No.

IN THE SUPREME COURT OF THE UNITED STATES

WARREN DOUGLAS VANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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January 10, 2023

CONTENTS

EXHIBIT 1:

United States v. Vann, No. 21-7057, 2022 WL 7366286 (10th Cir. Oct. 13, 2022)

2022 WL 7366286
Only the Westlaw citation is currently available. United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee, v.
Warren Douglas VANN, Defendant - Appellant.

No. 21-7057
|
FILED October 13, 2022

(D.C. Nos. 6:17-CV-00292-RAW & 6:02-CR-00085-RAW-1) (E.D. Oklahoma)

Attorneys and Law Firms

Gregory Dean Burris, Linda A. Epperley, Office of the United States Attorney, Muskogee, OK, for Plaintiff - Appellee.

Barry L. Derryberry, Office of the Federal Public Defender, Tulsa, OK, for Defendant - Appellant. Before HARTZ, BALDOCK, and McHUGH, Circuit Judges.

ORDER DENYING CERTIFICATE OF APPEALABILITY *
Harris L. Hartz, Circuit Judge

*1 Warren Vann seeks a certificate of appealability (COA) to appeal the district court's denial
of his motion under 28 U.S.C. § 2255 as untimely. 1 We deny his request for a COA and dismiss his appeal.

After conducting an evidentiary hearing on the timeliness issue, the magistrate judge issued a Findings and Recommendation that recites testimony by Mr. Vann and his mother without in any way questioning the veracity of the testimony. The district

court adopted the findings. We therefore accept as true the testimony described by the magistrate judge and summarize that testimony and the record evidence.

In May 2003 a jury in the United States District Court for the Eastern District of Oklahoma found Mr. Vann guilty on one count of first-degree murder in Indian country, one count of use of a firearm

in commission of a violent crime, one count of possession of a firearm after a felony conviction, and one count of possession of ammunition after a felony conviction. The court sentenced Mr. Vann to two consecutive terms of life in prison for the murder and use-of-firearm convictions, and two 10-year terms for the remaining convictions, the latter two terms to be served concurrently with the first life sentence. On February 16, 2005, we dismissed Mr. Vann's appeal following counsel's submission of a brief under Anders v. California, 386 U.S. 738 (1967). See United States v. Vann, 123 F. App'x 898 (10th Cir. 2005). Mr. Vann's conviction became final on May 17, 2005. See Kemp
v. United States, 142 S. Ct. 1856, 1860 (2022) (motions under § 2255 "must be filed within one year of the date on which the judgment of conviction becomes final. For someone who ... does not petition this Court for certiorari, a judgment becomes final when the time to seek certiorari expires
—ordinarily, 90 days after judgment." (citation and internal quotation marks omitted)).

A few months later, Mr. Vann's mother hired attorney Todd Hembree to file a § 2255 motion on her son's behalf. Mr. Hembree assured both Mr. Vann and his mother that he had plenty of time to file a § 2255 motion because there was no time limit on his challenge to the jurisdiction of the sentencing court. Although Mr. Hembree routinely promised that he was working on the motion, nearly seven years passed without result. On January 23, 2012, Mr. Hembree withdrew as Mr. Vann's attorney without ever having filed a motion for relief.

On August 8, 2012, Mr. Vann, acting on advice from a fellow inmate, filed a pro se application for relief under 28 U.S.C. § 2241 in the United States District Court for the Middle District of Florida, arguing that the sentencing court lacked jurisdiction because he did not commit his offenses in Indian country. On July 17, 2015, the

Florida district court dismissed Mr. Vann's application because he had neither moved for relief under § 2255 nor demonstrated why a § 2255 motion was an inadequate vehicle for his claims.

*2 Following this dismissal, Mr. Vann began requesting Oklahoma court and property records, planning once again to challenge the jurisdiction of the sentencing court but in a pro se § 2255 motion. Fellow inmates assisted Mr. Vann in this task by drafting and typing multiple requests to recordholders and legal aid practitioners. The first request was a letter to Legal Aid Services dated July 29, 2016, a year after the dismissal of the § 2241 action.

On July 28, 2017, Mr. Vann moved for relief under § 2255 and once again raised his jurisdictional argument. The district court denied Mr. Vann's motion as untimely and later denied a COA. After he sought relief from this court, we granted a COA, vacated the district court's judgment, and remanded for further proceedings to determine whether Mr. Vann was entitled to equitable tolling. The district court referred the matter to a magistrate judge and, following an evidentiary hearing and submission of briefs, the magistrate judge recommended denial of equitable tolling and of Mr. Vann's § 2255 motion. Mr. Vann objected, disputing the magistrate judge's findings that neither Mr. Hembree's misconduct nor Mr. Vann's concurrent and subsequent diligence in pursuing review

of his conviction satisfied the equitable-tolling standard. The district court adopted the magistrate judge's findings and recommendation, dismissed Mr. Vann's § 2255 motion as untimely, and denied Mr. Vann a COA.

A federal prisoner may appeal from a final order dismissing his § 2255 motion only when a COA has been issued. See 28 U.S.C. § 2253(c)(1)(B). We grant a COA only "if the applicant has made a substantial showing of the denial of a constitutional right." Id. § 2253(c)(2). When the district court denies a § 2255 motion on procedural grounds without considering the movant's constitutional arguments, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (emphasis added).

Mr. Vann argues in this court that he is entitled to equitable tolling. He contends that (1) Mr. Hembree's failure to provide competent legal advice was sufficiently egregious and (2) his own efforts to challenge his conviction as both a represented and a pro se movant were sufficiently diligent to justify tolling for the full period in question. We are not persuaded.

To be entitled to equitable tolling, a movant must show that (1) "some extraordinary circumstance ... prevented timely filing" and (2) the movant "has been pursuing his rights diligently." Holland v. Florida, 560 U.S. 631, 649 (2010) (internal quotation marks omitted). But even upon a finding of such an extraordinary circumstance, we will toll the limitations period only until that impediment to timely filing is removed. See Rudin v. Myles, 781 F.3d 1043, 1056 (9th Cir. 2015) ("We therefore conclude that extraordinary circumstances prevented Rudin from filing her application for federal habeas relief between November 10, 2004[, when counsel was appointed to represent her in collateral-review proceedings,] and August 22, 2007[, when Rudin was first on notice that her attorney had abandoned her and not filed a postconviction petition in state court]."); Harper v. Ercole, 648 F.3d 132, 142 (2d Cir. 2011) (tolling limitations period from beginning to end of extraordinary circumstance—hospitalization); Downs v. McNeil, 520 F.3d 1311, 1325 (11th Cir. 2008) (the equitable tolling period "would be from the time [the prisoner's] counsel told him his state habeas petition had been filed to the time it became clear to [the prisoner] that counsel's representation was a lie"); cf. Maples v. Thomas, 565 U.S. 266, 283 (2012) (client cannot "be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him"); Smalls v. Collins, 10 F.4th 117, 146 (2d Cir. 2021) (after negligent attorney notified prisoner that she was not representing him, "a reasonably diligent person could have retained an attorney and filed suit" because extraordinary circumstance caused by attorney error ceased to apply during remaining five months of limitations period).

*3 Reasonable jurists could decide that Mr. Hembree engaged in significant misconduct. And we can assume that Mr. Vann was entitled to equitable tolling during the time Mr. Hembree represented him. But tolling after Mr. Hembree's resignation on January 23, 2012, is questionable.

Mr. Vann argues that "[i]t is unreasonable ... to put an onus on [him] to reject his attorney's advice," even after he knows that his attorney has abandoned him. Aplt. Br. at 16. But that argument has little purchase in light of the facts of this case. Both Mr. Vann and his mother testified that they were advised by three other attorneys, including trial counsel immediately following the verdict, that a one-year statute of limitations applied to the § 2255 motion. And it is clear that Mr. Vann no longer relied on Mr. Hembree's advice after his resignation. In 2011 Mr. Vann had filed a bar complaint against Mr. Hembree and in 2012, having been told by fellow inmates that the limitations period had run on any § 2255 motion he might file, Mr. Vann followed their advice and pursued a § 2241 application rather than the § 2255 motion Mr. Hembree had planned to file. Also, as a general rule, tolling ends once a prisoner proceeds pro se. Cf. United States v. Denny, 694 F.3d 1185, 1191 (10th Cir. 2012) (once prisoner began acting pro se, his "ignorance of the law" ceased to "relieve him from the personal responsibility of complying with the law" (original brackets and internal quotation marks omitted)); Ross v. Varano, 712 F.3d 784, 799–800 (3d Cir. 2013) ("The fact that a petitioner is proceeding pro se does not insulate him from the 'reasonable diligence' inquiry and his lack of legal knowledge or legal training does not alone justify equitable tolling."); Doe v. Menefee, 391 F.3d 147, 177 (2d Cir. 2004) ("Given that we expect pro se petitioners to know when the limitations period expires ..., such inadvertence on Doe's part cannot constitute reasonable diligence."). We further note that Mr. Vann's reliance on jailhouse lawyers after Mr. Hembree's resignation is inadequate to justify equitable tolling. See Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000) ("The fact that an inmate law clerk was assisting in drafting the ... petition does not relieve [the defendant] from the personal responsibility of complying with the law.").

In addition, Mr. Vann failed to show reasonable diligence following Mr. Hembree's resignation. Even if we ignore the three years from August 8, 2012 (when he filed his § 2241 application) until July 17, 2015 (when that application was denied), he did not file his § 2255 motion until July 2017, two years after the § 2241 dismissal (which informed him that the proper avenue of relief would be under § 2255). Perhaps he assumed that he needed property records to support his jurisdictional claim before he could file his § 2255 motion. But he has pointed to nothing that prevented him from beginning to seek such records in 2012, five years before he filed his § 2255 motion.

In support of his claim of diligence, Mr. Vann relies upon the Supreme Court's decision in Holland
v. Florida and on three circuit opinions cited by Holland. But none of those cases involved the lack of diligence apparent here. In three of them the habeas petition was less than a year late. See Holland, 560 U.S. at 639, 653–54 (habeas petition was about five weeks late; remanding for consideration of equitable tolling where defendant filed a pro se § 2255 motion one day after learning that state high court had denied postconviction relief); United States v. Martin, 408 F.3d

1089, 1091, 1096 (8th Cir. 2005) (habeas petition was less than five months late; defendant filed his first pro se § 2255 motion two months after learning that attorney had falsely stated that he had filed a § 2255 motion, and one month after lodging a bar complaint against his attorney); Spitsyn
v. Moore, 345 F.3d 796, 798–99, 802 (9th Cir. 2003), as amended (Nov. 3, 2003) (habeas petition was less than nine months late; remanding on issue of equitable tolling where defendant filed pro se habeas petition five and a half months after his attorney returned the case file and abandoned his client). In Baldayaque v. United States, the third case cited by Holland, the § 2255 motion was close to three years late, but the district court found that the defendant "did everything that could have been expected of him and went to extraordinary ends to have a § 2255 motion filed on his behalf." 338 F.3d 145, 151 (2d Cir. 2003) (ellipses and internal quotation marks omitted). Yet even then the appellate court remanded for a determination of diligence. See id. at 153.

*4 Reasonable jurists could not debate the district court's dismissal of Mr. Vann's § 2255 motion as untimely. We therefore DENY his request for a COA and dismiss this appeal.

All Citations

Not Reported in Fed. Rptr., 2022 WL 7366286

Footnotes

* 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.

1 Because the district court denied Mr. Vann a COA, we construe his notice of appeal as a renewed COA request. {R., Vol. 1 at 334 (district court denial of COA).} Fed. R. App. P. 22(b)(2); 10th Cir. R. 22.1(A).

EXHIBIT 2:
United States v. Vann, 728 Fed. App'x. 877 (10th Cir. 2018) (unpublished)

728 Fed.Appx. 877 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee, v.
Warren Douglas VANN, Defendant-Appellant.

No. 18-7018
|
Filed June 21, 2018

(D.C. No. 6:17-CV-00292-JHP) (E.D. Oklahoma)

Attorneys and Law Firms

Gregory Dean Burris, Linda A. Epperley, Office of the United States Attorney, Eastern District of Oklahoma, Muskogee, OK, for Plaintiff-Appellee

Warren Douglas Vann, Pro Se

Before BRISCOE, HOLMES, and MATHESON, Circuit Judges.

ORDER AND JUDGMENT *
Per Curiam

Defendant-Appellant, Warren Douglas Vann, is in the custody of the Federal Bureau of Prisons. Proceeding pro se in the United States District Court for the Eastern District of Oklahoma, Mr. Vann filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody. The district court denied Mr. Vann's motion and refused to grant a certificate of appealability ("COA").

Mr. Vann initiated this appeal, in which he has filed an opening brief that includes a request for a COA. Pursuant to Tenth Circuit Rule 22.1(B), the United States has not filed a response brief. In accordance with 28 U.S.C. § 2253(c), a COA is granted as to whether Mr. Vann is entitled to equitable tolling.

In addition, we VACATE the district court's judgment, and REMAND with instructions for the district court to conduct any further proceedings necessary to determine whether Mr. Vann is entitled to equitable tolling. The Clerk is directed to issue the mandate forthwith.

All Citations

728 Fed.Appx. 877 (Mem)

Footnotes

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment 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.

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EXHIBIT 3:
United States v. Vann, 123 Fed. App'x. 898 (10th Cir. 2005) (unpublished)

123 Fed.Appx. 898
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1) United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee, v.
Warren Douglass VANN, Defendant-Appellant.

Nos. 03-7108, 03-7111.
|
Feb. 16, 2005.

Synopsis

Background: Defendant was convicted by jury in the United States District Court for first degree murder in Indian Country, use of firearm in commission of felony, possession of firearm after former conviction of felony, and possession of ammunition after former conviction of felony, and he appealed. Defendant's counsel filed Anders brief and moved for leave to withdraw as counsel.

Holding: The Court of Appeals, Robert H. Henry, J., held that photo lineup was admissible despite minor discrepancies in descriptions about whether suspect wore Army jacket, camouflage jacket, or green jacket.

Motion to withdraw granted; appeal dismissed.

Attorneys and Law Firms

*898 Inda A. Epperley, Gregory Dean Burris, Office of the United States Attorney Eastern District of Oklahoma, Muskogee, OK, for Plaintiff-Appellee.

Charles Whitman, Tulsa, OK, for Defendant-Appellant. Before EBEL, McKAY, and HENRY, Circuit Judges.

ORDER AND JUDGMENT *
ROBERT H. HENRY, Circuit Judge.

**1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See FED. R.APP. P. 34(a)(2); 10TH CIR. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Warren Vann was charged with and convicted by a jury of the following offenses: Count I: first degree murder in Indian Country, a violation of 18 U.S.C. §§ 1111(a), 1151, and 1153; Count II: the use of a firearm in the commission of a *899 felony, a violation of 18 U.S.C. § 924(c) (1)(A)(iii) and 924(j); Count III: possession of a firearm after former conviction of a felony; a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and Count IV: possession of ammunition after former conviction of a felony, a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The district court sentenced him to life imprisonment on Count I, life imprisonment on Count II (to be served consecutively with Counts I, III, and IV), 120 months on Count III, and 120 months on Count IV (to be served concurrently with counts I and III). The court also sentenced him to five years' supervised release on Counts I and II, and three years on each of Counts III and IV (each to run concurrently), and ordered him to pay a special assessment of $400.00 and restitution in the amount of $7,075.20.

Mr. Vann now appeals from his conviction and sentence, and seeks to raise numerous trial errors. Mr. Vann's counsel has filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and moves for leave to withdraw as

counsel. Mr. Vann has not filed an additional appellate brief. For the reasons set out below, we grant counsel's motion to withdraw and dismiss the appeal.

Anders holds that if counsel finds an appeal to be wholly frivolous after conscientious examination, he may advise the court and request permission to withdraw. Counsel must also submit to both the court and his client a brief referring to anything in the record arguably supportive of the appeal. The client may then raise any point he chooses, and the court thereafter must undertake a complete examination of all proceedings and then decide whether the appeal is in fact frivolous. If the court so finds, it may grant counsel's request to withdraw and dismiss the appeal. See Anders, 386 U.S. at 744, 87 S.Ct. 1396.

The Anders brief filed by Mr. Vann's counsel identifies four potential appellate issues: (1) the trial court erred in overruling Mr. Vann's motion to suppress the photo lineup that was presented to a witness, and (2) the trial court erred in refusing to dismiss the charges under Rule 29 of the Federal

Rules of Criminal Procedure, on the grounds of insufficient evidence. Counsel also notes that Mr. Vann may have claims of (3) ineffective assistance of trial counsel and (4) ineffective assistance of appellate counsel. Counsel has informed Mr. Vann that such claims should generally be brought in collateral proceedings, and not on direct appeal. See United States v. Galloway, 56 F.3d 1239, 1240 (10th Cir.1995).

**2 After careful review of the entire proceedings, we agree with counsel that no non-frivolous grounds for appeal appear on this record. The record amply supports the admissibility of the photo lineup. During the investigation of the murder, agents spoke with the next-door neighbor of the victim, Daphne Augare. Ms. Augare indicated that an unknown Native American male of average height, in his late 20's to early 30's, with dark hair and a thin mustache, wearing an olive green jacket and wearing at least two shirts, one maroon in color and one possibly green, and blue jeans, knocked on her back door and asked for a Kyle Johnson. The agents prepared a photo lineup with six individuals, and the neighbor identified the individual in the fifth photo as the unknown male, although she was not 100% sure. With some reservations, Ms. Augare later identified Mr. Vann in a preliminary hearing. At the trial, Ms. Augare identified Mr. Vann, and testified about several other factors that

were consistent with identifiable characteristics given by other witnesses in regard to what the defendant was driving and wearing.

*900 Our record review reveals that there were multiple witnesses that identified Mr. Vann at the trial, and there were minor discrepancies in the various witnesses' descriptions about whether he wore an Army jacket, a camouflage jacket, or a green jacket. The victim's son's description and identification of Mr. Vann were consistent with Ms. Augare's.

Mr. Vann does not indicate that the photo lineup was in any way suggestive that Mr. Vann was the suspect. Mr. Vann's assertion that such inconsistencies regarding his identification presented insufficient evidence to go to the jury is untenable. Cf. Kirby v. Illinois, 406 U.S. 682, 691, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (noting that "[t]he Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification"). As to the Rule 29 motion, this court reviews de novo the sufficiency of the evidence to support a conviction. United States v. Colonna, 360 F.3d 1169, 1178 (10th Cir.2004). In doing so, we view the evidence in the light most favorable to the government and determine whether a reasonable jury could have found the defendant guilty of the crime beyond a reasonable doubt. Id. We have reviewed the testimony adduced at trial and conclude the district court properly denied the motion. When the evidence is viewed in the light most favorable to the government, a reasonable jury could readily conclude that Mr. Vann committed each of the crimes charged in the indictment.

Accordingly, we GRANT counsel's motion to withdraw and we DISMISS the appeal.

All Citations

123 Fed.Appx. 898, 2005 WL 361760

Footnotes

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

EXHIBIT 4:
Order (United States District Court); *United States v. Vann,* 6:17-cv-00292-RAW, ECF 62 (E.D. Ok. Oct. 28, 2021

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

WARREN DOUGLAS VANN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. CIV-17-292-RAW
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Before the court is the objection of the petitioner to Findings and Recommendation. Petitioner was found guilty on four counts by a jury on May 13, 2003. (02-CR-85). The trial was conducted by former Judge Payne. Petitioner's appeal was dismissed by the United States Court of Appeals for the Tenth Circuit because "no non-frivolous grounds for appeal appear on this record." *United States v. Vann,* 123 Fed.Appx. 898, 899 (10th Cir.2005).

Petitioner filed in this court a petition pursuant to 28 U.S.C. §2255 on July 28, 2017. Judge Payne dismissed the petition as untimely (#14). On June 21, 2018, the United States Court of Appeals for the Tenth Circuit remanded this case, directing that on remand the district court is "to conduct any further proceedings necessary to determine whether Mr. Vann is entitled to equitable tolling." *United States v. Vann,* 728 Fed.Appx. 877 (10th Cir.2018). On June 26, 2018, the case was reassigned to the undersigned (#30).

This court referred the matter to the United States Magistrate Judge for proposed findings of fact and recommendations for disposition. The Magistrate Judge has done so. (#59). Defendant has filed objections (#60) and the government has filed a response (#61).

The court has reviewed the record. *See Gee v. Estes,* 829 F.2d 1005, 1008-09 (10th Cir.1987).

Defendant's objections are detailed and well-argued, but so then is the government's response. The court is persuaded the Magistrate Judge's thorough Findings and Recommendation (#59) should be affirmed and adopted. Petitioner has not demonstrated equitable tolling; therefore, his motion is hereby dismissed.*

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings, petitioner is denied a certificate of appealability.

It is the order of the court that the motion of the petitioner is hereby dismissed as untimely and this action is administratively closed.

It is so ordered on this 28th day of OCTOBER, 2021.

RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA

*In a previous order (#58) the court granted petitioner's motion to supplement his petition to add a claim based upon *Rehaif v. United States,* 139 S.Ct. 2191 (2019). As the order stated, the addition was contingent upon the section 2255 motion being found timely. The 2255 motion has been found untimely and therefore the *Rehaif* claim is dismissed as well.

EXHIBIT 5:
Findings and Recommendation (United States District Court); *United States v. Vann,* 6:17-cv-00292-RAW, ECF 59 (E.D. Ok. Sept. 30, 2021)

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

WARREN DOUGLAS VANN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CIV-17-292-RAW
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

FINDINGS AND RECOMMENDATION

This matter comes before the Court on Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket Entry #1). After the referral of this Motion by presiding United States District Judge Ronald A. White, the undersigned conducted a hearing and received evidence from the parties. Petitioner was personally present and represented by counsel, Rob Williams and Barry Derryberry. The Respondent was represented by Assistant United States Attorneys Linda Epperley and Dean Burris.

On October 19, 2002, Petitioner was convicted after a jury trial of the crimes of (1) Count One - Murder in Indian Country in violation of 18 U.S.C. §§ 1111(a), 1151, and 1153; (2) Count 2 - Possession of a Firearm While in Commission of a Violent Crime in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and 924(j); (3) Count 3 - Possession of a Firearm After Former Conviction of a Felony in violation of 18 U.S.C. §§ 922(g) and 924(a)(2); and (4) Count 4 -

Possession of Ammunition After Former Conviction of a Felony in violation of 18 U.S.C. §§ 922(g) and 924(a)(2). The Judgment entered October 10, 2003 indicated that United States District Judge James H. Payne sentenced Petitioner to Life Imprisonment on Count One and Live Imprisonment on Count Two, the latter Count to be served consecutively to Counts One, Three, and Four. Petitioner was sentenced to 120 months imprisonment on Count Three, 120 months imprisonment on Count Four, with the terms of imprisonment on Counts One, Three, and Four to be served concurrently.

Petitioner directly appealed the convictions to the Tenth Circuit Court of Appeals but the appeal was dismissed by that Court on March 14, 2005. As a result, Petitioner's conviction became final on May 17, 2005.

On December 15, 2011, Petitioner wrote the Court a letter wherein he noted that his direct appeal had been denied. He wrote that he had a lawyer to do his § 2255 and "I told him that we only had one year to file my 2255." Petitioner related that for five years his lawyer told him he was "about done" or "was putting the finishing touches on it." Four months prior to the dated letter, Petitioner stated that the lawyer told his family that he could not file the § 2255. Petitioner then requested that the Court

appoint counsel for him. (Case No. CR-02-085-RAW, Docket Entry #95). The request was denied by this Court. (Case No. CR-02-085-RAW, Docket Entry #96).

In 2012, Defendant filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 in the United States District Court for the Middle District of Florida while he was incarcerated in that state. On July 17, 2015, the Court dismissed the Petition as a "belated claim for relief challenging the sufficiency of the evidence that he committed the offenses in Indian Country." *Pet. Exh. No. 18.*

On December 27, 2016, Petitioner filed a "Request for Prosecutorial Relief Pursuant to the 'Holloway Doctrine'". (Case No. CR-02-085-RAW, Docket Entry #97). On September 17, 2017, the Request was denied. (Case No. CR-02-085-RAW, Docket Entry #101).

Thereafter, Petitioner, acting *pro se*, filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody on July 28, 2017. The primary basis for the Motion was the alleged ineffective assistance of his trial counsel, Rex Earl Starr, as well as jurisdictional challenges. On February 12, 2018, Judge Payne denied Petitioner's Motion, finding it was not filed within one year of Petitioner's conviction becoming final as required by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). He denied Petitioner's Motion to Alter,

Amend, or Reconsider Order on February 26, 2018. Judge Payne also denied a certificate of appealability on April 17, 2018.

Petitioner then appealed the denial to the Tenth Circuit Court of Appeals and filed his appellate brief. The appeal was abated to permit this Court to determine whether a certificate of appealability should issue. This Court denied the certificate. The Government, however, failed to file a response brief in the appeal. As a consequence, on June 21, 2018, the Tenth Circuit granted Petitioner a certificate of appealability and remanded this case to this Court with instructions "to conduct any further proceedings necessary to determine whether Mr. Vann is entitled to equitable tolling." On June 26, 2018, this case was reassigned to United States District Judge Ronald A. White.

Upon remand, Judge White appointed counsel to assist Petitioner in presenting evidence to support his Motion. Thereafter, the matter was referred to the undersigned to conduct an evidentiary hearing on the sole issue of whether the limitations period under the AEDPA was equitably tolled.

At the hearing, Petitioner's mother, Charlotte Grimmett ("Grimmett") testified that Petitioner's trial counsel, Mr. Starr informed her immediately after the trial and verdict that a one year statute of limitation applied to any § 2255 action Petitioner

wanted to file. Grimmett hired Todd Hembree ("Hembree"), who was a family friend and lawyer in August of 2005 to file a § 2255 action. Hembree required a retainer and Grimmett states that she paid him $1,800.00, although she no longer had proof of the payment. Despite hiring Hembree in August of 2005, Grimmett offered receipts into evidence which allegedly demonstrate that Hembree was paid to file a § 2255 motion. The receipts offered are for $500.00 dated August 11, 2004 (*Pet. Exh. No. 1*), $400.00 dated August 27, 2004 (*Pet. Exh. No. 2*), $460.00 dated November 1, 2004 (*Pet. Exh. No. 3*), $300.00 dated December 14, 2004 (*Pet. Exh. No. 4*), $300.00 dated February 9, 2005 (*Pet. Exh. No. 5*), $200.00 dated March 22, 2005 (*Pet. Exh. No. 6*), $300.00 dated April 20, 2005 (*Pet. Exh. No.* 7), $300.00 dated June 22, 2005 (*Pet. Exh. No. 8*), $200.00 dated March 17, 2006 (*Pet. Exh. No. 9*), $200.00 dated June 14, 2006 (*Pet. Exh. No. 10*), $100.00 dated November 6, 2006 (*Pet. Exh. No. 11*), $240.00 dated July 25, 2008 *(Pet. Exh. No. 12*), $200.00 dated July 31, 2009 (*Pet. Exh. No. 13*), $200.00 undated (*Pet. Exh. No. 14*), and $100.00 undated (*Pet. Exh. No. 15*). Some of the receipts have Petitioner's name on them, some do not. Grimmett stated that she wrote "Warren" in the corner of many of the receipts. (Tr. 35).

Hembree also represented other members of Grimmett's family

on various legal matters, including Mack Vann, Adam Vann, and Kenneth Vann. These matters included both criminal and civil proceedings. (Tr. 24-27, 29-31).

Grimmett testified that Hembree told her he had "plenty of time" and "no limit" because he was challenging jurisdiction in the § 2255. (Tr. 53). She stated that she spoke with Hembree 6 or 7 times per month. (Tr. 14).

Grimmett consulted with other attorneys including Jim Crosley and Ralph Keen. (Tr. 15). They all confirmed that Petitioner had one year statute of limitations to initiate a § 2255 action. Id.

On November 18, 2018, Petitioner filed a complaint with the Oklahoma Bar Association on Hembree. (Tr. 58). Grimmett also demanded a refund of the monies paid to Hembree because he did not file a § 2255 as promised. (Tr. 15). Hembree was running for attorney general of the Cherokee Nation and Grimmett threatened to go to the "meeting before they hired him" and tell them what Hembree had done to her son. (Tr. 16). As a result, on January 23, 2012, Hembree refunded $7,000.00 to Grimmett and resigned from further representation of Petitioner. (*Gov't Exh. No. 1*).

Petitioner testified that he was aware of the one year statute of limitations to file a § 2255 motion, informed Hembree of the deadline, and Hembree told him he knew it. (Tr. 53). Hembree

told him he was arguing jurisdiction so the one year limit did not apply. (Tr. 54). He contacted Hembree 12-15 times over the years about the § 2255. (Tr. 54-55).

Petitioner did not file a § 2255 after Hembree resigned because he was told by another inmate in Florida that § 2241 was a better bet. (Tr. 67). He waited two additional years to file the § 2255 petition because he was getting documents together. Id. Petitioner thought it more important to file the § 2241 rather than the § 2255 because he "trusted a guy" in prison. (Tr. 78).

The statute of limitations for filing a § 2255 seeking to vacate, set aside, or correct a federal sentence is one year from the latest of

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2255(f)(West).

Based upon the evidence presented, the latest date from which the one year statute of limitations runs is the date Petitioner's judgment became final or May 17, 2005. Thus, Petitioner's § 2255 motion was required to be filed by May 17, 2006, absent a showing that the deadline should be equitably tolled.

Equitable tolling of the limitations period is available "when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control." United States v. Gabaldon, 522 F.3d 1121, 1124 (10th Cir. 2008) quoting Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000). It is impossible for this Court to conclude that Petitioner acted diligently to pursue his § 2255 claims. He had been repeatedly informed that he had a one year statute of limitations to file the motion. He claims that Hembree's representations led him to fail to file his motion within the statute of limitations. Petitioner became aware of Hembree's refund of his fees and resignation from further representation at the latest on January 23, 2012, as evidenced by *Gov't Exh. No. 1.* Yet, he failed to file a § 2255 motion until July 28, 2017 – five and one half years later. This delay cannot credibly be found to be diligent.

Moreover, the failure to file was not attributable to extraordinary circumstances beyond Petitioner's control. In a strikingly similar case, the Tenth Circuit did not find extraordinary circumstances when a petitioner

> recognized his § 2255 motion was untimely, but asserted he was entitled to equitable tolling because the attorney he hired to represent him "never filed anything." In a comprehensive order, the district court concluded the allegations set out in Leonard's filings demonstrated, at most, simple negligence on the part of his retained counsel. Relying on binding precedent from this court, the district court further concluded that simple attorney negligence was insufficient to justify equitable tolling. Fleming v. Evans, 481 F.3d 1249, 1255-56 (10th Cir. 2007) (holding that although "egregious attorney misconduct may constitute extraordinary circumstances that justify equitable tolling," "attorney negligence is not extraordinary and clients, even if incarcerated, must vigilantly oversee, and ultimately bear responsibility for, their attorneys' actions or failures" (quotation omitted)).
>
> United States v. Leonard, 357 Fed. App'x 191, 192 (10th Cir. 2009).

Hembree's inaction in filing the § 2255 within one year – again, a deadline of which Petitioner was well-aware – amounted to, at its worst, an act of professional negligence. Such an act of negligence does not rise to the level of either the "egregious attorney misconduct" contemplated by Fleming nor "extraordinary circumstances" required by the precept of equitable tolling. At the heart of the matter, Petitioner bore the responsibility to

insure his interests were adequately protected by filing his §2255 request in a timely fashion when he knew of the deadline by which he was required to do so. Having failed to demonstrate the required elements of equitable tolling, this Court recommends that the § 2255 motion be denied as untimely.

IT IS THEREFORE THE RECOMMENDATION OF THIS COURT that Petitioner failed to make the required showing to warrant equitable tolling of the applicable statute of limitations for filing Petitioner's Motion under 28 U.S.C. § 2255. Accordingly, Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Docket Entry #1) should be **DENIED** and this action **DISMISSED.**

The parties are herewith given fourteen (14) days from the date of the service of these Findings and Recommendation to file objections with supporting brief. The failure to object to the Findings and Recommendation within fourteen (14) days will preclude appellate review of the judgment of the District Court based on such findings.

IT IS SO ORDERED this 30th day of September, 2021.

KIMBERLY E. WEST
UNITED STATES MAGISTRATE JUDGE