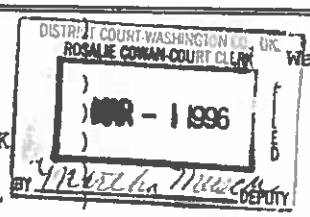
INFORMATION

STATE OF OKLAHOMA

vs.

ANTHONY HAROLD WARNICK
a/k/a TONY WARNICK
Defendant.



In the District Court of
Washington County, Oklahoma

CF-96-166

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OKLAHOMA

Now comes FREDERICK S. ESSER, the duly qualified and acting District Attorney, in and for the Eleventh Judicial District for the State of Oklahoma, and gives the District Court of Washington County, State of Oklahoma, to know and to be informed that ANTHONY HAROLD WARNICK, a/k/a TONY WARNICK, did, in Washington County, and in the State of Oklahoma, on or about the 1st day of August, 1995 through the 21st day of February, 1996, and anterior to the presentment hereof, commit the crime of SEXUAL ABUSE OF A CHILD -10 O.S. 7115 (1991 & Supp.) in the manner and form as follows:

That is to say, the said Defendant, ANTHONY HAROLD WARNICK, in the County of Washington, and State of Oklahoma, did unlawfully, intentionally, knowingly and feloniously commit the offense of sexual abuse upon R.T., a minor child whose name is known to the Defendant and whose date of birth the 31st day of May, 1991, to wit: on a date certain between August 1, 1995 and February 21, 1996 the said Defendant placed his mouth on the penis and anus of said R.T., fondled with his hand the penis and anus of R.T., and placed his penis upon the buttocks and into the mouth of R.T, in Washington County, Oklahoma, and did, then and there, commit the crime of SEXUAL ABUSE OF A CHILD

contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State.

FREDERICK S. ESSER, District Attorney

BY Stephen A. Kunzweiler
Stephen A. Kunzweiler
Assistant District Attorney

STATE OF OKLAHOMA
Washington County

I, Stephen A. Kunzweiler, being duly sworn, on oath, state that I have read the above and foregoing information and know the contents thereof and that the facts stated therein are true.

Stephen A. Kunzweiler

Subscribed and sworn to before me this 1st day of March, 1996.

Rosalie Cowan, Court Clerk
By Martha Mercer
Deputy

TM 3-4-96

No. CF-96-166

STATE OF OKLAHOMA

vs.

ANTHONY HAROLD WARNICK,
a/k/a TONY WARNICK,
Defendant

I N F O R M A T I O N

In the District Court of
Washington County, Oklahoma

Filed: _____

_____
Rosalie Cowan, Court Clerk

BY: _____
Deputy

NAMES OF WITNESSES

[redacted]

Sherry Beck,
[redacted] St.
Bartlesville, OK

Diane Young, BPD

Mike Miller, BPD

Bob Williams, DHS

Ray Harris, 600 Medical Park Center,
Bartlesville, Ok.

Sharon Beck, 1408 Armstrong,
Bartlesville, Ok.

Stoney Simoneaux, 22374 Aydell Lane
Maurepas, La.

INFORMATION

STATE OF OKLAHOMA)

vs.

ANTHONY HAROL WARNICK
a/k/a TONY WARNICK
Defendant.

DISTRICT COURT-WASHINGTON CO., OK
ROSALIE COWAN-COURT CLERK
MAR - 1 1996
FILED
BY Martha Mercer DEPUTY

In the District Court of
Washington County, Oklahoma

CF-96-166

THE STATE OF OKLAHOMA FURTHER ALLEGES:

THAT the said ANTHONY HAROL WARNICK did on the 11th day of August, 1988, enter a plea of nolo contendere to the crime of LEWD MOLESTATION, Case Number CRF-88-126 Count 1, Washington County, Oklahoma, District Court, and was sentenced to ten years in the custody of the Oklahoma Department of Corrections with the first four years to serve and the balance suspended subject to supervised rules of probation;

THAT the said ANTHONY HAROL WARNICK did on the 11th day of August, 1988, enter a plea of nolo contendere to the crime of LEWD MOLESTATION, Case Number CRF-88-126 Count 2, Washington County, Oklahoma, District Court, and was sentenced to ten years in the custody of the Oklahoma Department of Corrections with the first four years to serve and the balance suspended subject to supervised rules of probation;

THAT the said ANTHONY HAROL WARNICK did on the 11th day of August, 1988, enter a plea of nolo contendere to the crime of LEWD MOLESTATION, Case Number CRF-88-126 Count 3, Washington County, Oklahoma, District Court, and was sentenced to ten years in the custody of the Oklahoma Department of Corrections with the first four years to serve and the balance suspended subject to supervised rules of probation;

THAT the said ANTHONY HAROL WARNICK did on the 11th day of August, 1988, enter a plea of nolo contendere to the crime of LEWD MOLESTATION, Case Number CRF-88-126 Count 4, Washington County, Oklahoma, District Court, and was sentenced to ten years in the custody of the Oklahoma Department of Corrections with the first four years to serve and the balance suspended subject to supervised rules of probation;

THAT, by reason of the matters alleged, said Defendant, ANTHONY HAROL WARNICK, has committed the offense of:

SEXUAL ABUSE OF A CHILD
AFTER FORMER CONVICTION OF TWO OR MORE FELONIES

contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State.

FREDERICK S. ESSER, District Attorney

BY Stephen A. Kunzweiler
Stephen A. Kunzweiler
Assistant District Attorney

STATE OF OKLAHOMA
Washington County

I, Stephen A. Kunzweiler, being duly sworn, on oath, state that I have read the above and foregoing information and know the contents thereof and that the facts stated therein are true.

Stephen A. Kunzweiler

Subscribed and sworn to before me this 1st day of March, 1996.

Rosalie Cowan, Court Clerk
By Martha Mercer
Deputy

Tm 3-11-96

No. CF-96-16

STATE OF OKLAHOMA

vs.

ANTHONY HAROL WARNICK,

Defendant

INFORMATION

In the District Court of
Washington County, Oklahoma

Filed: ______________________

____
Court Clerk

BY: ______________________
Deputy

NAMES OF WITNESSES

Rosalie Cowan or representative
Washington County Court Clerk

Robert Glisson, Probation and Parole,
Washington County, Ok.

I, Jill L. Spitzer, 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 of Washington County, Oklahoma this 26 day of September 2018
By [signature] Jill L. Spitzer
COURT CLERK

INFORMATION

STATE OF OKLAHOMA

vs.

ANTHONY HAROL WARNICK
a/k/a TONY WARNICK
Defendant.

DISTRICT COURT-WASHINGTON CO. OK
ROSALIE COWAN-COURT CLERK
MAR - 1 1996
FILED
Martha Mercer

In the District Court of Washington County, Oklahoma

CF-96-165

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OKLAHOMA

Now comes FREDERICK S. ESSER, the duly qualified and acting District Attorney, in and for the Eleventh Judicial District for the State of Oklahoma, and gives the District Court of Washington County, State of Oklahoma, to know and to be informed that ANTHONY HAROL WARNICK, a/k/a TONY WARNICK, did, in Washington County, and in the State of Oklahoma, on or about the 12th day of January, in the year of our Lord, One Thousand Nine Hundred and Ninety-six, and anterior to the presentment hereof, commit the crime of LEWD MOLESTATION - 21 O.S. §1123(A) in the manner and form as follows:

That is to say, the said Defendant, ANTHONY HAROL WARNICK, , in the County of Washington, and State of Oklahoma, did unlawfully, intentionally, knowingly and feloniously, look upon, touch and feel the body and private parts of one D.N., a minor child whose name is known to the Defendant and whose date of birth is September 6, 1989, said child being under the age of sixteen years, in a lewd and lascivious manner, to wit: by then and there telling D.N. to take his pajamas down whereupon the said Defendant did look upon D.N. in his underwear in an indecent manner relating to the Defendant's sexual interest, and did thereafter place the Defendant's hand on the buttocks of D.N. in an indecent manner relating to the Defendant's sexual interest, in Washington County, Oklahoma, the said defendant being then and there three or more years older than D.N., and did, then and there, commit the crime of LEWD MOLESTATION

contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State.

FREDERICK S. ESSER, District Attorney

BY Stephen A. Kunzweiler
Stephen A. Kunzweiler
Assistant District Attorney

STATE OF OKLAHOMA
Washington County

I, Stephen A. Kunzweiler, being duly sworn, on oath, state that I have read the above and foregoing information and know the contents thereof and that the facts stated therein are true.

Stephen A. Kunzweiler

Subscribed and sworn to before me this 1st day of March, 1996.

Rosalie Cowan Court Clerk
By Martha Mercer
Deputy

No. CF-96-165

STATE OF OKLAHOMA

vs.

ANTHONY HAROL WARNICK,
a/k/a TONY WARNICK,
Defendant

I N F O R M A T I O N

In the District Court of
Washington County, Oklahoma

Filed: _____

_____
Rosalie Cowan, Court Clerk

BY: _____
Deputy

NAMES OF WITNESSES

Tamara L. Oliveaux, 517 Larchmont, Bartlesville, Ok.

James Warring, BPD
Mike Williams, BPD
Diane Young, BPD

INFORMATION

STATE OF OKLAHOMA)
) In the District Court of
vs.) Washington County, Oklahoma
)
ANTHONY HAROL WARNICK) CF-96-165
a/k/a TONY WARNICK)
Defendant.)

COURT-WASHINGTON CO.
ROSALIE COWAN-COURT CLERK
FILED
MAR - 1 1996
Martha Morgan DEPUTY

THE STATE OF OKLAHOMA FURTHER ALLEGES:

THAT the said ANTHONY HAROL WARNICK did on the 11th day of August, 1988, enter a plea of nolo contendere to the crime of LEWD MOLESTATION, Case Number CRF-88-126 Count 1, Washington County, Oklahoma, District Court, and was sentenced to ten years in the custody of the Oklahoma Department of Corrections with the first four years to serve and the balance suspended subject to supervised rules of probation;

THAT the said ANTHONY HAROL WARNICK did on the 11th day of August, 1988, enter a plea of nolo contendere to the crime of LEWD MOLESTATION, Case Number CRF-88-126 Count 2, Washington County, Oklahoma, District Court, and was sentenced to ten years in the custody of the Oklahoma Department of Corrections with the first four years to serve and the balance suspended subject to supervised rules of probation;

THAT the said ANTHONY HAROL WARNICK did on the 11th day of August, 1988, enter a plea of nolo contendere to the crime of LEWD MOLESTATION, Case Number CRF-88-126 Count 3, Washington County, Oklahoma, District Court, and was sentenced to ten years in the custody of the Oklahoma Department of Corrections with the first four years to serve and the balance suspended subject to supervised rules of probation;

THAT the said ANTHONY HAROL WARNICK did on the 11th day of August, 1988, enter a plea of nolo contendere to the crime of LEWD MOLESTATION, Case Number CRF-88-126 Count 4, Washington County, Oklahoma, District Court, and was sentenced to ten years in the custody of the Oklahoma Department of Corrections with the first four years to serve and the balance suspended subject to supervised rules of probation;

THAT, by reason of the matters alleged, said Defendant, ANTHONY HAROL WARNICK, has committed the offense of:

LEWD MOLESTATION
AFTER FORMER CONVICTION OF TWO OR MORE FELONIES

contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State.

FREDERICK S. ESSER, District Attorney

BY Stephen A. Kunzweiler
Stephen A. Kunzweiler
Assistant District Attorney

STATE OF OKLAHOMA
Washington County

I, Stephen A. Kunzweiler, being duly sworn, on oath, state that I have read the above and foregoing information and know the contents thereof and that the facts stated therein are true.

Stephen A. Kunzweiler

Subscribed and sworn to before me this 1st day of March, 1996.

Rosalie Cowan, Court Clerk
By Martha Morgan
Deputy

TM 3-4-96

No. CF-96-[illegible]

STATE OF OKLAHOMA

vs.

ANTHONY HAROL WARNICK.

Defendant

I N F O R M A T I O N

In the District Court of
Washington County, Oklahoma

Filed: _____

_____
Court Clerk

BY: _____
Deputy

NAMES OF WITNESSES

Rosalie Cowan or representative
Washington County Court Clerk

Robert Glisson, Probation and Parole,
Washington County, Ok.

I, Jill L. Spitzer, Court Clerk for Washington County, Oklahoma, hereby certify that the foregoing is a true, correct and full copy of the Information herewith set out as appears of record in the Court Clerk's Office in Washington County, Oklahoma this
26 day of September, 2018
By [illegible] Jill L. Spitzer
COURT CLERK

In the District Court of the Eleventh Judicial
District of the State of Oklahoma
Sitting in and for Washington County, Oklahoma

State of Oklahoma, Plaintiff,
-vs-
ANTHONY HAROLD WARNICK
aka TONY WARNICK
DOB 7-24-57
SOC: 442-60-7097
WM 5-6 130 BRO BRO
Defendant,

DISTRICT COURT-WASHINGTON CO., OK.
ROSALIE COWAN-COURT CLERK
FILED
FEB 29 1996
BY Johnna Ballard DEPUTY

No PC-96-81
CF 96-165
CF 96-166

AFFIDAVIT

The undersigned upon oath deposes and states as follows, to-wit: Affiants have probable cause to believe ANTHONY HAROLD WARNICK has committed the crime of SEXUAL ABUSE OF CHILD (2 cts)
That your Affiants are Police Officers currently assigned to Detective Division with the Bartlesville Police Department, Washington County, State of Oklahoma.

1. [redacted] age 6, said in an interview with Officer James Warring [redacted] mother's boyfriend, Tony, had told him to pull his pajamas down and Tony put his hand on [redacted] buttocks. In an interview with Detective Mike Miller of the Bartlesville Police Department on [redacted] said he was in his residence with his mother, [redacted] and her friend, Tony. While his mother was in the shower Tony came into his bedroom, told him to take his pajamas down and Tony touched [redacted] on the buttocks on the outside of his underwear. [redacted] said he told his mother when she came out of the shower what Tony did. Detective Miller talked again with [redacted] on February 1, 1996 where [redacted] again related the same account of being touched on the buttocks by Tony Warnick.

2. [redacted] states she has been friends with Tony Warnick for a short time and he was at her residence of [redacted] on January 12, 1996 visiting. She said she took a shower after putting her son [redacted] to bed in his bedroom. When she came out of the shower [redacted] told her Tony had touched him on the buttocks.

3. That on February 23, 1996, I, Detective Diane Young, met with Bob Williams of DHS, and I was present during Mr. Williams interview of [redacted] stated that his mother is [redacted] and that she sometimes lives with Anthony. Bob Williams took the anatomically correct dolls out for [redacted] so he could show us what Anthony did that he didn't like. [redacted] checked the genital areas of the dolls. [redacted] took the pants down of the male boy doll took out the penis and put it up to his mouth and started sucking. [redacted] tated that Anthony gets drunk. He says that he does this with his mother and him. He showed with the dolls Anthony's penis in the anus to his mom and to himself. He stated that his mother was not present when this happened to him she was out shopping. [redacted] said this happened at a house they were living in at the time.

4. Anthony Warnick read his Miranda Warning and signed a Consent to Voluntary Statement on February 28, 1996, at 3:29 P.M. Anthony Warnick stated he has been seeing [redacted] since July or August of 1995. That except for the last three weeks, they stayed at his mother's place in Oak Park. That recently [redacted] moved to [redacted] Bartlesville, Oklahoma. Warnick stated [redacted] would bring [redacted] to his mother's house in Oak Park. In his interview Anthony Warnick said he was a heavy drinker of beer and there were times he did not remember what he did while drinking and it was possible he could have done

Jm 3.6.96

what [redacted] said he did but did not remember doing it. He said recently [redacted] has stayed at his residence of 520 Highland also. He was questioned about [redacted] and said what [redacted] said did happen, he did touch [redacted] on the buttocks in the bedroom while [redacted] was in the shower.

5. Affiants are familiar with the locations of [redacted] and 520 Highland in Bartlesville and these locations are within Washington County, Oklahoma.

Based on this affidavit, and any attachments thereto, the undersigned prays that this Honorable Court issue a finding of fact that there is probable cause for arrest.

Subscribed and sworn to before me this 27th day of February 1996.

My commission expires:

3-11-99

Notary Public

Finding of Probable Cause

The undersigned Judge of this Court, based upon the above said affidavit, and any attachments thereto, hereby determines there to be probable cause to arrest.

Dated this 29th day of February 1996.

District Judge

I, Jill L. Spitzer, 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 26 day of September 1998

By Kathleen Spence Jill L. Spitzer COURT CLERK

Jm 3-6-96

IN THE STRICT COURT OF WASHINGTON COUNTY
THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

vs.

Anthony Harold Warnick,

Defendant,

Case No. CF-96-165-orig

Case No. CF-96-166

Case No. CF-88-128

Case No. CF-____-____

SS# 442-60-7097

Birth date: 7/24/57

Home Address: 520 NW Highland Drive
Bartlesville, OK 74003

DISTRICT COURT-WASHINGTON CO., OK
ROSALIE COWAN-COURT CLERK
MAR 20 1996
FILED
BY _____ DEPUTY

PLEA OF GUILTY
SUMMARY OF FACTS

Part A: Findings of Fact, Acceptance of Plea

		Circle
1.	Is the name just read to you your true name?	(Yes) No
	If no, what is your correct name? _____.	
	I have also been known by the name(s): _____.	
2.	(a) Do you wish to have a record made of these proceedings by a Court Reporter?	(Yes) No
	(b) Do you wish to waive this right?	Yes (No)
3.	Age: 38 Grade completed in school: GED.	
4.	Can you read and understand this form? (If the answer above is no, Addendum "A" is to be completed and attached.)	(Yes) No
5.	Are you currently taking any medications or substances which affect your ability to understand these proceedings?	Yes (No)

Jm 3.25.96

6. Have you been prescribed any medication that you should be taking, but you are not taking? Yes (No)

If so, what kind and for what purposes?_____

_____

7. Have you ever been treated by a doctor, or health professional for mental illness or confined in a hospital for mental illness? Yes (No)
If yes, list the doctor or health professional, place and when occurred:_____

_____

8. Do you understand the nature and consequences of these proceedings? (Yes) No

9. Have you received a copy of the information and read its allegations? (Yes) No

10. A. Do you understand you are charged with:

	Crime	Statutory Reference		
(1)	Lewd Molestation AFCF 2or more	21 O.S. 1123A	(Yes)	No
(2)	Sexual Abuse of a Child AFCF 2or More	10 O.S. 7115	(Yes)	No
(3)	_____	_____ O.S. _____	Yes	No
(4)	_____	_____ O.S. _____	Yes	No

B. Are you charged after former conviction of a felony? (Yes) No

If yes, list the felony(ies) charged:_____

_____.

11. Do you understand the range of punishment for the crime(s) is/are: (List in same order as No. 9 above)

(1) minimum 20 to maximum Unlimited and/or a fine $_____ (Yes) No

(2) minimum 20 to maximum Unlimited and/or a fine $_____ (Yes) No

(3) minimum _____ to maximum _____ and/or a fine $_____ Yes No

(4) minimum _____ to maximum _____ and/or a fine $_____ Yes No

Jm3-2596

12. Read the following statement:

You have the right to a speedy trial before a jury for the determination of whether you are guilty or not guilty and if you request, to determine sentence. [If pleading to capital murder, advise of procedure in 21 O.S. Section 701.10(B)]. At the trial:

(1). You have the right to have a lawyer represent you, either one you hire yourself or if you are indigent to a court appointed attorney.

(2). You are presumed to be innocent of the charges.

(3). You may remain silent, or if you choose, you may testify on your own behalf.

(4). You have the right to see and hear all witnesses called to testify against you and the right to cross-examine them.

(5). You may have your witnesses ordered to appear in court to testify and present evidence of any defense you have to these charges.

(6). The state is required to prove your guilt beyond a reasonable doubt.

(7). The verdict of guilty decided by a jury must be unanimous. However, you can waive a jury trial and, if all parties agree, the case could be tried by a Judge alone who would decide if you were guilty or not and if guilty, the appropriate punishment.

Do you understand each of these rights? (Yes) No

13. Do you understand by entering a plea of guilty or no contest you give up all these rights? (Yes) No

14. Do you understand that a conviction on a plea of guilty or no contest could increase punishment in any future case committed after this plea? (Yes) No

15. Is Mark Kane your lawyer? (Yes) No

16. Have you talked over the charge(s) with your lawyer, advised him/her regarding any defense you may have to the charges and had his/her advice? (Yes) No

17. Do you believe your lawyer has effectively assisted you in this case and are you satisfied with his/her advice? (Yes) No

Jm 3.25.96

18. Do you wish to change your plea of not guilty to guilty or no contest and give up your right to a jury trial and all other previously explained constitutional rights? (Yes) No

19. Is there a plea bargain? (Yes) No
What is your understanding of the plea bargain?
CF-96-165 20 years CC with CF-96-166
CF-96-166 20 years CC with CF-96-165
CRF-88-126 Revoke. 6 years CS with CF-96-165&166

20. Do you understand the Court is not bound by any agreement or recommendation and if the Court does not accept the plea agreement, you have the right to withdraw your plea? (Yes) No

21. Do you understand that if there is no plea bargain, the Court can sentence you within the range of punishment stated in question 11? (Yes) No

22. Do you understand your plea of guilty or no contest to the charge(s) is after: (check one) (Yes) No
[X] No prior felony convictions
[ ] One (1) prior felony conviction
[X] Two (2) or more prior felony convictions
List prior felony convictions to which pleading: ____

23. What (is) (are) your plea(s) to the charge(s) (and to each one of them)
CF-96-165 Guilty CF-96-166 No Contest.

24. Did you commit the acts as charged in the information? (Yes) No
State the factual basis for your plea(s)
I plead my hand on his bottom.

Jm 3.25.96

25. Have you been forc[illegible] abused, mistreated, or [illegible]omised anything by anyone to have you enter your plea(s)? Yes (No)

26. Do you plead guilty or no contest of your own free will, and without any coercion or compulsion of any kind? (Yes) No

27. If you are entering a plea to a felony offense, you have a right to a Pre-Sentence Investigation and Report which would contain the circumstances of the offense, any criminal record, social history and other background information about you.
Do you want to have the Report? Yes (No)

28. (a) Do you have any additional statements to make to the Court? Yes No
(b) Is there any legal reason you should not be sentenced now? Yes (No)

HAVING BEEN SWORN, I, the Defendant whose signature appears below, make the following statements under oath:

(1) CHECK ONE:
_____ (a) I have read, understood and completed this form.
__X__ (b) My attorney completed this form and we have gone over the form and I understand its contents and agree with the answers. see Addendum "A".
_____ (c) The Court Completed this form for me and inserted my answers to the questions.
(2) The answers are true and correct.
(3) I understand that I may be prosecuted for perjury if I have made false statements to this Court.

Anthony Harold Wm [illegible]
DEFENDANT

Acknowledged this 20th day of March, 1996.

James P. Dierks
Notary Public/Deputy Court Clerk/Judge

29. I, the undersigned attorney for the Defendant, believe the Defendant understands the nature, purpose and consequences of this proceeding. (S)He is able to assist me in formulating any defenses to the charge(s). I am satisfied that the Defendant's waivers and plea(s) of guilty or no contest are voluntarily given and he/she has been informed of all legal and constitutional rights.

[signature]
ATTORNEY FOR DEFENDANT

Sm3.25.96

30. The sentence recommendation in question 19 is correctly stated. I believe the recommendation is fair to the State of Oklahoma.

31. Offer of Proof (Nolo Contendere/No Contest plea.)_____

_____

_____

_____

_____
(ASSISTANT) DISTRICT ATTORNEY

THE COURT FINDS AS FOLLOWS:

32. A. The Defendant was sworn and responded to questions under oath.

B. The Defendant understands the nature, purpose and consequences of this proceeding.

C. The Defendants's plea(s) of guilty / no contest is/are knowingly and voluntarily entered and accepted by the Court.

D. The Defendant is competent for the purpose of this hearing.

E. The factual basis exists for the plea(s) (and former convictions)

F. The Defendant is guilty as charged: (check as appropriate)
[ ] after no prior felony convictions.
[ ] after one (1) prior felony conviction.
[✓] after two (2) or more prior felony convictions.

G. Sentencing or order deferring sentence shall be: imposed instanter (✓); or continued until the _____ day of _____, 19___, at _____ __.m. If the Pre-Sentence Investigation and Report is requested, it shall be provided to the Court by the _____ day of _____, 19____.

DONE IN OPEN COURT this 20th day of March, 1996.

J. Hoyt
Court Reporter Present

Judge P. Dowling
JUDGE OF THE DISTRICT COURT

_____
(Deputy) Court Clerk

_____
NAME OF JUDGE TYPED OR PRINTED

Jm3.25.96

Part B: Sentence on Plea

Case No. _____
State v. _____
Date: _____

(NOTE ON USE: Part B to be used with the Summary of Facts if contemporaneous with the entry of plea or may be formatted as a separate sentencing form if sentencing continued to future date.)

THE COURT SENTENCES THE DEFENDANT AS FOLLOWS:

TIME TO SERVE

1. You are sentenced to confinement under the supervision of the Department of Corrections for a term of years as follows: (list in same order as in question No. 10 in Part A)

20 yrs (concurrent; consec to below)

6 yrs (concurrent; ~~to~~

2. The sentence(s) to run (concurrently/consecutively) _____ or NOT APPLICABLE _____

DEFERRED SENTENCE

1. The sentencing date is deferred until _____, _____, 19____ at _____, _____.m.

2. You (will/will not) be supervised. The terms set forth in the Rules and Conditions of Probation found in Addendum D shall be the rules you must follow during the period of deferment.

SUSPENDED SENTENCE or SUSPENDED AS TO PART

1. You are sentenced to confinement under the supervision of the Department of Corrections for a term of years as follows:

Jm3.2596

to be suspended as follows:
(a) ALL SUSPENDED YES_____ NO_____
(b) suspended except as to the first _____ (months) (years) of the term(s) during which time you are to be held in the custody of the Department of Corrections, the remainder of the sentence(s) to be suspended under the terms set forth in the Rules and Conditions of Probations found in Addendum D.

2. The sentence(s) to run (concurrently/consecutively) _____ _____ or NOT APPLICABLE _____

FINES AND COSTS

You are to pay a fine(s), costs, fees to the Washington County District Court Clerk as set out in Addendum E which is attached and made a part of this Order.

"NOTICE OF RIGHT TO APPEAL"

Sentence to Incarceration, Suspended or Deferred:

To appeal from this conviction, or order deferring sentence, on your plea of guilty, you must file in the District Court Clerk's Office a written Application to Withdraw your Plea of Guilty within ten (10) days from today's date. You must set forth in detail why you are requesting to withdraw your plea. The trial court must hold a hearing and rule upon your Application within thirty (30) days from the date it is filed. If the trial court denies your Application, you have the right to ask the Court of Criminal Appeals to review the District Court's denial by filing a Petition for Writ of Certiorari within ninety (90) days from the date of the denial. Within ten (10) days from the date the application to withdraw plea of guilty is denied, notice of intent to appeal and designation of record must be filed pursuant to Oklahoma Court of Criminal Appeals Rule 4.2(D). If you are indigent, you have the right to be represented on appeal by a court appointed attorney.

Do you understand each of these rights to appeal? (Yes) No

Do you want to remain in the county jail ten (10) days before being taken to the place of confinement? (Yes) No

JM 3.25.96

Have you fully unde tood the questions that ve been asked? Yes No

Have your answers been freely and voluntarily given? Yes No

I ACKNOWLEDGE UNDERSTANDING OF RIGHTS AND SENTENCE IMPOSED.

Anthony Harold Wa[illegible]
Defendant

I, the undersigned attorney, have advised the Defendant of his appellate rights.

Attorney for Defendant

Done in open court, with all parties present, this 20th day of March 19 96.

Court Reporter Present

Judge of the District Court

Deputy Court Clerk

I, Jill L. Spitzer, 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 1st day of September 2018
By Nancy Lawrence Jill L. Spitzer COURT CLERK

In 3.25.96

ADDENDUM "A"

CERTIFICATE OF DEFENSE COUNSEL

As the attorney for the defendant, _____,
I certify that:

1. The Defendant has stated to me that he/she is (able/unable) to read and understand the attached form, and I have: (check appropriate option)

   _____ determined the Defendant is able to understand the English language.

   _____ determined the Defendant is unable to understand the English language and obtained _____ to interpret.

2. I have read and fully explained to the Defendant the allegations contained in the Information in this case.

3. I have read and fully explained to the Defendant all of the questions in the Plea of Guilty/Summary of Facts and the answers to the questions set out in the Summary of Facts are the Defendant's answers.

4. To the best of my knowledge and belief the statements and declarations made by the Defendant are accurate and true and have been freely and voluntarily made.

Date this _____ day of _____, 19_____.

_____

Attorney for the Defendant

Jm3.25.96

425 F.3d 842
United States Court of Appeals,
Tenth Circuit.

Anthony H. WARNICK, Petitioner–Appellant,
v.
Glynn BOOHER, Warden, Respondent–Appellee.

No. 02–5201.
|
Sept. 22, 2005.

Synopsis
Background: State prisoner brought habeas corpus petition challenging reduction of good-time credits after "rebill" or discharge date on first of consecutive sentences as violative of double jeopardy. The United States District Court for the Northern District of Oklahoma, Terry C. Kern, J., denied petition, and prisoner appealed.

The Court of Appeals, Hartz, Circuit Judge, held that concession that 155 credits had been deducted for erroneous reason did not totally moot claim that any deduction of good-time credits after rebill date violated double jeopardy as state had refused to restore 53 credits based on new ground.

Vacated in part and remanded.

Hartz, Circuit Judge, filed additional concurring opinion.

Attorneys and Law Firms

*842 Philip J. Weiser, University of Colorado School of Law, Boulder, CO, for the Petitioner–Appellant.

*843 William R. Holmes, Assistant Attorney General (W.A. Drew Edmondson, Attorney General, with him on the brief), Oklahoma City, OK, for Respondent–Appellee.

Before SEYMOUR, Circuit Judge, PORFILIO, Senior Circuit Judge, and HARTZ, Circuit Judge.

Opinion

HARTZ, Circuit Judge.

Anthony Warnick appeals the district court's denial of his application for habeas corpus relief under 28 U.S.C. § 2241.

While serving the second of two consecutive sentences, Mr. Warnick requested a review of his first sentence. He thought that the state had improperly subtracted 155 good-time credits—which, by statute, substitute for one day of imprisonment each. Oklahoma prison authorities initially rejected Mr. Warnick's challenge. But while this case was pending in district court, an Oklahoma Court of Criminal Appeals decision involving another prisoner made clear that the 155–credit subtraction was unlawful. The prison accordingly audited Mr. Warnick's sentence and restored the 155 credits. It did not give Mr. Warnick the full relief he sought, however, because during the audit it discovered an unrelated arithmetical error and subtracted 53 credits.

Mr. Warnick contends that the 155–credit subtraction and the 53–credit offset were unconstitutional on various grounds. His challenges to the 155–credit subtraction are moot because the prison has corrected the error. Accordingly, we vacate the district court's ruling on the 155 credits and remand for the district court to dismiss its judgment on the issue for lack of jurisdiction. That leaves for consideration Mr. Warnick's double-jeopardy challenge to the 53–credit offset. The district court, however, has not addressed this issue. Because the question of the offset's constitutionality should be decided by the district court in the first instance, we remand for further proceedings.

I. PRELIMINARIES

A. State Proceedings

On February 24, 1989, an Oklahoma state court sentenced Mr. Warnick to 10 years' imprisonment for lewd molestation. He was eventually released. On March 20, 1996, however, he was convicted on new charges of lewd molestation and sexual abuse of a minor, again in Oklahoma state court. He was sentenced to 20 years' imprisonment for each of these offenses, to be served concurrently. Additionally, his probation was revoked and he was ordered to serve six years' further imprisonment on his 1989 conviction. The six-year term was to be served before the 20–year sentences.

In Oklahoma, as in many other states, an inmate can earn good-time credits that reduce the duration of a sentence at the rate of one day per credit. Okla. Stat. tit. 57, § 138(A). The number of credits that an inmate earns each month is determined by his "class level"—for example, at class-level one, the inmate earns no credits; at level two, 22 credits; at level three, 33 credits; and at level four, 44 credits. *Id.* § 138(B) & (D) An inmate's class level depends on how long he has been confined, his participation in employment or other programs, and his general behavior. *Id.* § 138(D).

On February 1, 1997, Mr. Warnick was assigned to class-level four. He was then participating in the prison's sex-offender treatment program and held a job at its furniture factory. On June 1, however, Mr. Warnick was reassigned to class-level three, evidently because of his removal from the treatment program. On July 10, 1997, he was transferred to a different facility, consequently losing his furniture- ***844** factory job. On April 1, 1998, Mr. Warnick began as a "Vo–Tech student" and was returned to class-level four. Based on his days of confinement and the credits that he had earned, his "rebill date"—the date on which his first sentence ended and his two concurrent sentences began—was June 28, 1998. That date was duly entered on Mr. Warnick's consolidated time card for the six-year sentence, and a new card was started for his concurrent 20–year sentences.

What happened next is not clear from the record. A July 25, 2000, audit apparently revealed that Mr. Warnick should have been placed in class-level one when he lost his furniture-factory job. Instead, he was allowed to remain at class-level three, thereby earning credits to which he was not entitled. According to the audit memo, his sentence needed to be corrected by removing 75 credits and changing his rebill date from June 28 to August 18, 1998. But in his November 1, 2004, brief on appeal, Mr. Warnick states that the July 25 audit resulted in the removal of 155 credits. And an affidavit by a sentence-administration-unit employee explains that the July audit resulted in the removal of 155 credits and that this adjustment changed Mr. Warnick's rebill date from June 28 to August 18, 1998. Not only does the audit memo disagree with the brief and affidavit on the number of credits that were removed, but also *neither* figure matches the 52–day difference between June 28 and August 18, 1998, as one would expect, given that each credit substitutes for one day of confinement under § 138(A).

In any event, on July 28, 2000, Mr. Warnick filed a "request to staff"—the first stage in the prison grievance process—asking to be told "how time can be taken from me from a case I have already discharged." R. doc. 1 ex. N. On August 1 he was informed in writing by a prison staff member: "I was told that if days were given and you were not actually eligible to earn them[,] [an auditor] can take the days—even on a discharged case." *Id.* On August 9 he filed a formal grievance; prison officials denied relief again, for the same reason. On August 21 he appealed and on August 23 his appeal was returned on a form with a check mark on a line beside "no grounds for appeal." R. doc. 1 ex. Q.

B. Federal Court Proceedings

On January 2, 2001, Mr. Warnick filed an application for habeas corpus relief against Warden Glynn Booher under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Oklahoma. He contended that the postponement of his rebill date violated due-process, equal-protection, double-jeopardy, cruel-and-unusual-punishment, and ex post facto principles. The district court had jurisdiction to entertain a request for habeas corpus relief that would affect the duration of Mr. Warnick's confinement even though his success would not have resulted in his immediate release. *See Wilkinson v. Dotson*, — U.S. —, 125 S.Ct. 1242, 1247–48, 161 L.Ed.2d 253 (2005). On January 8, 2001, the case was transferred to the United States District Court for the Northern District of Oklahoma, the district within which Mr. Warnick had been convicted. On January 30 the district court recharacterized Mr. Warnick's application as one under § 2241 rather than § 2254 and directed that the Warden either respond or move to dismiss. Venue remained proper in the Northern District of Oklahoma notwithstanding the application's recharacterization. *See* ***845** 28 U.S.C. § 2241(d). [1]

On March 22 the Warden moved to dismiss for failure to exhaust state remedies. He claimed that Mr. Warnick could seek mandamus in Oklahoma state court. Mr. Warnick opposed the motion to dismiss. He also noted that a further audit had taken place on February 12, resulting in the revocation of an additional 968 credits from the concurrent 20–year sentences for failure to participate in the sex-offender treatment program. On February 26, 2002, the district court denied the Warden's motion to dismiss, agreeing with Mr. Warnick that no state-court remedy was available.

In May 2002, as a result of an Oklahoma Court of Criminal Appeals decision holding that mandatory participation in the sex-offender treatment program is unconstitutional, the prison again audited Mr. Warnick's sentence and returned the 155 credits originally subtracted and the 968 that were subtracted on February 12. But the same audit revealed an unrelated 53–credit calculation error: in April 1996, instead of subtracting 53 credits, prison staff subtracted 106 credits from Mr. Warnick's sentence. The prison corrected this error as well, resulting in a net adjustment of 968 credits on the 20–year sentences and 155 offset by 53, or 102, credits on the six-year sentence. Mr. Warnick's rebill date became July 15, 1998, again by calculations that we do not understand and that do not seem to follow the one-credit-equals-one-day rule. (Indeed, the Warden refers to the 53 credits in one brief as "the 53 day correction," Aplee. Br. (April 9, 2004) at 5, and in another as "the 17 days of earned credits," Aplee. Br. (December 3, 2004) at 2–3.) As a result of this audit, the only credit subtraction currently in dispute is the 53–day calculation-error offset.

On November 15, 2002, the district court denied Mr. Warnick's application for habeas corpus relief. But it addressed only the original 155–day subtraction, not the later 53–day offset. (Apparently, neither party had advised the court of the most recent adjustments.) The court held that there was no factual or legal basis for his equal-protection claim, the offset did not violate double-jeopardy principles because it did not result in confinement beyond the original sentence, there was no merit to his claim that "undue mental anguish and stress" resulting from the correction constituted cruel and unusual punishment, any change in the prison regulations did not disadvantage Mr. Warnick in violation of ex post facto principles, and the Due Process Clause did not entitle him to any procedural protection with respect to the subtraction of erroneously awarded credits because his interest in such credits was not a liberty interest.

On November 21, 2002, Mr. Warnick filed a notice of appeal to our court.

C. Certificate of Appealability

"Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from ... the final order in a habeas corpus ***846** proceeding in which the detention complained of arises out of process issued by a State court." 28 U.S.C. § 2253(c)(1)(A). "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits," the prisoner "must demonstrate that reasonable jurists would find the district

court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

Mr. Warnick originally challenged on appeal the subtraction of the 155 credits on double-jeopardy, due-process, and ex post facto grounds. On June 3, 2003, we granted a certificate of appealability covering one of Mr. Warnick's due-process contentions, and on March 9, 2004, we expanded it to cover his contention that subtraction of good-time credits after his rebill date violated double-jeopardy principles. In response to the Warden's contention that these claims were mooted by restoration of the 155 credits, Mr. Warnick has now further contended that the 53–credit offset in May 2002 was likewise contrary to double-jeopardy principles because it took place after his rebill date had passed.

In our March 2004 order we expressly reserved the question whether the restoration of the 155 credits moots Mr. Warnick's claims. We now hold that it does in part. The Warden has conceded the error of the original 155–credit reduction, so there is nothing left for judicial resolution on that matter. Accordingly, the district court's ruling has been mooted insofar as it concerns the original reduction. But Mr. Warnick's claim as a whole is not mooted, because the 155 credits have not been fully restored as he sought. With respect to the unrestored 53 credits, the Warden has in essence simply changed his explanation for why Mr. Warnick is not entitled to them, and that new explanation is still subject to Mr. Warnick's original objection that the subtraction of any credits after his rebill date violates double-jeopardy principles. Mr. Warnick therefore need not pursue a new § 2241 application to challenge the failure to restore the remaining 53 credits. His claim has remained the same; it is only the response to the claim that has changed. Indeed, our grant of a certificate of appealability on his double-jeopardy claim probably need not be supplemented to encompass his challenge to the 53–credit adjustment. To the extent that it does not encompass this challenge, we grant an additional certificate on the issue.

II. DISCUSSION

Mr. Warnick's sole surviving claim is that the 53–credit offset on his six-year sentence violated double-jeopardy principles because it took place after he had fully served that sentence. We remand to the district court so that it can address the merits of that claim. But in light of the district court's abbreviated treatment of the issue in its prior decision, we believe a further discussion of the applicable law will be helpful. The district court denied Mr. Warnick's double-jeopardy claim on the ground that the reduction in good-time credits had not resulted in confinement beyond his original six-year sentence. But, as we shall see, the *timing* of adjustments to a defendant's term of confinement has double-jeopardy implications. Even a correction to a clear error may be unconstitutional if the correction comes at a time that violates the defendant's legitimate expectation of finality. Whether Mr. Warnick suffered a double-jeopardy violation raises interesting questions of federal constitutional law, but it also raises questions *847 regarding Oklahoma law, administrative procedures within the Oklahoma Corrections system, and the specific facts of this case. These matters are best addressed by the district court in the first instance. The following describes, in a limited manner, considerations that should guide the district court in determining whether the record must be supplemented and how ultimately to resolve the double-jeopardy claim.

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall be ... subject for the same offence to be twice put in jeopardy of life or limb." In *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), the Supreme Court held that the Fourteenth Amendment makes applicable to the states all the protections provided by the Double Jeopardy Clause.

The Clause protects against (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "multiple punishments for the same offense." *Jones v. Thomas*, 491 U.S. 376, 381, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989) (internal quotation marks omitted). The prohibition against multiple punishments, which is the prohibition at issue in this case, itself includes two prohibitions: (1) against "greater punishment than the legislature intended," *Jones*, 491 U.S. at 381, 109 S.Ct. 2522 (internal quotation marks omitted); and (2) against sentence adjustments that upset a defendant's legitimate "expectation of finality in his sentence." *United*

States v. DiFrancesco, 449 U.S. 117, 136, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). The district court apparently focused on the first of these multiple-punishment prohibitions, denying Mr. Warnick's double-jeopardy claim on the ground that the offset of which he complains did not result in confinement beyond the original sentence.

To be sure, Mr. Warnick's punishment does not exceed what the legislature authorized, as was the case in *Ex Parte Lange*, 18 Wall. 163, 85 U.S. 163, 21 L.Ed. 872 (1873) (imposition of two alternative, and mutually exclusive, punishments—fine and imprisonment); *accord In re Bradley*, 318 U.S. 50, 52, 63 S.Ct. 470, 87 L.Ed. 608 (1943), and *Jones* (defendant sentenced, contrary to state law, to both felony murder and the underlying felony). But protection of the "expectation of finality" recognized in *DiFrancesco*, 449 U.S. at 136, 101 S.Ct. 426, imposes limits on sentence adjustments, even to comply with the sentencing statute. In that case the issue was whether a federal statute permitting the government to appeal the sentence of a "dangerous special offender" violated the Double Jeopardy Clause. *DiFrancesco*, 449 U.S. at 118–21, 101 S.Ct. 426. It was clear that the government was seeking only a punishment authorized by statute; indeed, it was arguing that the sentence imposed was unlawful. *Lange* and *Jones* were thus inapplicable; there was no question of imposing a punishment more severe than the legislature had intended. Instead, the question was what limits the Clause imposes on an adjustment to a sentence that moves it *within* the range authorized by the legislature.

The Court identified one necessary condition for a violation of the Clause on this ground—namely, that the adjustment violate a legitimate expectation of the defendant in the finality of his sentence. *Id.* at 137–39, 101 S.Ct. 426. Acquittal, as a matter of constitutional law, gives a defendant a legitimate expectation in the finality of his (lack of a) sentence. *Id.* at 129–130, 132, 101 S.Ct. 426. But the Court observed that "the pronouncement of sentence has never carried the finality that ***848** attaches to an acquittal," *id.* at 133, 101 S.Ct. 426, and held that "[t]he Double Jeopardy Clause does not provide [a] defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be," *id.* at 137, 101 S.Ct. 426. Nonetheless, although constitutional law did not create a legitimate expectation of finality, one might have been created by *non* constitutional law. In *DiFrancesco*, however, this was clearly not the case because the adjustment was authorized by the statutory appeal provision at issue. *Id.* at 137, 139, 101 S.Ct. 426. Because neither constitutional nor nonconstitutional law gave the defendant a legitimate expectation that his sentence was final when pronounced and could not be corrected on appeal, the government appeal did not violate the Double Jeopardy Clause.

In this case it is undisputed that Mr. Warnick's sentence, even after the 53–day offset, is not greater than the legislature intended. Thus, his claim is similar to that in *DiFrancesco*. Although in form his sentence has not been increased, one may question whether there is a substantial difference with respect to the interest in finality between requiring a person to serve additional time on a discharged sentence because of an alleged error in imposing sentence or because of an alleged error in measuring its execution. *Cf. DiFrancesco*, 449 U.S. at 137, 101 S.Ct. 426 (comparing increase of sentence on appeal to revocation of probation (which involves no increase in sentence) and finding the situations "different in no critical respect"). In determining whether Mr. Warnick had a legitimate expectation that his sentence was final before the 53–day offset was made, it will be necessary for the district court to examine two issues: (1) whether Oklahoma law —constitution, statutes, regulations, and case law—forbids making the offset after Mr. Warnick's rebill date and (2) if not, whether there has been an event in this case, like an acquittal, that gave Mr. Warnick a legitimate expectation of finality as a matter of federal constitutional law, state law to the contrary notwithstanding.

As for the second of these issues, we note that the federal constitution apparently creates only modest legitimate expectations (aside from the expectation of finality in an acquittal). *DiFrancesco* establishes that the pronouncement of sentence in itself does not give a prisoner a legitimate expectation of finality; if it did, then the sentencing appeal that *DiFrancesco* approved would have violated double-jeopardy principles. Indeed, this court suggested years ago that errors in measuring the execution of a sentence could be corrected at any time. In a case in which a prisoner was freed several years early because of an error in the prison records, we pronounced the dictum that there could be "no doubt of the power of the government to recommit a prisoner who is released or discharged by mistake, where his sentence would not have expired if he had remained in confinement." *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir.1930). If the government

can recommit even a prisoner whom it freed, then surely it can recommit one that remains in prison—particularly when it is realized that to "recommit" in the latter case is simply to reclassify certain days of imprisonment as belonging to one consecutive sentence rather than another. On the other hand, the Fourth Circuit has held that it violated the Double Jeopardy Clause to increase sentences that had already been served even though they had been served concurrently with a sentence on which the prisoner was still confined. *See United States v. Silvers*, 90 F.3d 95, 101–02 (4th Cir.1996). We leave it to the district court in the first instance to resolve the issue.

*849 III. CONCLUSION

To the extent that the district court rendered judgment on Mr. Warnick's claim that the 155–credit subtraction from his good time was incorrect, we vacate the judgment and remand to the district court to dismiss the claim as moot. As for Mr. Warnick's claim that Oklahoma violated double-jeopardy principles by making the 53–credit offset, we remand to the district court for further proceedings. On remand the district court may wish to appoint counsel for Mr. Warnick.

HARTZ, Circuit Judge, concurs.

I add this concurrence simply to note the difficulty of determining whether Oklahoma law gave Mr. Warnick a legitimate expectation that his sentence could not be adjusted upward after his rebill date.

Mr. Warnick was sentenced to two terms of imprisonment. The first term arose from a single sentence, the second term arose from two concurrent sentences. After telling Mr. Warnick that his first term was complete and while Mr. Warnick was serving his second term, the prison discovered that the first term was in fact supposed to continue for a further 53 days and adjusted Mr. Warnick's records accordingly. At the outset it should be noted that this precise context would not arise for a federal prisoner. Federal statutes have provided that consecutive sentences are to be treated for sentence-administration purposes as a single sentence. *See* 18 U.S.C. § 3584(c); 18 U.S.C. §§ 4161, 4165 (repealed 1984). These statutes have never been held unconstitutional.

In Oklahoma, however, consecutive sentences are treated separately. *See* Okla. Stat. tit. 21, § 61.1.[1] In *Ex parte Grimes*, 92 Okla.Crim. 87, 221 P.2d 679, 681 (Okla.Crim.App.1950), the court wrote: "Where there are one or more convictions and judgments thereon, the accused should be incarcerated upon the first conviction for which a commitment is issued for the period of time therein named. At the end of that period of confinement, the imprisonment should commence upon the second conviction and terminate in like manner, and so on for the third and subsequent convictions." (internal quotation marks omitted). The question before the district court is whether in this context an Oklahoma prisoner has such an expectation of finality with respect to a sentence that a correction to the period of confinement cannot be made after the sentence has been discharged but while the prisoner is still confined on a consecutive sentence.

Because the sentence correction here related to good-time credits, a description of the administration of these credits must precede further analysis. Good-time credit systems were adopted by statute, *see, e.g.*, Okla. Stat. tit. 57, § 138, in part to give prisoners an extra incentive to abide by prison policies, *see, e.g.*, *State v. McCallion*, 875 P.2d 93, 94–95 (Alaska Ct.App.1994); they were no part of the common law. The governing statutes authorize the Department of Corrections to promulgate regulations. *See* Okla. Stat. tit. 57, §§ 138(B) (giving Department power to *850 promulgate regulations governing class-level assignments), 507(b) (giving Director of Corrections general power "[t]o prescribe rules and regulations for the operation of the Department").

Section 138 does not provide for sentence audits to correct credit-calculation errors. It does provide for an "adjustment review committee" that "[a]t least once every four ... months ... shall evaluate the class level status and performance of [each] inmate and determine whether or not the class level for the inmate should be changed." *Id.* § 138(F). "Any inmate who feels aggrieved by a decision made by an adjustment review committee may utilize normal grievance procedures in effect with the Department of Corrections and in effect at the facility in which the inmate is incarcerated." *Id.* But these

provisions do not apply here because Mr. Warnick complains of a sentence adjustment to correct a calculation error, not a change in his class-level assignment.

The sentence-administration regulations neither clearly prohibit nor clearly permit an offset or audit for calculation errors after rebill; they are silent on the question. On one hand, the regulations contemplate adjustments of credits attributable to a prior month:

> Any modifications of any type of credit for preceding months discovered through the audit process will be posted in the other column of the month through which the audit is performed. If a modification results in taking of credit previously posted, the credit will be preceded by the symbol for negative credit (-).

DOC Manual OP–060211(VI)(C)(2)(d). And audits of time calculations are provided for by DOC Manual OP–060211(VIII). On the other hand, the May 2002 audit of Mr. Warnick's records did not take place in any of the "situations" in which "[a]udits will be performed"—for example, on reception, parole, or rebill. DOC Manual OP–060211(VIII)(A)(1). But a list of situations in which audits *will* be performed does not necessarily imply that those are the only situations in which an audit *may* be performed. For example, the Department's "[r]esolution/action" in response to a grievance "may include any appropriate remedy as authorized by Oklahoma law." DOC Manual OP–090124(VI)(C)(1). A sentence audit would seem to be an appropriate remedy for a grievance claiming a credit-calculation error, even though "in response to a grievance" is not one of the situations in which, according to the sentence-administration regulations, an audit "*will* be performed." DOC Manual OP–060211(VIII)(A)(1) (emphasis added).

The case law likewise does not offer definitive guidance. Language in an early case strongly suggests that adjustments to good-time credits are forbidden once the prisoner has completed a sentence. In 1920 the Oklahoma Criminal Court of Appeals wrote the following concerning a prisoner serving consecutive sentences: "[I]n this case ... the prisoner had fully served the first three terms of imprisonment for which he was sentenced, and the warden of the penitentiary [was] powerless to go back and deprive the prisoner of good time ... under any of such sentences." *Ex parte Ray*, 18 Okla.Crim. 167, 193 P. 635, 639 (Okla.Crim.App.1920).

But this statement in *Ray* is explicitly dictum. *See Ray*, 193 P. at 639. And the syllabus by the court in *Ray* limits the broader language in the opinion to circumstances distinguishable from this case. Rather than saying that good-time credits on a fully served sentence may *never* be adjusted, the syllabus states:

> "[W]here a prisoner has fully served a sentence and has begun to serve a second or other subsequent sentence, the ***851** warden of the penitentiary is without power to go behind the sentence the prisoner is then serving and deprive the prisoner of good time ... allowed when serving the previous sentence *for any infraction of the prison rules occurring subsequent to the completion of the previous term.*"

Id. at 635–36 (emphasis added).

Moreover, cases decided after *Ray* suggest that the Oklahoma courts might permit the audit and offset in this case. In *Ex parte Edwards*, 88 Okla.Crim. 433, 204 P.2d 547 (Okla.Crim.App.1949), the prisoner was first convicted of stealing "domestic fowl" and sentenced on that charge to two years' imprisonment in the state reformatory. While confined he was convicted of assault with intent to kill and sentenced to a further two years' imprisonment in the reformatory, to be served after the initial two-year sentence. *Id* at 547–48. After that, while still confined on the first sentence, he was convicted of murder and sentenced to 40 years' imprisonment. *Id.* at 548. He was moved to the penitentiary and booked in to serve the 40–year sentence. *Id.* After that sentence had been fully served, the warden held him to serve the second two-year sentence, to be followed by the remainder of the first two-year sentence. *Id.* He petitioned for habeas corpus, contending that because sentences are to be served in the order received, the warden's booking him in on the 40–year

sentence before he had finished serving the first two constituted a waiver of the remaining time on the first two sentences. *Id.* at 549.

The Oklahoma Criminal Court of Appeals put the question and answered it this way:

> By reason of the failure of the Clerk at the State Penitentiary to enter the sentences in their proper order, should petitioner be discharged prior to the time the sentences imposed upon him would be fully served? We think not.... [T]he proper procedure would be for the Warden of the Penitentiary to correct his records.... Petitioner would then be entitled to his discharge on May 12, 1950.

Id. at 550. Thus, the Oklahoma court held that time allotted to the 40–year sentence, which had been fully served, could, because of the warden's mistake, be reclassified as time on the two two-year sentences, with the consequence that Petitioner's release would be delayed.

In a later case with similar facts—sentences appearing in the wrong order in the prison records—the court explained that "[a]n incorrect entry by the warden [will] not authorize the release of [a] prisoner unless it [is] shown that he [has] fully satisfied the valid sentences which [have] been pronounced against him." *Grimes*, 221 P.2d at 681. And in the context of crediting to another sentence time served on an invalidated sentence, the same court quoted at length a Fourth Circuit decision that said: " 'We emphasize[ ] that all that [is] involved [is] an adjustment of the administrative records of the prison authorities.' " *Floyd v. State*, 540 P.2d 1195, 1197 (Okla.Crim.App.1975), quoting *Miller v. Cox*, 443 F.2d 1019, 1021–22 (4th Cir.1971).

As further guidance, one may look to state agencies' interpretations of state law. Under federal law when the agency that has promulgated the regulation in question has also interpreted it, courts may give that interpretation substantial deference. *See, e.g., Archuleta v. Wal–Mart Stores, Inc.*, 395 F.3d 1177, 1184–85 (10th Cir.2005); *Gerber v. Hickman*, 291 F.3d 617, 626 (9th Cir.2002) (en banc) (Tashima, J., dissenting) ("the Warden's interpretation of the [prison] regulation is entitled to deference"). Oklahoma law appears to be the same. *See Liberty Bank & Trust Co.* ***852** *v. Splane*, 959 P.2d 600, 602 (Okla.Civ.App.1998) ("Our courts will show great deference to the interpretation given a statute or rule by the officers or agency charged with its administration, and will not disturb that construction except for very cogent reasons.").

Here, the Department of Corrections interpreted the audit regulations when it rejected Mr. Warnick's claim that his sentence could not be audited after it had been fully served. On August 9, 2000, after Mr. Warnick appealed the loss of 75 credits, the Department wrote: "The Department of Corrections auditor has the responsibility and the authority to correct errors related to the service of your sentence. You were clearly not entitled to the credit and it was appropriately removed from your record." R. doc. 1 ex. O. In a letter to Mr. Warnick five days later, the Department wrote: "The Department of Corrections has the responsibility and the authority to correct errors related to the service of sentences *while an inmate is in our custody*. You were clearly not entitled to the credit and it was appropriately removed from your record." R. doc. 1 ex. P (emphasis added).

Similarly, the Warden has consistently taken the position in this litigation that the audit and offset were legal. In *Auer v. Robbins*, 519 U.S. 452, 462, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), the Supreme Court deferred to an interpretation of the Secretary of Labor advanced in an amicus brief. The Court held that this "does not, in the circumstances of this case, make it unworthy of deference" because "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* The Court contrasted *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212–13, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988), in which the Secretary of Health and Human Service's interpretation advanced in litigation was rejected because its having been adopted there for the first time and its being inconsistent with the Secretary's prior litigation positions revealed it to be "nothing more than an agency's convenient litigating position."

The district court will need to determine in the first instance what, if any, deference is owed these agency pronouncements. Of course, the district court may find it convenient and expeditious to certify this issue of state law to the Oklahoma Court of Criminal Appeals.

A final point is necessary to clarify the issue before the district court. The critical double-jeopardy question in cases like this is whether state law gave the prisoner a *legitimate expectation* of finality in his sentence before that sentence was adjusted. Even if state law permitted the audit and offset *when they took place*, it is possible that this state-law result was so unforeseeable that the correction violated a legitimate expectation of finality.

A similar question is presented when a state court changes the common law of crimes, and an adversely affected defendant argues that this denies him due process. In *Rogers v. Tennessee*, 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001), the Supreme Court considered such a case. Rogers had stabbed Bowdery, who died 15 months later. *Id.* at 454, 121 S.Ct. 1693. At common law this could not be murder because of the "year-and-a-day rule": Bowdery did not die within a year and a day of Rogers's stabbing him. *Id.* at 453–54, 121 S.Ct. 1693. The Tennessee Supreme Court nonetheless affirmed Rogers's conviction of murder by abolishing the rule. *Id.* at 455–56, 121 S.Ct. 1693. Relying on "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning," *id.* at 459, 121 S.Ct. 1693, the United States Supreme ***853** Court held "that a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning ... where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," *id.* at 462, 121 S.Ct. 1693 (internal quotation marks omitted). That was not the case in *Rogers* because the year-and-a-day rule was "widely viewed as an outdated relic of the common law," *id.*, had been widely abandoned elsewhere, and appeared in Tennessee cases only in dicta (although the Tennessee Supreme Court had recognized it as a part of Tennessee's common law). *Id.* at 455, 462–67, 121 S.Ct. 1693. *Cf. Stephens v. Thomas*, 19 F.3d 498, 500–01 (10th Cir.1994) (no ex post facto violation in correctly applying statute that had been misconstrued by agency).

All Citations

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Footnotes

1 Section 2241(d) provides:

> Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

1 Okla. Stat. tit. 21, § 61.1 states:

> When any person is convicted of two (2) or more crimes in the same proceeding or court or in different proceedings or courts, and the judgment and sentence for each conviction arrives at a state penal institution on different dates, the sentence which is first received at the institution shall commence and be followed by those sentences which are subsequently received at the institution, in the order in which they are received by the institution, regardless of the order in which the judgments and sentences were rendered by the respective courts, unless a judgment and sentence provides that it is to run concurrently with another judgment and sentence.

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