ground one), (2) because trial counsel performed deficiently and prejudicially by agreeing to a continuance in August 2005 and by inadequately briefing and arguing his pretrial dismissal motion that alleged IAD violations (ground two), and (3) because the state

[12] Respondent suggests that petitioner seeks application of § 2244(d)(1)(D) only as to his ground one claim. Dkt. # 12, at 5 & n.3. The Court disagrees. Petitioner expressly states that he could not raise the claims he asserts in grounds one, two, and four until May 2019 because that is when he found the "detainer." Dkt. # 1, at 5, 7, 11; Dkt. # 2, at 6. Petitioner appears, however, to concede that § 2244(d)(1)(D) does not apply to his ground three Brady claim and that the Brady claim is untimely under § 2244(d)(1)(A). Dkt. # 1, at 9. Nonetheless, petitioner urges the Court to apply the actual-innocence exception to excuse the untimeliness of the Brady claim. Id. The Court will address petitioner's actual-innocence argument in Section III.D of this opinion and order.

district court deprived him of a fair trial and due process by acting with bias and prejudice when it erroneously determined that the state did not file a detainer and ruled that the IAD therefore did not apply (ground four). Dkt. ## 1, 2. Petitioner contends that § 2244(d)(1)(D) provides the commencement date for his one-year limitation period because he could not prove these claims until May 15, 2019, when he discovered the purported detainer. Dkt. # 1, at 5-13; Dkt. # 2, at 5-9; Dkt. # 14.

For three reasons, the Court finds that § 2244(d)(1)(D) does not apply. First, the state district court found that the state did not lodge a detainer against petitioner, and petitioner did not challenge that finding on direct appeal. Ordinarily, a federal habeas court must presume that a state court's factual findings are correct unless the petitioner rebuts that presumption "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Here, petitioner has presented evidence that supports, rather than rebuts, the state district court's finding. Specifically, he submitted evidence that officials at FCI-El Reno received the district attorney's letter on April 27, 2005, and completed a form that same day reflecting that petitioner had no detainers lodged against him as of that date. Dkt. # 2, at 66. This supports the state district court's finding that federal officials did not proceed as if any detainer had been filed against petitioner. Dkt. # 2, at 64. Second, the record demonstrates that petitioner not only knew the key facts underlying his ground one claim, but also presented those facts in state district court through the pretrial motion he filed in October 2005 seeking dismissal of his charges based on alleged IAD violations. Dkt. # 2, at 37-41. Thus, petitioner knew the factual predicate of his ground one claim in 2005, even if he did not discover evidence to support that claim, namely, the purported detainer, until May 15, 2019. See Pacheco v. Artuz, 193 F. Supp. 2d 756, 760 (S.D.N.Y. 2002) (stating that, under § 2244(d)(1)(D), the time starts from the date the petitioner is "on notice

of the facts which would support a claim, not from the date on which the petitioner has in his possession evidence to support his claim"). Third, even adopting petitioner's view that the letter should be construed as a detainer, the record shows that a habeas petitioner exercising reasonable diligence could have discovered the purported detainer as early as 2005. See Madrid v. Wilson, 590 F. App'x 773, 776 (10th Cir. 2014) (unpublished) (explaining that § 2244(d)(1)(D)'s reasonable-diligence requirement is "an 'objective standard' that refers to when a plaintiff 'could have' discovered the pertinent facts, not when she [or he] actually discovered them" (quoting United States v. Denny, 694 F.3d 1185, 1189 (10th Cir. 2012)). Significantly, petitioner's own pleadings and exhibits (1) show that the state district court referred to the district attorney's intent to prepare and send a "ten point letter," most likely the same letter petitioner characterizes as a detainer, in a minute order filed on February 18, 2005, Dkt. # 14, at 20, (2) allege that trial counsel received a copy of the purported detainer "with 'original discovery'" in May 2005 and performed deficiently by failing to submit the detainer with the pretrial dismissal motion he filed on October 4, 2005, Dkt. # 2, at 7, 14, 18, 24, and (3) allege that the state district court had access to but "ignore[d] the copy of the [d]etainer in the Court's file" when that court denied petitioner's pretrial dismissal motion on October 13, 2005, Dkt. # 2, at 9, 11-12.

Under these circumstances, the Court finds that petitioner has not rebutted the presumption that the state district court correctly found that no detainer was filed against petitioner. Further, the Court finds that petitioner knew the factual predicate of his ground one claim in 2005 even if he failed to discover the purported detainer until 2019, and, in any event, petitioner "could have" discovered the purported detainer long before May 2019. The Court therefore concludes that

petitioner has not shown that his one-year limitation period commenced on May 15, 2019, under § 2244(d)(1)(D).

**C. Petitioner's circumstances do not warrant equitable tolling.**

Next, petitioner appears to contend that if § 2244(d)(1)(A) governs his commencement date of his one-year limitation period for the IAD-related claims, his circumstances warrant equitable tolling from July 1, 2008, when that period commenced, to May 15, 2019, when he discovered the purported detainer. Dkt. # 2, at 5-8.

A petitioner seeking equitable tolling of the one-year limitation period bears the burden to show specific facts demonstrating "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing" of the federal habeas petition. Holland, 560 U.S. at 649. Petitioner alleges that the district attorney, his trial counsel, and the state district court judge hindered his efforts to pursue his IAD-related claims because they denied the existence of a detainer in 2005, causing him to believe that no detainer had been filed against him and thereby delaying his discovery of the purported detainer. Dkt. # 2, at 5-8.

Even assuming these allegations are sufficient to demonstrate that extraordinary circumstances stood in petitioner's way and prevented him from filing a timely federal habeas petition, the record does not support that petitioner diligently pursued his IAD-related claims. See Burger v. Scott, 317 F.3d 1133, 1141 (10th Cir. 2003) (noting that, in this circuit, courts "generally decline[] to apply equitable tolling when it is facially clear from the timing of the state and federal petitions that the petitioner did not diligently pursue his claims"). Instead, as previously discussed, the record shows that petitioner (1) sought dismissal of his charges in 2005, before his trial, based on the alleged IAD violations he asserts in ground one, (2) did not challenge the state district court's

adverse ruling on his pretrial dismissal motion, or raise any other IAD-related claims, on direct appeal, (3) did nothing to further pursue his IAD-related claims until September 2018 when he read an article about the IAD and began researching whether the state had, in fact, violated his rights under the IAD, and (4) first requested information from the Federal Bureau of Prisons regarding his IAD-related claims on May 13, 2019. On this record, the Court cannot conclude that petitioner acted with the requisite diligence to support equitable tolling.

**D. Petitioner does not present a credible claim of actual innocence.**

Finally, petitioner urges the Court to excuse the untimeliness of the Brady claim he asserts in ground three because he "is claiming 'actual innocence' of shooting with intent to kill." Dkt. # 1, at 9; Dkt. # 2, at 25-27.

A petitioner who presents a credible claim of "actual innocence" may obtain habeas review of an otherwise untimely habeas claim. Perkins, 569 U.S. at 392. But the equitable exception to the statute of limitations "applies to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner].'" Perkins, 569 U.S. at 394-95 (alteration in original) (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)). Thus, a petitioner asserting an actual-innocence claim must (1) "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial," Schlup, 513 U.S. at 324, and (2) "show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence," id. at 327. Critically, a petitioner who asserts an actual-innocence claim need not "prove diligence to cross a federal court's threshold." Perkins, 569 U.S. at 399. But

a court may consider the "timing [of the petitioner's actual-innocence claim] as a factor relevant in evaluating the reliability of a petitioner's proof of innocence." Id.

Though not well-developed, petitioner's assertion of actual-innocence appears to be intertwined with his ground three Brady claim. In support of the Brady claim, petitioner appears to allege that the dtate failed to make available before trial (1) tape recordings that were allegedly made by a witness who testified at petitioner's sentencing hearing, but not at trial, and (2) a written statement from that same witness that described the witness's unsuccessful efforts to get petitioner to confess his guilt while petitioner and the witness were housed in adjoining jail cells before petitioner's trial. Dkt. # 2, at 25-27, 42-52. Petitioner further alleges that the tape recordings and the written statement "held evidence favorable" to petitioner and "would have shown that [he] had never 'shot with intent to kill.'" Dkt. # 2, at 26.

To the extent the Court understands petitioner's actual-innocence claim, the Court finds that it is not credible for two reasons. First, the evidence petitioner appears to rely on, namely, a portion of his sentencing transcript containing testimony about unfruitful attempts to obtain inculpatory evidence against petitioner and the witness's written statement about the same, is not new. The record shows that trial counsel cross-examined the witness in question at petitioner's sentencing hearing, submitted the written statement penned by the witness as an exhibit at that hearing, and moved for a mistrial on the basis of the Brady violation alleged in ground three. Dkt. # 2, at 42-52. Second, and relatedly, the fact that petitioner was present at his 2006 sentencing hearing and heard the witness's testimony about the written statement and the attempts to obtain a tape-recorded confession from petitioner severely undermines the credibility of petitioner's claim, asserted 14 years later, that the allegedly withheld written statement and audiotapes would prove his actual innocence.

For these reasons, the Court rejects petitioner's argument that the untimeliness of his Brady claim should be excused under Perkins.

## IV.

Based on the foregoing, the Court finds that 28 U.S.C. § 2244(d)(1)(A) governs the commencement date for petitioner's one-year limitation period and concludes that petitioner's habeas claims are therefore untimely. The Court further concludes that petitioner has not demonstrated any equitable reasons to extend the limitation period and has not presented a credible claim of actual innocence that would excuse his untimely claims. The Court therefore grants respondent's dismissal motion and dismisses the petition for writ of habeas corpus, with prejudice, as time-barred. As a result, the Court denies as moot petitioner's motion for appointment of counsel. Lastly, the Court finds nothing in the record to support issuance of a certificate of appealability. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

**ACCORDINGLY, IT IS HEREBY ORDERED** that:

1. Petitioner's request for an evidentiary hearing on the dismissal motion is **denied**.
2. Respondent's motion to dismiss (Dkt. # 11) is **granted**.
3. The petition for writ of habeas corpus (Dkt. # 1) is **dismissed with prejudice**.
4. A certificate of appealability is **denied**.
5. Petitioner's motion for appointment of counsel (Dkt. # 10) is **denied as moot**.
6. A separate judgment shall be entered in this matter.

**DATED** this 21st day of January, 2021.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**MARK E. SELLS,**

**Petitioner,**

**v.**

**SCOTT CROW,**

**Respondent.**

**Case No. 20-CV-0323-CVE-CDL**

**JUDGMENT**

In an opinion and order filed contemporaneously herewith, the Court granted respondent's motion to dismiss petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus, and dismissed the petition, with prejudice, as barred by 28 U.S.C. § 2244(d)(1)'s one-year statute of limitations.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that judgment is hereby rendered in favor of respondent and against petitioner.

**DATED** this 21st day of January, 2021.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF WASHINGTON COUNTY
STATE OF OKLAHOMA

MARK E. SELLS )
)
Petitioner, )
)
vs. )
) Case No. CF-2004-239
STATE OF OKLAHOMA, )
)
Respondent. )

DISTRICT COURT WASHINGTON COUNTY
JILL L. SPITZER, COURT CLERK
FILED
DEC – 2 2019
BY

ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF

NOW on this 2nd day of December, 2019, this matter comes before the Court upon the Petitioner's Application For Post-Conviction Relief. THE COURT HEREBY FINDS as follows:

1. The Petitioner was convicted in November 2006 after a jury trial in the instant case.

2. Thereafter the Petitioner perfected an appeal and the Oklahoma Court of Criminal Appeals issued a mandate affirming the jury verdict.

3. The Petitioner filed an Application for Post-Conviction Relief on or about July 1, 2019, Motion for Evidentiary Hearing on or about July 22, 2019, and Motion to Amend and Supplement Petitioner's Post-Conviction Relief Petition on or about August 26, 2019.

4. The State filed a Response on October 1, 2019, objecting to the Petitioner's Application.

5. In his Application, the Petitioner failed to allege any circumstance required by the provisions of Title 22 O.S. § 1080 for which the requested relief can be granted.

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6. Further, all propositions raised by the Petitioner in his Application were, or should have been, raised on direct appeal.

7. The Petitioner failed to raise any new proposition that could NOT have been raised on direct appeal, therefore he effectively waived his right to raise them now.

8. The Post-Conviction Relief Act is not intended to provide the Petitioner a second appeal.

The Petitioner's Application for Post-Conviction Relief, therefore, is denied. Furthermore, the Petitioner's Motion for Evidentiary Hearing is moot, and therefore also denied.

Linda A. Thurman
Judge of the District Court

**Certificate of Mailing**

I certify that on the 2 day of December, 2019, a true and correct copy of the foregoing Order was mailed via US mail with proper postage thereon to:

Mr. Mark E. Sells DOC #546774
Lawton Correctional Facility
5 B-117
8607 SE Flowermound Road
Lawton, OK 73501

Sheryl Bates
Deputy Clerk

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA



| | |
|---|---|
| **MARK E. SELLS,** | |
| **Petitioner,** | |
| **v.** | **No. PC 2020-0016** |
| **THE STATE OF OKLAHOMA,** | |
| **Respondent.** | |

**ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF**

On January 6, 2020, Petitioner, *pro se*, appealed to this Court from an order of the District Court of Washington County, Case No. CF-2004-239, denying him post-conviction relief. Petitioner was convicted following a jury trial of Shooting with Intent to Kill and Assault with a Dangerous Weapon. He was sentenced to thirty-five years imprisonment on the first count and eight years imprisonment on the second count. The sentences were ordered to be served consecutively.

On post-conviction appeal Petitioner argues (1) the District Court lost jurisdiction when they returned him to Federal custody, (2) the District Court erred in denying him an evidentiary hearing, (3) he was denied effective assistance of trial counsel, (4) he was denied a fair and

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impartial trial, and (5) he was denied due process.

In an order filed December 2, 2019, the Honorable Linda Thomas, District Judge, denied Petitioner's application for post-conviction relief. Judge Thomas found Petitioner failed to allege any circumstance required by the provisions of Sec. 1080 of Title 22 for which the requested relief can be granted, that all propositions raised by Petitioner were, or should have been, raised on direct appeal. Judge Thomas found Petitioner failed to raise any new proposition that could not have been raised on direct appeal and effectively waived his right to raise them now.

Petitioner's conviction was appealed to this Court. In an unpublished opinion issued March 31, 2008, Appeal No. F 2006-1319, the Judgment and Sentence was affirmed. All issues previously ruled upon by this Court are *res judicata*, and all issues not raised in the direct appeal, which could have been raised, are waived.

Ineffective assistance of trial counsel was raised on direct appeal and is therefore barred by the doctrine of *res judicata*. The remaining issues are procedurally barred or have been waived. Further, the record does not support Petitioner's contention the District Court erred in denying his post-conviction application without an evidentiary

hearing. An evidentiary hearing is only required when there exists a genuine issue of material fact. *See* Sections 1083-1084 of Title 22.

As Petitioner has failed to show entitlement to relief in a post-conviction proceeding, the order of the District Court of Washington County denying Petitioner's application for post-conviction relief is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 2nd day of March, 2020.

**DAVID B. LEWIS, Presiding Judge**

**DANA KUEHN, Vice Presiding Judge**

**GARY L. LUMPKIN, Judge**

**ROBERT L. HUDSON, Judge**

Appendix E

Scott Rowland

**SCOTT ROWLAND, Judge**

ATTEST:

John D. Hadden

Clerk

PA

Appendix

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MARK SELF IS NOT OPENING UP AND SPEAKING FREELY AS HE DID BEFORE. AT FIRST I THOUGHT HIS SILENCE WAS DUE TO THE SPEAKER WHICH HE MENTIONED TO ME, IT BEING IN THE LIGHT FIXTURE IN THE HALLWAY OUTSIDE OUR DOORS. BUT I NOW GET THE IMPRESSION THAT HE IS LEARY OF ME AND AS TO WHY THEY SUDDENLY MOVED ME NEXT DOOR TO HIM. AFTER SEVERAL ATTEMPTS TO GET HIM TO TALK ABOUT HIS CASE AND IF HE STILL WANTED SOMETHING DONE TO HIS PARENTS, HE IS BEING OVERLY CAUTIOUS AND NOT SAYING ANYTHING. RIGHT AFTER THEY MOVED ME NEXT TO HIM HE HAD A VISIT WITH HIS ATTORNEY AND SINCE THAT TIME HIS OPINION IS THAT HE WILL WIN HIS CASE AT JURY TRIAL.
ALL I CAN DO AT THIS TIME IS OFFER TO TESTIFY AT HIS TRIAL OF OUR CONVERSATIONS IN THE PAST CONCERNING HIS PARENTS IF THAT SHOULD BE NEEDED OF ME

Appendix #1

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RIGHT Before MIDNIGHT ON SUNDAY 10-29-06 They moved me out of SECURITY cell #2 to put a WOMAN FROM tank #3 N. I. showed BIG EAGLE THE RECORDER WITHOUT AN

5/13/2019

Received
MAY 21 2019
FOIA/PA Section
Federal Bureau of Prisons

FOIA/PA Section
Office of General Counsel, Rm. 924
Federal Bureau of Prisons
320 First Street, N.W.
Washington, D.C. 20534

Dear Sir(s):

My name is Mark Edwin Sells and my Federal ID number was: #09741-062. I served a 30 month sentence at F.C.I. El Reno, in Yukon, Oklahoma from around December of 2004 until May of 2006. I hope you can help me find the dates of three events that transpired while I was in Federal Custody at F.C.I. El Reno, with regard to pending charges against me by Washington County, Oklahoma.

First, I need to know the date that Washington County filed/notified Federal Authorities at FCI El Reno, of a detainer or charges against me, by them.

Second, I need to know the date that I requested a "Fast and Speedy Trial" under the provisions of the IAD (Interstate Agreement on Detainers), while at FCI El Reno.

Third, and last, I need to know the date that Washington County was notified that I had asked for/invoked my right to a 'Fast and Speedy Trial' under the IAD.

I am an Honorably Discharged Veteran of the United States Marine Corps and would greatly appreciate any assistance you can give me in finding the aforementioned dates, including any copies of these notifications. Thank you for taking the time to help me.

Sincerely,

Mark E. Sells ODOC #546774
Lawton Corr. Facility 5-B-117
8607 S.E. Flowermound Rd.
Lawton, OK 73501

Appendix G

IN THE DISTRICT COURT IN AND FOR WASHINGTON COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,
Plaintiff,

vs.

MARK EDWIN SELLS,
Defendant.



ORIGINAL

Case No: CF-04-239
F-2006-1319



* * * *

TRANSCRIPT OF PRELIMINARY HEARING PROCEEDINGS

held October 13, 2005,

before the Honorable Curtis L. DeLapp,

Associate District Judge.

* * * *

APPEARANCES:

FREDERICK S. ESSER, District Attorney, Washington County Courthouse, 420 South Johnstone, Bartlesville, Oklahoma 74003, appeared on behalf of the State of Oklahoma.

MARK KANE, Attorney at Law, P.O. Box 2566, Bartlesville, Oklahoma 74003, appeared on behalf of the Defendant.

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REPORTED BY:
MARY BETH BUCHANAN, C.S.R., R.M.R.
Washington County Courthouse
420 South Johnstone, Suite 310
Bartlesville, Oklahoma 74003-6605

DISTRICT COURT OF OKLAHOMA
OFFICIAL TRANSCRIPT

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**STATE WITNESS** **PAGE**



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# EXHIBITS

| STATE'S EXHIBIT | | IDENTIFIED | OFFERED | RULED |
|---|---|---|---|---|
| 1 | OSBI report | 70 | -- | -- |
| 2 | Photo | 111 | 115 | 115 |
| 3 | Photo | 112 | 115 | 115 |
| 4 | Photo | 113 | 115 | 115 |
| 5 | Photo | 113 | 115 | 115 |
| 6 | Photo | 114 | 115 | 115 |
| 7 | Photo | 114 | 115 | 115 |
| 8 | Photo | 114 | 115 | 115 |

| DEFENDANT'S EXHIBITS | | IDENTIFIED | OFFERED | RULED |
|---|---|---|---|---|
| 1 | Diagram by N. Sells | 59 | 59 | -- |



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PROCEEDINGS

THE COURT: All right. We're here today on State of Oklahoma versus Mark Edwin Sells, CF-04-239. Mr. Sells is represented by Mr. Mark Kane; Mr. Rick Esser representing the State. Set for preliminary hearing.

There's been filed in this case a motion to dismiss and brief in support by Mr. Kane, which I have read through.

And upon reading that, particularly the paragraph talking about, "according to the Washington county deputy and jail administrator, Gordon Brown, the only time the defendant was held in the Washington County Jail was from May 5th to June the 2nd," and then the minutes that he reflect.

I had the minute sheet pulled because my recollection of this case was the State came to me asking for a date to writ him here. We set December 17th, which is usually the case.

If they have someone they want to writ, I have them writ them back for a status docket day for initial appearance.

And then on that date, he did not appear. The State -- We passed it because the State needed -- The authorities would not release him, but the minute says he appeared.

On that date, we then set it for February 18th, try that again. Again, that minute shows that he appeared; and my recollection was he did not appear again and we had to issue another writ, which is -- we set April the 1st at 9:00 for the status review date.

April 1st, he was still in DOC; and he was ordered to appear. And I had the jail check to see if he was -- just double-check my memory whether he was ever here prior to May the 6th, and they have no record of that. At least that is my memory.

I don't know, you know, whether these minutes are somebody else or they thought he was here in the jail or what. But and Mr. Kane can, you know, address that if Mr. Sells has a different memory.

But my only thing is he did not appear in this court till May the 6th of 2005 on a writ of habeas corpus ad prosequendum issued by the district attorney's office, which is reflected.

So, Mr. Kane, my first question is: Does he have a different memory about being here earlier than that day? Or do you have evidence to show he was here earlier than that date or exactly what the --

I mean, that's what I remember happening is that we had set him a number of times and they could not get him here. So...

MR. KANE: Your Honor, as you know, I was not appointed till after all of these appearances; and so I can only rely on the minutes.

THE COURT: Uh-huh.

MR. KANE: But the -- And I don't question your recollection.

THE COURT: As I said, in your motion there, that's why when I read the motion and read those minutes that you have reflected for December 17th and February the 18th and then read the thing about the jail, because I remember how the February --

I mean, I remember how all those things transpired, particularly December 17th was a date that we had set for the writ -- or that's when they came in and asked for the writ.

And that minute is there for initial appearance date, and then they issued the writ after that. And then that was -- he was not produced.

So those minutes need to be corrected, unless there's evidence that I'm unaware of that he was here prior to that time. So that's what I'm asking.

MR. KANE: I will not mislead the Court. I don't have any evidence that he was here on those two dates, other than what the minute says.

THE COURT: Okay. Now, the rest, the rest of

the brief talks about the Interstate Agreement on Detainers Act -- which I'm going to call the IADA for purposes of the record, a shorter version -- and that that was violated for two reasons, one, that the case was not brought to trial within 120 days; and, two, that he was returned back to federal custody prior to -- or was turned back following those times he was here.

Being familiar with the IADA and having dealt with that in the past and having done research in the past on this issue or issues regarding the IADA, this case is similar to the case of Rackley vs. State, R-A-C-K-L-E-Y, which was cited at 814 P.2d 1048, which is a 1991 Court of Criminal Appeals case.

In that particular case, the appellant in that case claimed his conviction was obtained in violation of the IADA.

The facts behind that case, says:

Apparently, sometime after the crimes in the present cases were committed but before the trial on the charges, appellant was placed into federal custody. As a result, the State obtained appellant's presence for purposes of preliminary examination and trial by filing two --

-- and then quotation marks --

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-- writs of habeas corpus ad prosequendum --
-- end of quotation marks --
-- requesting that the appellant be transported from the federal penitentiary in El Reno to Oklahoma City at Oklahoma County District Court. Appellant claims that after he was returned to federal custody following the preliminary examination without having been tried on the State charges, the State lost its ability to proceed in that case. The court in that case disagreed with appellant's analysis. In the first place, appellant has not established that the present prosecution was based on a detainer triggering the IADA. The record further fails to show if the detainer was on file that appellant gave notice or made a demand for trial as required by § 1347. Such notice and demand is mandatory to invoke the agreement provision requiring the State to commence before the prisoner's returned to the original jurisdiction or place of confinement citing § 1347, Article III (d). And then assuming that there was a proper detainer, the IADA provides it only applies in courts where

detainers are pending.

In that case, they went on to say that his case was already done and he hadn't raised it. Mr. Sells has raised it.

The issue, though, under the IADA as set out in the statute is there's two ways, at least this Court's aware of, to get a prisoner before it on cases.

One is filing a detainer under the IADA; and once that is done by the State -- and the process is filling out a form. There's a number of forms under the Detainer Act which has been filed in this jurisdiction before for other people requesting custody.

And then the court having the jurisdiction of the indictment shall have, then, duly approved that detainer and requires the court to sign the request for a detainer form, record -- to be recorded and transmit the request.

And then there shall be a 30-day period after receipt of the appropriate authorities before the request can be honored in what we call the sending state within which period the governor of the sending state may disapprove the request for temporary custody or availability. The Act does apply to the federal jurisdictions as well.

Then upon the request of the officers, written request as provided in that paragraph, paragraph (a):

The appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of confinement under which the prisoner is being held, the time he's already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

In this case, it would be the federal authorities.

Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged the detainers against the prisoner with similar certificates and with notice informing them of the request for custody or availability of other reasons therefore.

Now, in this case, it's clear that Mr. Sells has never filed any type of request under the first part of the IADA asking that he be taken. There's a procedure set out in that case, and he's never done that.

The question is has the State filed a detainer under the IADA in this case triggering the provisions of

that article. Well, as in the Rackley case, the State did not file a detainer in this case.

The other way to get people here is filing a writ of habeas corpus ad prosequendum, which is clear that that's been done and those documents were filed.

The filing of a writ of habeas corpus ad prosequendum does not trigger the IADA as set forth in the Rackley case. It is a different statutory and different animal doing that stuff.

The court in Henager vs. State at 716 P.2d 699 (sic), a 1986 case -- and, again, another defendant in federal custody -- states that the state must fail the detainer under the Act until, you know, filed an agreement. Until then, the agreement is not applicable. The IADA is not applicable.

And then it goes on to say in that case when a continuance is granted by joint agreement, the time is tolled.

But in this particular case, the State did not file the detainer under the IADA. It filed a writ of habeus corpus ad prosequendum; and the federal authorities released him on the writ, which is, as I said before, a different statutory animal than a detainer under the IADA.

So this Court's ruling is the IADA and its provisions have not been triggered in this particular case.

The fact that he was returned is not a violation of the IADA under the Rackley case.

It's pretty as close on point as you can find as far as that they specifically say in that case in quotation marks the State filed two writs of habeas corpus ad prosequendum and that does not trigger the IADA Act because it's not a detainer under that particular Act.

And then if it was a detainer, as other cases state, the federal authorities -- Well, another reason why it's not a detainer under the Act is that the federal authorities did not, then, comply with or treat it as a detainer and comply with the statutory requirements to provide to this Court the information that was in part -- paragraph (b) of Article IV.

So this Court doesn't even get to the issue of whether or not there was a tolling by the passing by agreement the preliminary hearing because in this case, the Court finds that the IADA has not even been triggered in this case in regard to Mr. Sells' appearance here.

And so the motion to dismiss is denied by the Court, and Mr. Sells may have an exception to that ruling by the Court. But it is denied.

Having done that, we are set for preliminary hearing today. And is the State ready to proceed at preliminary hearing?



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MR. ESSER: We are, Your Honor. We have one witness who's still en route from Oklahoma City. That would be Terrance Higgs. We anticipate his arrival shortly. We are ready to proceed otherwise.

THE COURT: Is the defendant ready to proceed?

MR. KANE: Your Honor, we are ready to proceed for the preliminary hearing. Let the word come out of my mouth that we object to the ruling and note our exception, please.

THE COURT: You may have an exception to the ruling. You want to go see if -- Before we start, let's go off the record here.

(AN OFF-THE-RECORD DISCUSSION WAS HELD.)

(A BRIEF RECESS WAS TAKEN.)

THE COURT: All right. Back on the record in State of Oklahoma versus Mark Edwin Sells. State would call its first witness, then, for purposes of preliminary hearing.

MR. ESSER: Judge, we would call Orville Lee Sells to the stand.

MR. KANE: Your Honor, we'd like to invoke the rule of sequestration, please.

MR. ESSER: We'd ask an exception for Deputy Miller who is the custodian of the evidence and the chief

# CERTIFICATE

STATE OF OKLAHOMA )
)
COUNTY OF WASHINGTON )

I, Mary Beth Buchanan, C.S.R., R.M.R., Official Court Reporter within and for the State of Oklahoma, do hereby certify that on October 13, 2005, before the Hon. Curtis L. DeLapp, in the District Court of Washington County, State of Oklahoma, I stenographically reported the proceedings had and the evidence given; and that the above and foregoing is a true, correct, and complete transcript of the proceedings had and the testimony given, taken at said time and place, to the best of my ability.

Witness my hand and seal this 3rd day of April 2006.

Mary Beth Buchanan CSR/RMR
Mary Beth Buchanan, C.S.R., R.M.R.
Mary Beth Buchanan
Oklahoma Certified Shorthand Reporter
Certificate No. 1091
Exp. Date: December 31, 2006

Appendix
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Washington County Office
420 S. Johnstone, #222
Bartlesville, OK 74003
(918) 337-2860
FAX (918) 337-2898

Nowata County Office
Nowata County Courthouse
Nowata, OK 74048
(918) 273-3167

Victim Services Center
420 S. Johnstone, #222
Bartlesville, OK 74003
(918) 337-2816

Bogus Check Division
420 S. Johnstone, #222
Bartlesville, OK 74003
(918) 337-2824

OFFICE OF
District Attorney

Frederick S. Esser
Eleventh Judicial District
State of Oklahoma

Shelley K. G. Clemens
Assistant

Thomas Janer
Assistant

Kyra K. Franks Williams
Assistant

Rhonda Hilger
Victim-Witness Coordinator

Scott Julian
Assistant

April 26, 2005

U.S. Department of Justice
Federal Bureau of Prisons
Federal Correctional Institution
El Reno, OK 73036

INMATE TO BE RETURNED TO F.C.I. EL RENO, OKLAHOMA AND IS NOT TO BE RELEASED FROM CUSTODY WITHOUT THE WRITTEN PERMISSION OF THE WARDEN

Re: Mark Edwin Sells
Federal #09471062
Our Case No.: CF-2004-239
DOB: 03-21-63

Dear Sir:

Mark Edwin Sells, an inmate of the Federal Correctional Institution in El Reno, Oklahoma stands charged in the District Court of the 11th Judicial District of the State of Oklahoma with **Shooting With Intent to Kill – Two Counts**, and his appearance is necessary to answer to said charges.

The District Court of the 11th Judicial District of the State of Oklahoma, 420 South Johnstone, Bartlesville, Oklahoma, by Associate District Judge of Washington County, Curtis L. DeLapp, hereby issues the said Writ of Habeas Corpus Ad Prosequendum to Martha Mersch the Court Clerk of Washington County, 420 South Johnstone, telephone number (918) 337-2860.

Mark Edwin Sells is set for initial appearance before the District Court of Washington County.

The District Attorney for the 11th Judicial District in and for Washington County, State of Oklahoma, Frederick S. Esser, has requested the appearance of Mark Edwin Sells for the said initial appearance.

Mark Edwin Sells will be confined in the Washington County Jail, 420 South Johnstone, Bartlesville, Oklahoma during the legal proceedings.

Appendix
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page 1 of 2

The date for the requested proceedings is set for May 6, 2005 at 9:00 a.m.

Mark Edwin Sells will be transported by Deputy Jerry Henshall and Deputy Bill Hewitt of the Washington County Sheriff's Department, telephone number (918)337-2800 at the direction of the court, and his projected return to the federal institution will be May 9, 2005.

This is to certify that the above-named inmate will be provided safekeeping, custody, and care while in the custody of the Washington County Sheriff's Department, and that said Washington County Sheriff's Department will assume full responsibility for that custody, to include providing the inmate the same level of security required by Bureau of Prisons policy, 2 escorts, handcuffs, belly chain and leg irons. The inmate will be returned at the conclusion of the inmate's appearance in the proceeding for which the writ was issued. I have full power and authority to make this certification for said Washington County Sheriff's Department as the Sheriff for that authority.

Patrick J Ballard
Patrick J. Ballard, Sheriff

Signature

4-26-05
Date

Reba Crawford
Reba Crawford, Witness

Reba Crawford
Signature

4-26-05
Date

Sincerely,

Frederick S. Esser

Frederick S. Esser
District Attorney

FSE:br

Federal Correctional Institution, Oklahoma

Spoke With: Janet Smith
Title: Dep Clerks
Phone Number: 918 337 2800
Date Verified: 4-27-05
Staff Signature:

Appendix
I
Page 2 of 2

THE DISTRICT COURT IN AND FOR WASHINGTON COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,

vs.

MARK EDWIN SELLS,
Defendant.

Sheryl Wright

CASE NO. CF-04-239

I, Martha Mersch, Court Clerk for Washington County, Oklahoma hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out as appears of record in the Court Clerk's Office in Washington County, Oklahoma this 13 day of March 20 07
By Sheryl Wright Deputy
Martha Mersch
COURT CLERK

CF-2004-239

TRANSCRIPT OF SENTENCING HEARING

Held on December 20, 2006

Before the Honorable Janice P. Dreiling

District Judge

RECEIVED
MAR 26 2007
OIDS
APPELLATE DIVISION

COPY

APPEARANCES:

FREDERICK ESSER, District Attorney, Washington County Courthouse, 420 South Johnstone, Bartlesville, Oklahoma, 74003, appeared on behalf of the State of Oklahoma.

MARK KANE, Attorney at Law, P.O. Box 2566, Bartlesville, Oklahoma, 74005, appeared on behalf of the Defendant, Mark Edwin Sells.

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P.

A No, I did not.

MR. KANE: Thank you

THE COURT: Any further questions, Mr. Esser?

MR. ESSER: No, not of this witness.

THE COURT: Thank you. You may step down. Do you have further witnesses?

MR. ESSER: We have one other at this time, Dennis Milligan.

THE COURT: Mr. Milligan, if you could raise your right hand and I'll swear you in.

(THE OATH WAS ADMINISTERED.)

---

DENNIS MILLIGAN

after having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. ESSER:

Q Would you identify yourself for the judge, please?

A Dennis Milligan.

Q Mr. Milligan, why don't you tell the judge where you reside at this time?

A Lawton Correctional Facility.

Q Can you tell the court, before the Lawton



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A He -- I remember he made a comment that he was really pissed off at her because she would not allow his son to watch except for one hour of cartoons on Saturday and that really upset him. I know when he was speaking on the phone his demeanor would change, his eyes would get real beady and his complexion would get red and he'd be like spitting when he would talk and his voice would change, became a whole different person.

MR. ESSER: I don't think I have any other questions at this time

THE COURT: Mr. Kane.

---

CROSS-EXAMINATION

BY MR. KANE:

Q Do you recognize this handwriting?

A Yes, it's mine.

Q Did you write all of these pages?

A Yes.

Q When did you write these pages?

A When I was here about a month ago, a little over a month ago. I'm not sure of the exact date.

Q Is it more than one letter or just -- was that first?

A This was the first part and this first page was the last part. You have it backward. This page here is last.

Q Okay. And so you wrote this letter to whom?

A Well, I didn't address it to anyone. It was to go to the District Attorney's Office.

Q What made you think that he wanted a letter from you?

A I didn't know if he wanted one or not. It was the only way I had to communicate to him.

Q To what? A letter was the only way you had to communicate with --

A Mark. When I came back this time he was not opening up and discussing any of this which we had discussed before.

Q Why did you send a -- why did you need to communicate with the D.A.?

A Because they had me in a security cell next door to Mr. Sells.

Q For what purpose? Had you been a bad prisoner?

A No, sir.

Q Why?

A To see if Mark would open up and I could get him on a tape recorder.

Q And they gave you a tape recorder?

A Yes.

Q And did you get Mr. Sells on tape?

A No, sir. He was suspicious of why I was back in there in a security cell next to him.

Q He was what?



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A Suspicious of the reason for me being in a security cell back next to him. He just would not open up. Every time I'd approach the subject he would just not open up at all.

Q All right. So you did have the tape recorder on?

A Yes.

Q But you just didn't get any good stuff?

A He never approached the subject.

Q But you got him talking about other things?

A He talked about other things.

Q And you got that recording, right?

A No.

Q Well, what were you going to do, just punch the recorder on?

A I'd run the recorder and when he wouldn't speak on the subject I would erase it and have it ready in case he did the next time we talked.

Q And this was when -- was this before his trial?

A It was about a month ago.

Q Okay.

A I'm not sure of the date, and I'm not sure when his trial was.

Q You knew when you were trying to gather evidence from Mr. Sells you were -- you knew he hadn't been tried yet, right?



Appendix J

A Yes.
Q All right. So it was before his trial?
A Yes. I'm not sure of the dates.
Q Okay. And what did you do with the tape recordings that you had?
A When they pulled me out of the cell I gave it back to Officer Red Eagle.
Q And was there anything on --
A No.
Q So how long were you trying to gather evidence?
A You'd have to look at the jail records to see how long I was in the cell. I'd say approximately five days. Somewhere in that area.
Q And how was it they chose you to do this?
A Because I had brought to their attention because I felt like one of the female jailers was going to be hurt on the attempt to escape.
Q If you thought a female jailer was going to be hurt, they said here take a recorder and see what he says to you?
A I approached them about my concern about a female jailer possibly being hurt on an attempted escape. I told them what our conversation had been in total. I was given a tape to see if I could get any of that on tape, which I was not able to. So that's when I wrote this letter telling them that apparently he was not going to open up

and discuss it any further.

Q Okay.

A So I was pulled out of the tank, out of the cell, and put back into a regular tank.

MR. KANE: I'd like to mark this as, I don't know, defendant's exhibit what? I don't know what number. I guess make it sentencing one.

MR. ESSER: No objection.

THE COURT: It shall be marked and admitted for the purpose of this hearing, Defendant's Exhibit 1.

Q (By Mr. Kane) And just to get it straight, this Defendant's Exhibit 1 is a copy of the document that you produced yourself by your own handwriting?

A Yes.

Q And it was produced prior to Mr. Sells jury trial in this county. Is that correct?

A Yes, sir.

Q And you gave the original of this document to the District Attorney's Office. Is that correct?

A I gave it to I believe Officer Red Eagle, the original document at the time. No, I'll take it back. I gave it to my attorney Glenn Davis is who I gave it to originally.

Q All right. And what role did Mr. Davis play in this?

A He was communicating for me to the District

THE COURT: Mr. Esser, do you wish to respond?

MR. ESSER: Judge, just that I understand Mr. Kane needs to make a record for purposes of appeal. Previously, Your Honor, the information that Mr. Kane has requested was not provided to him because it was part of a pending criminal investigation. There is no requirement under any statute or constitutional requirement I'm aware of to advise a defendant who is on trial that he is under investigation for other charges at the same time and to provide the defense attorney copies of a pending criminal investigation while it is still in the course of developing.

We would also argue that it would be unconstitutional and in our opinion a violation of my ethical duty to file a charge against someone before I had the evidence against them. I have to wait until I have sufficient evidence to show at least probable cause and more likely what I could do to convince a jury beyond a reasonable doubt of a criminal charge before I file it.

So I understand why Mr. Kane has to make the argument, but I'd ask the court to overrule it.

MR. KANE: Your Honor, I'm not so foolish to think -- I don't think you're so foolish to think that I'm arguing he should have given me this because of the threat

to shank somebody or asking somebody to commit another crime on his behalf. There's evidence in here about the crime that Mr. Sells was charged with and went to trial on. That's what I'm talking about that should have been given to me for that purpose, not for any future charges.

THE COURT: I understand your point.

MR. KANE: Thank you.

THE COURT: Please give me Defendant's Exhibit 1, please. All right. Mr. Kane, the court is going to deny your motion and you may have an exception. Defendant's Exhibit No. 1 has been admitted for the record, and I'm certain it will be part of the appeal in Mr. Sell's case.

MR. KANE: Your Honor, I don't know whether Mr. Milligan was endorsed as an additional witness for purposes of trial or not. It could be easily found out by looking at the computer. I don't have a recollection one way or the other. Obviously he wasn't used.

THE COURT: Anything else you want to say about that?

MR. KANE: No, Your Honor, not at this point.

THE COURT: All right. Do you wish to make an opening statement?

MR. KANE: Your Honor, we will not be

State of Oklahoma,
County of Beckham

# SWORN AFFIDAVIT

I, Mark E. Sells, who resides at North Fork Correctional Center CS #251, 1605 E. Main Street, Sayre, OK 73662; make this sworn statement under penalty of Perjury. 28 U.S.C. § 1746

I so state, having personal knowledge of the facts set forth in this affidavit, that: The following is True and correct, to the best of my knowledge and memory:

That in late October or early November of 2006, while I was a prisoner at the Washington County Oklahoma jail, I had several conversations with Dennis Milligan, who was a prisoner in the next cell. These conversations were Always initiated by inmate Milligan. In these conversations I talked freely about my upcoming Trial, and how I knew I would win at Trial. I stated the following repeatedly, even when inmate Milligan tried to tell me the State would 'put me away for the rest of my life': I talked about my 'intent' to send my father a 'message' to quit coming to my house, threatening me, that he would get DHS to 'take' my son from me. That my plan was to show up unannounced at my parents' house and fire a 'shot' OVER my father's head to let him 'see' how it 'feels' to have someone show up unannounced and start problems. I talked about disconnecting the phone line at the house to give me a head start in leaving before his parents called the police. I NEVER had any intention of hurting either of my parents in any way, and certainly not trying to kill either of them. I never had any [plan] intent to harm either of his parents, in any way. Inmate Milligan, [on behalf of the State] offered to commit first degree murder, trying to 'entrap' Petitioner in an illegal act. He, after initiating a conversation, stated that I should not take any chances in a courtroom with a jury, and that he could 'take care of my parents



MES

Appendix 'K'

if I wanted him to'. When I said, 'what do you mean 'take care of them?', he said he could kill them for me, for a price, that he had been in prison a long time and had 'connections'.' I responded to this by saying "I am going to win in court, and [that] he better not go near my parents or harm them or any of my family in any way!" I found out at my sentencing Hearing on 12-20-2006, that these conversations had been recorded by inmate Milligan and the State, hoping I would admit Guilt and further incriminate myself. Inmate Milligan was lying on the Stand, and I demanded the confessed tapes be played to prove he had perjured himself and prove the State had put him on the Stand to lie. It was then, off the record, the District Attorney said [lied] the tapes had been 'misplaced'.

This is what was said, to the best of my recollection, and is evidence that I never intended to harm either of my parents.

**IT IS SO SWORN:**

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; 18 U.S.C. §

Mark E. Sells

on, _____
Date

## NOTARY

Applicant, Mark E. Sells, being known to me, appeared before me, swearing the afore is True and Correct to the best of his knowledge.

Subscribed and sworn to before me this 24 day of August, 2021.

My Commission Number is: 21003855

My Commission Expires: 3-20-2025

Notary Public

RENEE L MOAD NOTARY PUBLIC STATE OF OKLAHOMA 21003855 EXP. 03/20/2025



MES

D. HHC Duffie TST 2/4/88

001123

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES

THIS IS AN IMPORTANT RECORD. SAFEGUARD IT.

ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

# DD FORM 214, 1 JUL 79

PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE.

## CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

| 1. NAME (Last, First, middle) | 2. DEPARTMENT, COMPONENT AND BRANCH | 3. SOCIAL SECURITY NO. |
|---|---|---|
| SELLS, Mark Edwin | USMC-II | 43 76 |

| 4a. GRADE, RATE OR RANK | 4b. PAY GRADE | 5. DATE OF BIRTH | 6. PLACE OF ENTRY INTO ACTIVE DUTY |
|---|---|---|---|
| CPL | E-4 | 630321 | Oklahoma City, OK |

| 7. LAST DUTY ASSIGNMENT AND MAJOR COMMAND | 8. STATION WHERE SEPARATED |
|---|---|
| HqBtry, 12thMar, 3dMarDiv, FPO SFRAN 96602 | SU#2 HqBn MCB CamPen CA RUC:33149 Marine Corps |

| 9. COMMAND TO WHICH TRANSFERRED | 10. SGLI COVERAGE |
|---|---|
| Reserve Support Center (MCRSC) Overland Park, KS 66211 | AMOUNT $ 35,000 ☐ NONE |

11. PRIMARY SPECIALTY NUMBER, TITLE AND YEARS AND MONTHS IN SPECIALTY *(Additional specialty numbers and titles involving periods of 1 year or more)*

0044 Field Artillery Fire Control Man
(02 years, 05 months)

| 12. RECORD OF SERVICE | YEAR(s) | MONTH(s) | DAY(s) |
|---|---|---|---|
| a. Date Entered AD This Period | 01 | 07 | 14 |
| b. Separation Date, This Period | 04 | 05 | 10 |
| c. Net Active Service This Period | 02 | 09 | 27 |
| d. Total Prior Active Service | 00 | 00 | 00 |
| e. Total Prior Inactive Service | 00 | 00 | 00 |
| f. Foreign Service | 01 | 11 | 26 |
| g. Sea Service | 00 | 00 | 00 |
| h. Effective Date of Pay Grade | 84 | 05 | 01 |
| i. Reserve Oblig. Term. Date | 87 | 07 | 13 |

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED *(All periods of service)*

Rifle Marksman Badge, Letter of Appreciation, Sea Service Deployment Ribbon, Good Conduct Medal

14. MILITARY EDUCATION *(Course Title, number weeks, and month and year completed)*

None

| 15. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM | 16. HIGH SCHOOL GRADUATE OR EQUIVALENT | 17. DAYS ACCRUED LEAVE PAID |
|---|---|---|
| ☐ YES ☒ NO | ☒ YES ☐ NO | 0 |

18. REMARKS

Good Conduct Medal Period Commences: 840511

HOR: Mann, OK

"NOT A FINAL DISCHARGE"

SNM was provided a complete dental examination and all appropriate dental services and treatment within 90 days prior to release from active duty.

| 19. MAILING ADDRESS AFTER SEPARATION | 20. MEMBER REQUESTS COPY 6 BE SENT TO OK DIR. OF VET AFFAIRS |
|---|---|
| P.O. Box 59, Mann, OK 74083 | ☒ YES ☐ NO |

| 21. SIGNATURE OF MEMBER BEING SEPARATED | 22. TYPED NAME, GRADE, TITLE AND SIGNATURE OF OFFICIAL AUTHORIZED TO SIGN |
|---|---|
| Mark E Sells | J. R. MCGLOTHLIN, CAPTAIN, USMC, EXECO |

APPENDIX L

SPECIAL ADDITIONAL INFORMATION *(For use by authorized agencies only)*

| 23. TYPE OF SEPARATION | 24. CHARACTER OF SERVICE (Including upgrades) | |
|---|---|---|
| TRANSFERRED TO THE MARINE CORPS RESERVE | HONORABLE | |
| 25. SEPARATION AUTHORITY | 26. SEPARATION CODE | 27. REENLISTMENT CODE |
| MARCORSEPMAN PAR 1006 | MBM-1 | RE-1A (TO EAS) |

28. NARRATIVE REASON FOR SEPARATION

COMPLETION OF REQUIRED ACTIVE SERVICE (RETURN FROM OVERSEAS WITH LESS THAN 90 DAYS

| 29. DATES OF TIME LOST DURING THIS PERIOD | 30. MEMBER REQUESTS COPY 4 |
|---|---|
| NONE | MES INITIALS |

S/N 0102-LF-000-2140

SERVICE-2