Case No. 23-6375

IN THE SUPREME COURT OF THE UNITED STATES

MARK E. SELLS, *Petitioner,*

-vs-

UNITED STATES, *Respondent,*

To the Honorable Neil M. Gorsuch,

Associate Justice of the United States Supreme Court and,

Circuit Justice for the Tenth Circuit

ON PETITION FOR A WRIT OF CERTIORARI

FOR: UNITED STATES TENTH CIRCUIT COURT OF APPEALS,

CASE No. 23-5101 ('En Banc' rehearing denied 10-16-23)

PETITION FOR WRIT OF CERTIORARI

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PETITION TO UNITED STATES SUPREME COURT FOR CERTIORARI TO HEAR SELLS' APPEAL ON QUESTION(S):

Question #1: Did the United States Tenth Circuit Court of Appeals, violate Sells' Right to 'Due Process' and 'access to a Court of Law' guaranteed by Amendments: V, VI, and XIV, of the United States Constitution, by 'Dismissing' Sells' 18 U.S.C. § 3742 Appeal without adjudication, 'ruling contrary to', and 'making unreasonable application of [United States Supreme Court Law] in *Smith v. Barry, 502 U.S. 244, 248 (1992)* concerning FRAP[1]- Rule 3(c)(1)(B), *and Haines v. Kerner, 404 U.S. 519-521, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972),* for the sole purpose of **avoiding** having to '*Hear*' and adjudicate Sells' lawfully brought [with merit] claim(s), concerning the violation of the 'terms' of Sells Federal 'Plea Agreement' in *'04-CR-0057-TCK', N.D. Okla. (2004)*, by the indirect effects of 'other' Court rulings, which Sells did not seek to challenge with this filing? This ruling being being 'contrary to other, long established United States Supreme Court law' (*Torres v. Oakland Scavenger Co., 487 U.S. 312, 317, 101 L. Ed. 2D 285, 108 S. Ct. 2405(1988)*), as well as being in direct conflict with other 'circuit courts' precedent. See: *Smith v. Galley, 919 F.2d 893, 895 (1990).*

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[1] Federal Rules of Appellate Procedure

PARTIES TO PROCEEDING:

MARK E. SELLS, Petitioner,;

UNITED STATES, Respondent,;

and 'interested party' [in Opposition]: STATE of OKLAHOMA; who:

(has failed to respond to all filings and has not made 'Entry of Appearance').

LIST OF RELEVANT PROCEEDINGS:

1. Appellant's Petition to re-Hear Appeal (no. 23-5101) '*En Banc*' to U.S. 10th Cir., dtd 9-26-2023.
2. U.S. 10th Cir. Order 'Dismissing Sells Appeal' in '*United States v. Sells*', *appeal no. 23-5101*, dtd 9-15-23. Appendix 'C'
3. U.S.10th Cir.Order Denying Re-Hearing in 23-5101,dtd10-16-23;Appdx 'D
4. District Court, N. D. Okla., Order Denying Relief, dtd 12-13-2022, (Appendix 'B') in case no. '04-CR-57-TCK', ['*United States v. Sells*',] *on 'Motion Under 18 U.S.C. §3145(b);* ***§ 3742(a)(3),(c)(1), (Dkt. #'s 65 & 66),*** *United States v. Sells,463F.3d 1148(10th Cir.2006)*[2] *(Original conviction, by Plea Agreement, FRCrP*[3]*- Rule 11)* where Sells asked for review of current detention and claimed violation of my Federal Plea Agreement.
5. Appellant's Appeal to U.S. 10th Cir., dtd 2-21-2023, 'United States v. Sells', appeal no. 22-5114, .
6. Appellant's Appeal to U.S. Supreme Court [requesting Certiorari] to Hear Sells' Appeal of 10th Cir. Denial to Hear Sells' claims, dtd 2-21-

[2] Published Opinion – U.S. 10th Cir. Court of appeals, 2006

[3] Federal Rules of Criminal Procedure

2023, and Denial of 're-Hearing', dtd 6-5-23 in 'United States v. Sells', appeal no. 22-5114, .

7. 'State of Oklahoma v. Mark Edwin Sells', CF-2004-239, (2006). Appellant filed for post-conviction relief[4] in Oklahoma, 4-29-21, in Washington County, OK. **Relief Denied** on 10-29-21. Appendix 'D'.

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[4] based on *McGirt v. Oklahoma, 591 U.S. ___, 121 S.Ct. 2454 (2020)*

Index of Appendix's

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[5] U.S. Dept. of Interior, 'Certificate of Degree of Indian Blood' card issued through U.S. B.I.A.; to Mark E. Sells

United States Constitution:

Amendment

U.S. Statutory Law

OPINIONS BELOW

- U.S. 10th Cir. Order 'Dismissing Sells Appeal' in '*United States v. Sells*', *appeal no. 23-5101*, dtd 9-15-23. Appendix
- U.S. 10th Cir. Order 'Denying 'En Banc' Re-Hearing of Denial Sells Appeal' in '*United States v. Sells*', *appeal no. 23-5101*, dtd 10-16-23. Appendix
- District Court, N. D. Okla., Order Dismissing Sells' motion dtd 12-13-2022, (Appendix 'B') in case no. '04-CR-57-TCK'; unpublished
- U.S. 10th Cir. Order denying relief in '*United States v. Sells*', *appeal no. 22-5114*, dtd 5-3-23. Appendix 'A'. unpublished
- U.S. 10th Cir. Order denying rehearing in 'United States v. Sells',appeal no. 22-5114, dtd 6- 5-23. Appendix 'C'. unpublished
- Sells Appeal to U.S. Supreme Court, dtd _____, Pending
- 'State of Oklahoma v. Mark Edwin Sells', CF-2004-239, (2006). Post-conviction relief Denied on 10-29-21. Appendix 'F'.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1); as provided for in United States Supreme Court Rules, Rule(s) 10 (a)(c). The U.S. 10th Cir., has entered a decision in conflict with United States Supreme Court 'Law' in *Smith v. Barry, 502 U.S. 244, 248 (1992)* and *Torres v. Oakland Scavenger Co., 487 U.S. 312, 317, 101 L.Ed. 2D 285, 108 S.Ct. 2405(1988)(and* other Appellate Circuit decisions (*Smith v. Galley, 919 F.2d 893, 895 (1990))*, concerning the application of FRAP – Rule 3(c)(1)(B), and the doctrine of "*liberal construction*" called for in *Smith v. Barry, supra (1992)* regarding the

requirements of the 'Notice of Intent to Appeal' a 18 U.S.C. § 3742 (a)(3)(c)(1)) motion; and in doing so, has 'so far departed from the accepted and usual course of judicial proceedings' by, attempting to deny Sells 'Due Process of the Law, in violation of the U.S. Constitution, and U.S. Statutory law giving Sells the Constitutional right to have his claim 'Heard' and adjudicated by a court of law. The U.S. 10th Cir., deciding an important question of Federal law in a way that directly conflicts with multiple, relevant decisions of the United States Supreme Court, such actions giving this Court Jurisdiction.

- U.S. 10th Cir., dismissed my Appeal [#23-5101] on: 9-15-23 (Appendix 'C')
- Timely petition for re-hearing '*En Banc*' mailed/filed on: 9-26-23;
- U.S. 10th Cir., denied 'En Banc' re-hearing on: 10-16-23(Appendix 'D')
- Notification of all parties, including 'interested party' [Oklahoma] have been made, as noted and sworn to in Certificate of Mailing at all document(s) end.

Pro Se litigant requests the protection of *Haines v. Kerner, 404 U.S. 519-521, 92 S. Ct. 594, 30 L. Ed.2d 652 (1972); Smith v. Barry, 502 U.S. 244, 248 (1992)*

CONSTITUTIONAL and STATURORY PROVISIONS

United States Constitution:

Amendment V

"No person shall be ..., nor be deprived of life, liberty, or property, without due process of law;"

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, ..., and to have the Assistance of Counsel for his defense"

Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"

Amendment XIV

Section 1; "..., No State shall make or enforce and law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Statutory Law

18 U.S.C. § 1151
"means, (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government,"

18 U.S.C. § 1153(a)
"Any Indian who commits ... within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the **exclusive** jurisdiction of the United States." (emph. added)

18 U.S.C. § 3742(a)(3),(c)(1) § 3742. Review of a sentence

(a) Appeal by a defendant. A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence:

(1) was imposed in violation of law;

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, ... or

(c) Plea agreements. In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure:

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(d) Record on review. If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals:

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(e) Upon review of the record, the court of appeals shall determine whether the

sentence:

(1) was imposed in violation of law;

(3) is outside the applicable guideline range, and

(B) the sentence departs from the applicable guideline range based on a factor that:

(i) does not advance the objectives set forth in section 3553(a)(2) [18 USCS § 3553(a)(2)]; or

(ii) is not authorized under section 3553(b) [18 USCS § 3553(b)]; or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title [18 USCS § 3553(a)] and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c) [18 USCS § 3553(c)]; or

(f) Decision and disposition. If the court of appeals determines that;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and;

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(g) Sentencing upon remand. A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall re sentence a defendant in accordance with section 3553 [18 USCS § 3553] and with such instructions as may have been given by the court of appeals, except that:

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that:

(emph. added (a)(c)(d)(e)(f)(g))

STATEMENT of the CASE

In March [10th / 11th] 2004, police [Tulsa Cnty and Washington Cnty sheriff's deputies] searched[6] Sells' residence after receiving reports that someone had fired shots into his parents' home. During the search, police found a pipe-bomb', firearms, and ammunition. On 3-16-2004, Sells was charged in Federal Court [N.D. Okla.] with possession of an unregistered destructive device. Due to the overly broad scope of the warrant and the general rummaging conducted by sheriff's deputies during the search, Sells moved to suppress all evidence seized during the search. When the District Court, [N.D. Okla.] denied in part Sells motion to suppress, severing what the court considered the 'valid' parts of the warrant, Sells entered a conditional 'Guilty' Plea, via 'Plea Agreement' (FRCrP[7] – Rule 11), reserving his right to appeal the denial of his motion to suppress (*United States v. Sells, 463 F.3d 1148, 1153 (10th Cir. 2006)*; and the United States agreeing that Sells would be sentenced within the Federal Sentencing Guidelines range (24 to 30 months), and if the Court made any upward departure above the Guideline range, up to the Allowable Statutory Maximum of 10 years (120 months), Sells reserved the right to withdraw his 'Guilty Plea'. Sells specifically brought before the Court that he would be charged with NO OTHER CRIMES [that the United States knew about at this time], while under Federal jurisdiction, and was promised this by the Court and by the U.S. Attorney. See: *'04-CR-057-TCK', dkt. #19 including 'Exhibit One'; 'Transcript' of "Plea Hearing" held 6-*

[6] Sells has raised and still maintains the 'warrant' was invalid and that sheriff's deputy Rhames lied about not 'rumaging' during the search at the hearing, as he later confessed to at Sells' State [Oklahoma] trial [Washington Cnty, OK] CF-2004-239 (See: 'Original Record' Trial Transcript, which Washington County has REF"USED to furnish to Sells), and N.D. Okla., Court refused to develop facts. See: U.S. v. Sells, 463 F.3d 1148 (10th Cir. 2004).

[7] FRCrP - Federal Rules Criminal Procedure

8-2004; 'transcript' of "Change of Plea Hearing" held 6-21-2004; 'Transcript' of Sells' "Sentencing hearing" held 9-27-2004. On 10-5-2004, Judge T. Kern, having accepted Sells Plea Agreement with the United States, enters 'Judgment' (dkt. #24) in '04-CR-057-TCK', sentencing Sells within the agreed upon 'guideline' range, to 30 months incarceration in Federal prison with 3 years of 'supervised release' with specified 'additional' requirements [mental health counseling] to be satisfied before release from 'supervised release'. See: *Hughes v United States, 138 S. Ct. 1765, 201 L. Ed. 2d 72, (US 2018).* **Sells agreed to this** in Plea Agreement.

Facts Material to Consideration of Questions Presented

1. 18 U.S.C. § 3742(a)(3),(c)(1) gave Sells the statutory right to appeal the violations of the 'terms' of his Federal Plea Agreement, with Sells filing a timely 'Notice of Intent to Appeal on 9-6-2023, which listed the ONLY 'court Order' ['04-CR-57-TCK', N.D. Okla., (2004) dkt. #24] challenged, claiming this 'Order' has been Indirectly violated by other court rulings[8]. Appendix 'C'.
2. Sells filed a lawful motion claiming violation of the terms of his Federal Plea Agreement in '04-CR-57-TCK', N.D. Okla., (2004), (*United States v. Sells, 463 F.3d 1148 (10th Cir. 2006)– Original conviction-via Plea Agreement),* under 18 U.S.C. § 3742 (a) and (c), which mandates [by statute] Appellate review, with Sells only seeking enforcement of the 'terms' of his original 'Plea agreement'.
3. Sells filed a 'correct' Notice of Intent to Appeal, giving Notice to all parties of the ONLY ruling Sells was challenging with this filing, that being the 'Original' sentencing Order, claiming that other court rulings had 'indirectly' affected the

[8] Which Sells does NOT attempt to challenge with this filing.

terms of Sells original plea agreement, which Sells intended to fully argue in my 'Opening Brief'. Sells did not attempt to challenge or appeal those rulings with this filing, thus Sells' Notice of Intent to appeal was in full compliance with FRAP – Rule 3

4. 18 U.S.C. § 3742 (e), **requires** the Appellate Court make a determination if the sentence is:

   1. *(1) was imposed in violation of law;*
   2. *(3) is outside the applicable guideline range, and:*
   3. *(B) the sentence departs from the applicable guideline range based on a factor that:*
   4. *(i) does not advance the objectives set forth in section 3553(a)(2) [18 USCS § 3553(a)(2)]; or*
   5. *(ii) is not authorized under section 3553(b) [18 USCS § 3553(b)]; or*
   6. *(iii) is not justified by the facts of the case; or*
   7. *(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, ...*

5. The 10th Circuit Court did not do this, instead choosing to Dismiss Sells' appeal [#23-5101] without adjudication. See: Order dtd 9-15-2023, Appendix 'C', and Order dtd 10-16-23 Denying [*En Banc*] 'Rehearing'. Appendix ' D'

6. 18 U.S.C. § 3742 (f) **requires** the Appellate Court make a decision and 'disposition' of the appeal based upon its determination of the facts; either upholding the [in this case, NEW, modified] sentence, or remanding for re-sentencing (18 U.S.C. § 3742 (g)) in-line with the original Plea Agreement. The 10th Circuit Court did not do this. See: Order dtd 9-15-2023, Appendix 'C'

7. Sells is and was 'Native American' (Appendix 'I'; 25 U.S.C. § 1301(4); 18 U.S.C. § 1153(a)), at the time of the offenses Oklahoma convicted Sells of, with the

Federal Court, N.D. Oklahoma, holding **exclusive** original jurisdiction over Sells; with the terms of Sells Federal Plea Agreement in 04-CR-0057-TCK applying to Sells, regardless of whether Oklahoma's court rulings affected Sells and Sells' Federal Plea Agreement. Which they did and DO violate said terms.

8. 18 U.S.C. § 3742(a)(3),(c)(1) gave Sells the statutory right to appeal. Sells filed a timely 'Notice of Intent to Appeal on 9-6-2023, according to FRAP–Rule 4 (c).

9. To prematurely dismiss Sells motion claiming violations of my Federal plea Agreement *(04-CR-0057-TCK, N.D. Okla., (2004), dkt. #19)* for the sole purpose of avoiding adjudication of Sells' claims in order to KEEP Sells illegally incarcerated, violates Sells right to 'Due Process of Law' under the VI and XIV Amendments of the U.S. Constitution, and U.S. Supreme Court law in *Haines v. Kerner, 404 U.S. 519-521, 92 S. Ct. 594, (1972),* as Sells' claims were cognizable and properly brought, with merit.

10. Oklahoma does not and did not have jurisdiction over 'Indians' [like Sells], on 'Indian Land' on the Eastern half of Oklahoma according to *McGirt v. Oklahoma, 591 U.S. ___, 121 S.Ct. 2454 (2020)* and ***Oklahoma v. Castro-Huerta, 597 U.S. ___, p. 10 & 11 (2022)***; 25 U.S.C. § 1301(4); 18 U.S.C. § 1153(a); and their continued exercise of jurisdiction and imposition of sentence upon Sells while Sells is under 'exclusive Federal jurisdiction' violates the 'terms' of Sells Federal Plea Agreement in *(04-CR-0057-TCK, N.D. Okla., (2004), dkt. #19)(Appendix 'H'),* and the 'terms' of the N.D. Oklahoma Court's 'exclusive' sentence over Sells. *Appendix 'G'.*

ARGUMENT and AUTHORITY

I

This Appeal is SOLELY about the violation of Sells right to 'Due Process of Law' and my right to have my claim(s) heard and adjudicated by a court of law.

The Federal Court's have repeatedly used legal 'flim-flam', to apply 'procedural bars' to AVOID adjudication of my claim(s) in order to KEEP me illegally imprisoned in violation of the U.S. Constitution and Federal Law. They repeatedly make 'unreasonable application of U.S. Supreme Court law', and/or rule 'contrary to U.S. Supreme Court law', to miss-apply the FRAP - Rule 3(c)(1)(B), to impose a 'procedural [jurisdictional] bar', as they have in the current case at bar, which is ONLY the most recent of my attempts to bring my claims before a federal court for adjudication. In the current case, the U.S. 10th Circuit Court's 3-Judge panel made both 'unreasonable application of Supreme Court law', and ruled 'contrary to Supreme Court law' to prematurely Dismiss my lawfully made [18 USC 3742] appeal claiming three violations of the 'terms' of my federal Plea Agreement in my original conviction, in which I only seek enforcement of the 'terms' of my Plea Agreement. I do not raise or challenge any other court orders, judgments, or convictions with this filing. I ONLY claimed that other court choices and rulings **INDIRECTLY** affected and violated the 'terms' of my Plea Agreement, which I expected to be able to fully argue, without challenging, in my 'Opening Brief'. Yet the U.S. 10th Circuit Court is determined to **NOT** give me my 'day in court', under any circumstances, or despite statutory law

allowing my claims to be heard, and DESPITE my Constitutional rights under the V, VI, and XIV Amendments of the U.S. Constitution.

The 10th Cir. Ruling to Dismiss, dtd 9-15-2023 [in Appeal no. 23-5101], is 'contrary' to several other U.S. Circuit Court rulings, *Smith v. Galley, 919 F.2d 893, 895 (1990); Frace v Russell, 341 F.2d 901, 903 (CA3) (treating brief as notice of appeal), cert denied, 382 US 863, 15 L Ed 2d 101, 86 S Ct 127 (1965); Allah v Superior Court of California, 871 F.2d 887, 889-890 (CA9 1989) (same); and Finch v Vernon, 845 F.2d 256, 259-260 (CA11 1988) (same);* and' contrary to U.S. Supreme Court law in *Smith v. Barry, 502 U.S. 244, 248 (1992) – saying "content of notices of appeal: Notices "shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken.";* which Sells did in fact comply with, by ONLY challenging that the 'terms' of my plea agreement in *'04-CR-0057-TCK, N.D. Okla., (2004), dkt. #19; (Appendix 'H')* and my 'exclusive' 'original sentence' (Appendix 'G'), imposed therein, had been **'INDIRECTLY'** violated by the actions of other Court(s), thus, giving notice of the ONLY 'Order' [my original sentencing order] being challenged (dkt.#24, supra). The 'Advisory Committee' saying with regard to FRAP – Rule 3 and Rule 4: "The Advisory Committee's caveat that courts should "**dispense with literal compliance in cases in which it cannot fairly be exacted.**,"" See: *Torres v. Oakland Scavenger Co., 487 U.S. 312, at 315 (II, [1b][3] 108 S. Ct. 2405(1988), saying by referencing Foman v Davis, 371 US 178, 9 L Ed 2d 222, 83 S Ct 227 (1962),* which compels a contrary construction

to the conclusion of 'construction' the U.S. 10th Cir. court's 3-Judge Panel reached in the case at bar.

> In Foman, the Court addressed a separate provision of Rule 3(c) requiring that a notice of appeal *"designate the judgment, order or part thereof appealed from." Foman was a plaintiff whose complaint was dismissed. She first filed motions in the District Court seeking to vacate the judgment against her and to amend her complaint. While the motions were pending, she filed a notice of appeal from the dismissal. When the District Court denied her motions, Foman filed a second notice of appeal from the denial. The Court of Appeals concluded that the first notice of appeal was premature because of Foman's pending motions, and that the second notice of appeal failed to designate the underlying dismissal as the judgment appealed from. This Court reversed the appellate court's refusal to hear Foman's appeal on the merits of her dismissal, holding that the court should have treated the second notice of appeal as "an effective, although inept, attempt to appeal from the judgment sought to be vacated."*

The *'Barry'* court[9] saying further, at:

> *""[1c][3] Courts will liberally construe the requirements of Rule 3".* See *Torres v. Oakland Scavenger Co., 487 U.S. 312, 316, 317, 101 L.Ed. 2D 285, 108 S.Ct. 2405(1988)*); Foman v Davis, 371 US 178, 181-182, 9 L Ed 2d 222, 83 S Ct 227 (1962). Thus, when papers are "technically at variance with the letter of [Rule 3], a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." Torres, supra, at 316-317, 101 L Ed 2d 285, 108 S Ct 2405. This principle of liberal construction does not, however, excuse noncompliance with the Rule. Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review. Torres, supra. Although courts should construe Rule 3 liberally when determining whether it has been complied with, noncompliance is fatal to an appeal."

Sells argues that under the 'Liberal Construction' standard of *Smith v. Barry, supra*, Sells' Docketing Statement' to the U.S. 10th Cir. Court should have served to further

[9] *Smith v. Barry, 502 U.S. 244, 248 (1992)*

clarify that the only 'court order' being challenged/appealed in Sells' 'Notice of Intent to Appeal', was, as Sells stated, '*04-CR-0057-TCK, N.D. Okla., (2004), dkt. #24* '. Sells argues that 'dismissing' my appeal for not stating which orders were being appealed, without considering Sells docketing statement, dtd 9-11-2023, and Sells other, prior filings to the District and U.S. 10th Circuit Court, violates and is contrary to the 'liberal construction' standard of *Smith v. Barry, supra,* and violates my right to 'due Process of the Law', to bring my claims before a court for adjudication.

In my Appeal to the 10th Cir. (23-5101) *[Docketing Statement]* my first claim (**1**) was that the Federal District Court, N.D. Okla., had violated my Plea agreement by choosing (See: *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505(1986); Gon v. Gonzales, 534 F. Supp. 2d 118 (D.D.C. 2008)*)-having the power to decide the claim either way), to refuse to adjudicate my lawfully filed motions, (see: N.D. Okla., District Court Order in 04-CR-057-TCK, dtd 12-13-2022 (dkt. # 74;), which **I am not challenging** with this filing, as that Order and the subsequent District Court and 10th Cir. Appellate Order's are **already under appeal to the U.S. Supreme Court** (Appeal mailed 8-16-2023,[10] with no response/ruling as of this filing), thus choosing to leave me illegally incarcerated. Sells ONLY raises that this CHOICE of the District Court (the Court that originally imposed sentence in 04-CR-0057-TCK, Dkt. #24), did in fact by this Choice, modify the original sentence and violate the terms of my Plea Agreement (*United States v. Lonjose, 663 F.3d 1292 (10th Cir. 2011)*) by increasing the term of my incarceration to 546 months, while still under 'exclusive' Federal

[10] Sells does not raise this 'Order' ruling to the 10th Cir. Court, which has already chosen to ignore Sells' earlier appeal under this statute and under 18 USC § 3145(b), which Sells has already appealled.

'original jurisdiction', which imposed 'additional' sentence, and allows Sells to appeal this 'modification'.See: *United States v. Ruiz, 536 U.S. 622, 122 S.Ct. 2450(2002);* **Hughes v United States, 138 S. Ct. 1765, 201 L. Ed. 2d 72, (US 2018)- 'Once the district court accepts the agreement, the agreed-upon sentence is the only sentence the court may impose'**; *United States v. Jordan, F.3d 133 (10th Cir. 2017); U.S. v. Davis, 442 F,3d 1003 (CA7 Wis. 2006); FRCrP- Rule 11 (c).*

The 10th Circuit, by ruling 'contrary to *Smith v. Barry, 502 U.S. 244, 248 (1992)* and ignoring the stated fact [by Sells] that the ONLY 'court order' being questioned is the violation of the original sentence in '04-CR-0057-TCK'/ by Plea Agreement, to misapply FRAP – Rule 3 to try to hold Sells to a standard of 'specific construction' (*United States v. Gordon, 895 F.2d 932, 936 (4th Cir.) - holding: 'is to be construed narrowly'; United States v. Hazel, 928 F.2d 420; 289 U.S. App. D.C. 8; (1991)*) of listing court rulings **NOT** being appealed in Sells' filing, which is not how the supreme Court in '*Barry*' ruled that FRAP – Rule 3 (c)(1)(B) should be applied. Sells only noted and claimed that other rulings Indirectly 'affected' Sells Plea Agreement. The 10th Cir., has, by Dismissing Sells Appeal (10th Cir. no. 23-5101) and disregarding the statute brought under, ruled 'contrary to' U.S. Supreme Court in *Foman v Davis, 371 US 178, 9 L Ed 2d 222, 83 S Ct 227,(1962)*, saying: [under that decision a court may construe the Rules liberally] and ignore "mere technicalities"[11], made violation of Amendment(s) V, VI, and XIV of the U.S. Constitution, to deny Sells 'Due Process of Law'. This, as Sells holds, I am not required to give notice of court rulings that

[11] *Quoted in: Torres v. Oakland Scavenger Co., 487 U.S. 312, 317, 108 S.Ct. 2405(1988)*

indirectly affected my 'Plea Agreement', but are NOT being appealed or challenged! I Did Satisfy FRAP – Rule 3(c)(1)(B).

My second claim (**2**) made in my Docketing statement was that the District Court in declaring that my 'supervised release has ended' in District Court 'Order' 11-23-2021, dkt. #60, WHICH SELLS IS NOT CHALLENGING OR APPEALLING, I SAY AGAIN, SELLS IS NOT CHALLENGING OR APPEALLING, only taking notice of the court's declaration and it's affect upon the terms of Sells Plea Agreement, that despite my having NOT completed all the 'stated terms' (See: 04-CR-0057-TCK, dkt. #19 including Exhibit One of dkt. #19) of my supervised release, has in fact, modified the 'terms' of said Plea Agreement without a Hearing, and therefore is subject to Appellate review. See: *United States v. Ruiz, 536 U.S. 622, 122 S. Ct. 2450(2002);* Hughes v United States, 138 S. Ct. 1765, 201 L. Ed. 2d 72, (US 2018); *United States v. Jordan, F.3d 133 (10th Cir. 2017); U.S. v. Davis, 442 F,3d 1003 (CA7 Wis. 2006); United States v. Lonjose, 663 F.3d 1292 (10th Cir. 2011);* and

Sells making a third claim (**3**) concerning 04-CR-0057-TCK and violation of his Plea Agreement in Sells docketing Statement to the U.S. 10th Circuit for Sells 18 USC 3742 appeal. This 3rd claim is based upon **the unique circumstance created by the '*McGirt* [*v. Oklahoma*] ruling,** and subsequent *Oklahoma v. Castro-Huerta, 597 U.S. ___, p. 10 & 11 (2022)* ruling, whereas, never before [Sells 3rd claim, made in Sells 'Docketing Statement[12] which was sent to the 10th Circuit court with a copy of my 'Notice of Intent to Appeal', which detailed Sells three (3) claimed violations of '04-CR-0057-

[12] Which satisfies the 'liberal construction standard' of notice in *Smith v. Barry, 502 U.S. 244, 248 (1992); and Torres v. Oakland Scavenger Co., 487 U.S. 312, at 315 (II, [1b][3] 108 S.Ct. 2405(1988). Foman v Davis, 371 US 178, 9 L Ed 2d 222, 83 S Ct 227 (1962).* See: Certificate of Service. End of all Doc.'s

TCK' Sells gave notice of in the 'Notice of Intent to Appeal'] has a 'State' conviction without subject-matter jurisdiction **affected** the 'terms' of a Federal Plea Agreement with Sells [me] **NOT challenging** the 'State' conviction, only asking for review under 18 U.S.C. § 3742(a)(3),(c)(1) to see if, in fact, (1) the State conviction while I am under **'exclusive'** federal jurisdiction (18 U.S.C. § 1153(a); Appendix 'G'), did 'modify' and impose additional sentence in my sentence 04-CR-0057-TCK in violation of Hughes v United States, 138 S. Ct. 1765, 201 L. Ed. 2d 72, (US 2018) and the 10th Circuit's own ruling in United States v. Lonjose, 663 F.3d 1292 (10th Cir. 2011), thus allowing for appeal and review under 18 U.S.C. § 3742 et seq. (see: *United States v. Ruiz, 536 U.S. 622, 122 S.Ct. 2450(2002)*;

II

Sells further argues that the U.S. Attorney by choosing to, and actually, opposing Sells Motion(s) under 18 U.S.C. §§ 3145)(b), 3742(a)(1)(3)(c)(1) violated its [the United States] obligations in its Plea Agreement with Sells in *'04-CR-0057-TCK' (N.D. Okla., 2004), dkt. # 19*), in 'spirit' and in actual 'letter' of the Plea Agreement (dkt. # 19, supra), by the CHOICE of the U.S. Attorney. Sells argues that the U.S. Attorney had the statutory authority to: (1) remain neutral to Sells' motions to vacate and file NO opposition, or in the alternative, file a brief/motion [as the District Court ordered] stating a neutral position, stating that Sells' motion(s) had No relevant or adverse affect on the interests of the United States; or (2), the U.S. Attorney could have come out 'in support' of Sells motion(s), as supported by statutory authority (18 U.S.C. §§ 3145)(b), 3742(a)(1)(3)(c)(1); 25 U.S.C. §§ 1301(4), 1302(f)) and U.S. Supreme Court

precedent (*RADLAX GATEWAY HOTEL, LLC v. AMALGAMATED BANK, 566 US 639 (2012); J. Scalia quoting Varity Corp. v. Howe, 516 U.S. 489, 519, 116 S. Ct. 1065, (1996) (Thomas, J., dissenting); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384, (1992); Morton v. Mancari, 417 U.S. 535, 550-551, (1974), HCSC-Laundry v. United States, 450 U.S. 1, 6, 101 S. Ct. 836, 67 L. Ed. 2D 1 (1981)*; or **(3)** which the U.S. Attorney CHOSE, was to undertake **'private' representation of the 'interests' of the State of Oklahoma, outside the 'scope and authority' of the U.S. Attorney's office,** to file a 'Response Brief' in 'Opposition' to Sells motion(s), arguing for and supporting Oklahoma keeping Sells incarcerated, in violation of Federal law and the U.S. Constitution. See: *McGirt v. Oklahoma, 591 U.S. ___, 121 S.Ct. 2454 (2020); Oklahoma v. Castro-Huerta, 597 U.S. ___, p. 10 & 11 (2022)*; *Deerleader v. Crow, 2021 WL 150014 (N.D. Okla. Jan. 15th 2021);*

In arguing for the District court to re-characterize Sells motions as 'Habeas' requests, in order to avoid adjudication of Sells motions, the U.S. Attorney has violated Sells Plea Agreement and my Constitutional right to 'Due Process', to bring his claims before a court for adjudication. The U.S. Attorney, in doing so violated statutory law in 25 U.S.C. § 1302(f), which states the U.S. Attorney MUST uphold ALL Federal Law within 'Indian Territory' [where Sells was/is] including Sells Constitutional rights. The circumstances of Sells conviction by Oklahoma being virtually identical to the case of *Deerleader v. Crow, 2021 WL 150014 (N.D. Okla. Jan. 15th 2021),* therefore leaving **NO DOUBT** in the U.S. Attorney's 'mind' that Sells is being held in violation of Federal Law, with the U.S. Attorney knowing this and **still choosing to advocate for**

keeping Sells illegally incarcerated, violates Sells Plea Agreement, my 'civil rights', and modifies Sells sentence and term of incarceration while under 'exclusive' Federal jurisdiction. 18 U.S.C. § 1153(a). **Sells was not required to 'disclose' this in his Notice of Intent to Appeal, under FRAP – Rule 3(c)(1)(B), but could argue in his Opening Brief to the Appellate Court.**

B

The United States Tenth Circuit Court of Appeals violated Sells Right to 'Due Process' by dismissing Sells' Appeal [#23-5101] **for the SOLE purpose of avoiding adjudication** of Sells 'motions/claims' in which 'merit' was shown?" This dismissal deprived Sells 'Due Process of the Law' and 'Equal Protection of the law'. U.S. Constitution, Amendments: V, VI, XIV.

The U.S. 10th Cir. Court] KNOWS, without ANY doubt, that I [Sells] am being held by Oklahoma without 'subject-matter jurisdiction' to do so (*Gonzalez v. Thaler, 565 U.S. 134, 132 S.Ct. 641 (2012);Henderson v. Shinseki, 562 U.S. 428, 435,131 S.Ct. 1197, 1202-1203 (2011);United States v. Cotton, 535 U.S. 625, 630, 122 S.Ct. 1781 (2002)*), which has increased my length of incarceration while under 'EXCLUSIVE' Federal jurisdiction (18 U.S.C. § 1153(a); *Hughes v United States, 138 S. Ct. 1765, 201 L. Ed. 2d 72, (US 2018); United States v. Ruiz, 536 U.S. 622, 122 S.Ct. 2450(2002)*; [which is 'SLAVERY' and is in violation of the XIII Amendment of the U.S. Constitution], with statutory law 18 U.S.C. § 3742 [et seq.] giving Sells the right to brings any and all claims of violation of Sells Federal Plea Agreement, whether through 'modification' of the terms, or outright increase before an appellate court for adjudication, and re-sentencing in

accordance with the terms of the original plea agreement. The 10th Cir. Court has gone to great lengths to avoid adjudication of my [Sells] claims/motions, choosing to leave me 'enslaved' by and within Oklahoma. The U.S. Supreme Court says [in the past] that this violates my Constitutional Rights, as in now, when a court refuses to hear/adjudicate a claim for the sole purpose of having to grant relief, it is a clear violation of 'Due Process" and the VI and XIV Amendments to the U.S. Constitution. *Mooney v. Holohan, 294 U.S. 103, **at 112** (1935)* saying "That requirement, in **safeguarding the liberty of the citizen** against deprivation through the action of the State, embodies the fundamental conceptions of Justice which lie at the base of our civil and political institutions. *Hebert v. Louisiana, 272 U. S. 312, 316, 317, 47 S. Ct. 103, 48 A.L.R. 1102" ; also saying @ 294 U.S. 113* "That Amendment[13] governs any action of a State, "whether through its legislature, **through its courts**, or through its executive or administrative officers." (emph. added) *Carter v. Texas, 177 U. S. 442, 447, 20 S. Ct. 687; Rogers v. Alabama, 192 U. S. 226, 231, 24 S. Ct. 257; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 234, 17 S. Ct. 581." see also: Frank v. Mangum, 237 U. S. 309, 335, 35 S. Ct. 582 – saying 'It is only where an act or ommission operates so as to deprive a defendant of notice, or an opportunity to present such evidence as he has, that it can be said that due process of law has been denied; Moore v. Dempsey, 261 U. S. 86, 90, 91, 43 S. Ct. 265.). Mooney [v. Holohan, supra]* also says "*Upon the state court, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution. Robb v. Connolly, 111 U.S. 624, 637, 4 S. Ct. 544 (1884)."*

[13] XIV Amendment, U.S. Constitution

This refusal to adjudicate my claims and bring me before a Federal court for Hearing and adjudication has caused me great, irreparable, 'Harm' by leaving me illegally 'detained' by Oklahoma, increasing the length of my incarceration while under exclusive Federal jurisdiction, from the agreed upon 30 months, to 546 months, violating the terms of my Plea Agreement, depriving me of my right to 'Liberty' and 'the pursuit of happiness' (U.S. Declaration of Independence) after serving my agreed upon 30 months of incarceration, without 'Due Process of Law'. This immense upward departure imposing 'impermissible punishment". See: Amendments, V, VI, VIII, XIII, XIV. This is a 'substantive' Due Process violation. *U.S. v. Salerno, 481 U.S. 739, at 746, 95 L. Ed.2d 697, 107 S.Ct. 2095 (1987) (Opinion by Ch. J. Rehnquist, with J. Scalia joining fully); Rochin v. California, 342 U.S. 165, 172 (1952); Palko v. Connecticut, 302 U.S. 319, 325-326 (1931).*

My claims under 18 U.S.C. § 3742(a)(3)(c)(1), were cognizable claims as filed, with 'merit' shown, and the U.S. Supreme Court in *Haines v. Kerner, 404 U.S. 519-521, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972),* saying:

> "allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears [404 US 521] "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v Gibson, 355 US 41, 45-46 (1957), 2 L Ed 2d 80, 84, 78 S Ct 99. See Dioguardi v Durning, 139 F.2d 774 (CA2 1944). [3] Accordingly, although we intimate no view whatever on the merits of petitioner's allegations, we conclude that he is entitled to an opportunity to offer proof."

CONCLUSION

REASONS for GRANTING PETITION FOR CERTIORARI

18 U.S. § 3742 *et seq.* allowed for 'specific' review of a Federal Plea Agreement, by a Federal Appellate Court holding 'jurisdiction', to determine if that Plea agreement has been violated. Sells FULLY met the requirements of FRAP – Rule 3 (c)(1)(B) by disclosing 04-CR-0057-TCK, dkt.#19 (Sentencing Order) as the ONLY court order being appealed, with Sells seeking enforcement of the original terms of the Plea agreement. The N.D. Okla., Court sentenced Sells to 30 months incarceration, NOT 546 months, and the **choices** of the N.D. Okla., court and the U.S. 10th Cir. Court, along with those of Oklahoma, have violated the terms of Sells Plea Agreement, and imposed 'impermissible punishment' in violation of the V, VI, VIII, XIII, XIV Amendments, the U.S. Constitution and Federal law. 18 U.S. § 1153(a) § 3742

PLEADING

Sells Prays the Court grant Certiorari to Hear this case to correct these violations of the U.S. Constitution, application of Statutory Law, and to give guidance and uniformity to the Circuit Courts with regard to these issues, while addressing the 'Due Process' violations at 'bar'.

IT IS SO PETITIONED, AND PRAYED, THAT CERTIORARI BE GRANTED:

Mark E. Sells

12-5-23
Date