

FILED

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

MAR 31 1978

Jack G. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA and)	
KENNETH L. HARRIS, Revenue)	
Officer, Internal Revenue Service,)	
)	
Petitioners,)	
)	
vs.	)	Civil No. 78-C-65-B
)	
CJ ENTERPRISES, INC., and)	
JOSEPH E. MOUNTFORD, as President)	
of CJ Enterprises, Inc.,)	
)	
Respondents.)	

ORDER DISCHARGING RESPONDENTS
AND DISMISSAL

On this 31st day of March, 1978, Petitioners' Motion To Discharge Respondents And For Dismissal came for hearing and the Court finds that Respondents have now complied with the Internal Revenue Service Summons served upon them November 30, 1977, that further proceedings herein are unnecessary and that the Respondents, CJ Enterprises, Inc., and Joseph E. Mountford, as President of CJ Enterprises, Inc., should be discharged and this action dismissed upon payment of \$65.00 costs by Respondents.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THE COURT that the Respondents, CJ Enterprises, Inc., and Joseph E. Mountford, as President of CJ Enterprises, Inc., be and they are hereby discharged from any further proceedings herein and this cause of action and Complaint are hereby dismissed upon payment of \$65.00 costs by said Respondents.

W. E. Carson
UNITED STATES DISTRICT JUDGE

FILED

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

MAR 31 1978

U.S. District Court
Northern District of Oklahoma

UNITED STATES OF AMERICA and)	
KENNETH L. HARRIS, Revenue)	
Officer, Internal Revenue)	
Service,)	
)	
Petitioners,)	
)	
vs.	)	Civil No. 78-C-64-B
)	
JOSEPH E. MOUNTFORD,)	
)	
Respondent.)	

ORDER DISCHARGING RESPONDENT
AND DISMISSAL

On this 31st day of March, 1978, Petitioners' Motion To Discharge Respondent And For Dismissal came for hearing and the Court finds that Respondent has now complied with the Internal Revenue Service Summons served upon him November 30, 1977, that further proceedings herein are unnecessary and that the Respondent, Joseph E. Mountford, should be discharged and this action dismissed upon payment of \$41.00 costs by Respondent.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THE COURT that the Respondent, Joseph E. Mountford be and he is hereby discharged from any further proceedings herein and this cause of action and Complaint are hereby dismissed upon payment of \$41.00 costs by said Respondent.

Clayton L. Brown
UNITED STATES DISTRICT JUDGE

- prospective defense witnesses and was inadequately prepared to present a meaningful defense; to depose a prosecution witness for purposes of impeachment; and to submit written instructions to the Trial Court on circumstantial evidence and to support a directed verdict.
2. The Trial Court excluded vital testimony of a defense witness as hearsay, and said testimony had it been pursued could have cleared petitioner of the charge.
 3. Petitioner was denied his constitutional right to compulsory process for obtaining witnesses in his own behalf.
 4. The testimony was insufficient to support a conviction as well as incompetent and conflicting.
 5. The Trial Court failed to instruct the jury on circumstantial evidence, failed to meet its burden of proof of guilty beyond a reasonable doubt, and shifted the burden of proof to petitioner.
 6. Petitioner was denied a full and fair hearing pursuant to the Oklahoma Post-conviction Procedure Act.

Having carefully reviewed the petition, response, traverse, transcripts and records of the State proceedings, and being fully advised in the premises, the Court finds that an evidentiary hearing is not required and the petition should be denied and the case dismissed.

In Petitioner's first contention that he was denied effective assistance of counsel, he claims that defense counsel failed to subpoena vital defense witnesses and to seek a continuance to compel the attendance of vital defense witnesses. The witnesses about which the Petitioner complains are Wanda and Gary McDonald, for whom subpoenas were issued, but not returned, and the witnesses were not present at trial when called. From a careful review of the trial transcript, this appears to have been a trial tactic of defense counsel to attempt to cast suspicion on said persons in the minds of the jury, which the actual testimony of the witnesses could have dispelled. Petitioner presents no facts as to what these witnesses could have testified in his behalf, and relies only on the statements of Mrs. Betty Boline, taken in the Trial Judge's chambers as an offer of proof, which were clearly hearsay, and properly excluded from the hearing of the jury. Defense counsel in his cross-examination of the prosecution witnesses diligently tried to establish from the witnesses that the stabbing which caused the death of the victim occurred outside and prior to the victim's entering the apartment where he died. Seven defense witnesses were called and the direct examination illicit was to that end. The chief prosecution

witness testified in part as follows:

Preliminary hearing transcript, page 8, lines 6 and 7:

"Q Alright, when you woke up, what did you observe, sir?

"A Speegle, stabbed Jackson."

Trial transcript, page 42, lines 17 and 18:

"Q But you said you saw somebody stab somebody.

"A Oh, yes. Sammy Jackson."

And, at page 60, lines 2 and 3:

"Q And all you saw then was Mr. Speegle do what?

"A Stab Mr. Jackson."

Which testimony defense counsel attempted to discredit as self-serving as the witness had also been a suspect of the crime, and by showing that he was too drunk to remember what happened. It appears from the transcript that the failure to produce the McDonald witnesses was a stratagem, and that a continuance for their presence was not desired. Had they been present their testimony may well have caused Petitioner more harm than good. Without specification and supporting factual allegations of the alleged favorable evidence these witnesses would have produced, these conclusory allegations of ineffective counsel are insufficient. Counsel is duty bound to produce only those witnesses, if available, who will adequately present themselves to the jury on the issue he presents. Grant v. State of Oklahoma, 382 F.2d 270 (10th Cir. 1967). Trial techniques and the witnesses to be used or not used in a trial is a matter for trial counsel to determine by the exercise of professional judgment. Grant v. State of Oklahoma, Id.; Bozel v. Hudspeth, 126 F.2d 585 (10th Cir. 1942).

As to the claim that counsel was ineffective for his failure to depose witnesses. Petitioner was represented by retained counsel of his own choice. A private investigator was employed. When Petitioner selected his own counsel, the effectiveness of that counsel is his responsibility. Plaskett v. Page, 439 F.2d 770, 771 (10th Cir. 1971). The alleged mistakes in trial tactics and somewhat careless preparation, even if proved, clearly did not reduce the trial to a mockery of justice. Linebarger v. State of Oklahoma, 404 F.2d 1092 (10th Cir. 1968) cert. denied 394 U. S. 938 (1969); Opie v. Meacham, 419 F.2d 465 (10th Cir. 1969) cert. denied 399 U. S. 927 (1970); 26 A.L.R. Fed. 218.

Petitioner's bald, conclusory assertion that his trial counsel was ineffective because he did not present written instructions to the Trial Court on circumstantial evidence and to support a directed verdict does not raise a constitutional claim. Petitioner makes no assertion that the standard instruction on circumstantial evidence was in any way inadequate. Trial counsel is not required to submit requested written instructions unless there is an issue on which he wishes a particular instruction, then he may call that to the Court's attention with the law to support it's inclusion and accuracy. A Trial Court is under no obligation to use words of a submitted instruction even though the proposed instruction may be both a correct statement of the law and artfully expressed. Sanseverino v. United States, 321 F.2d 714 (10th Cir. 1963). Indeed, it is usually preferable for the Court to use its own language in framing instructions. Even if failure to file requested written instructions were a mistake in judgment or trial practice by defense counsel, in the circumstances before the Court it would not be a deprivation of constitutional rights, and therefore is not grounds for review in this habeas corpus proceeding. See, Pierce v. Page, 362 F.2d 534 (10th Cir. 1966); Linebarger v. State of Oklahoma, Supra.

Petitioner's allegations of ineffective trial counsel are insufficient and clearly refuted by the record. In reviewing the State transcript, the specific grounds urged by the Petitioner have been considered and they do not support a finding of ineffective assistance of counsel. Where the transcript of the State trial refutes Petitioner's claim that he was denied effective counsel, Federal plenary hearing in habeas corpus proceeding is not required. Edwards v. Wainwright, 461 F.2d 238 (5th Cir. 1972). As was said in Gillihan v. Rodriguez, 551 F.2d 1182, 1187 (10th Cir. 1977) cert. denied ___ U. S. ___ (1977):

"The burden on appellant to establish his claim of ineffective assistance of counsel is heavy. Neither hindsight nor success is the measure for determining adequacy of legal representation.' Tapia v. Rodriguez, 446 F.2d 410, 416 (10th Cir. 1971), quoting from Ellis v. Oklahoma, 430 F.2d 1352, 1356 (10th Cir. 1970), cert. denied, 401 U. S. 1010, 91 S.Ct. 1260, 28 L.Ed.2d 546 (1971). Accord, Lorraine v. United States, 444 F.2d 1 (10th Cir. 1971) (per curiam). This circuit adheres to the well established principle that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only

perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation. Ellis v. Oklahoma, 430 F.2d 1352, 1356 (10th Cir. 1970), cert. denied, 401 U. S. 1010, 91 S.Ct. 1260, 28 L.Ed.2d 546 (1971). Accord, United States v. Coppola, 486 F.2d 882, 887 (10th Cir. 1973), cert. denied, 415 U. S. 948, 94 S.Ct. 1469, 39 L.Ed.2d 563 (1974); Johnson v. United States, 485 F.2d 240, 241-42 (10th Cir. 1973); Tapia v. Rodriguez, 446 F.2d 410, 416 (10th Cir. 1971); United States v. Davis, 436 F.2d 679, 681 (10th Cir. 1971); Linebarger v. Oklahoma, 404 F.2d 1092, 1095 (10th Cir. 1968), cert. denied 394 U. S. 938, 89 S.Ct. 1218, 22 L.Ed.2d 470 (1969); Goforth v. United States, 314 F.2d 868, 871 (10th Cir.), cert. denied 374 U. S. 812, 83 S.Ct. 1703, 10 L.Ed. 2d 1035 (1963)."

Petitioner's second issue is that the Trial Court committed error in excluding testimony of a defense witness "under the guise of hearsay." As previously stated herein and clearly supported by the trial transcript, the testimony offered was hearsay and properly excluded. It is a well established rule that State Court rulings on the admissibility of evidence may not be questioned in a Federal habeas corpus proceeding, unless they render the trial so fundamentally unfair as to constitute a denial of Federal constitutional rights. Gillihan v. Rodriguez, Id. at pp. 1192-93, and cases there cited; Praxedes v. Cobarrubio v. Ralph Lee Aaron, No. 76-2112 Unreported (filed July 27, 1977).

The third issue of Petitioner that he was denied compulsory process is clearly without merit. Subpoenas were issued and Petitioner was not denied compulsory process for obtaining witnesses in his own behalf.

The fourth issue that the evidence was insufficient, incompetent and conflicting is also without merit. That issue was properly determined by the Oklahoma Court of Criminal Appeals on direct appeal. The issue raises no constitutional question cognizable in this habeas corpus proceeding as the conviction was not so devoid of evidentiary support as to raise a due process issue. Johnson v. Turner, 429 F.2d 1152 (10th Cir. 1970); Mathis v. People of the State of Colorado, 425 F.2d 1165 (10th Cir. 1970).

Petitioner's fifth allegation is not supported by the record. The Trial Court in Instruction No. 10 properly instructed the jury on circumstantial evidence. The attack on the instructions herein raises no Federal constitutional question. Ortiz v. Baker, 411 F.2d 263 (10th Cir. 1969) cert. denied 396 U. S. 935 (1969). Habeas corpus is not available to set aside a conviction on the basis of erroneous jury instructions unless the error has such an effect on the trial as to render it so funda-

mentally unfair that it constitutes a denial of a fair trial in a constitutional sense. Martinez v. Patterson, 371 F.2d 815 (10th Cir. 1966); Woods v. Munns, 347 F.2d 948 (10th Cir. 1965); Alexander v. Daugherty, 286 F.2d 645 (10th Cir. 1961) cert. denied 366 U. S. 939 (1961); Linebarger v. State of Oklahoma, Supra. Further, the Trial Court instructed the jury that the State had the burden of proof to establish the crime charged beyond a reasonable doubt. Petitioner's bald, conclusory allegation that the State failed to meet its burden of proof is covered in the discussion regarding sufficiency of the evidence, above; and his bald, conclusory claim that the burden of proof was shifted to him is totally without merit.

Petitioner's sixth and final allegation is that he did not receive a full and fair hearing in his State post-conviction proceeding. There is no Federal constitutional requirement that the State provide a means of post-conviction review of State Court convictions. Further, it has been stated that an error of law occurring in a collateral State proceeding does not reach constitutional proportions. LeMay v. Henderson, 407 F.2d 494 (6th Cir. 1969) cert. denied 395 U. S. 970 (1969). The unavailability or adequacy of State post-conviction procedures are material only in the context of exhaustion of State remedies on federally protected rights. Errors or defects in a State post-conviction proceeding do not render a prisoner's detention unlawful. See, Noble v. Sigler, 351 F.2d 673 (8th Cir. 1965) cert. denied 385 U. S. 853 (1966).

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 be and it is hereby denied and the case is dismissed.

Dated this 31st day of March, 1978, at Tulsa, Oklahoma.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

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

FILED

MAR 31 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ALBERT EQUIPMENT COMPANY, INC.,)
an Oklahoma Corporation,)
)
Plaintiff,)
)
vs.)
)
THE HOME INDEMNITY COMPANY, a)
New York Corporation,)
)
Defendant.)

No. 77-C-177-C

ORDER OF DISMISSAL

ON this 31st day of March, 1978, upon the written application of the parties for a Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the Plaintiff filed herein against the Defendant be and the same hereby is dismissed with prejudice to any future action.

Clerk

JUDGE, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

RICHARD CARPENTER

Richard Carpenter
Attorney for Plaintiff

RICHARD D. WAGNER

Richard D. Wagner
Attorney for Defendant

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

PHILLIPS MACHINERY COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 LEBLOND, INC.,)
)
 Defendant.)

No. 77-C-304 (C)

FILED

MAR 30 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

Comes on for hearing and consideration in open Court on this 3rd day of February, 1978, the plaintiff's Motion for Summary Judgment filed November 2, 1977, as to the defendant's counterclaim on an open account, and further the defendant's Cross-Motion for Summary Judgment as to the counterclaim. Having considered the pleadings and briefs and supporting Affidavits as filed by both parties, and having heard argument of counsel, the Court finds that the debt had been acknowledged by both sides, there was no disputed amount and the amount was not in controversy. The defendant, as creditor, did not intend to enter into a separate agreement but merely was permitting the plaintiff to make payments on the liquidated and acknowledged debt over a longer period of time. The defendant never agreed to accept anything different from what it considered itself entitled to, and further, the amount was undisputed and not compromised in any manner. Furthermore, this was simply an arrangement between the parties which was not supported by any consideration.

The evidence does not reflect that there was a doubtful or disputed claim or any controversy as to the amount owed by the plaintiff to the defendant on its open account. The correspondence between the parties supports this fact. The plaintiff

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

FILED

MAR 29 1978

MIAMI STONE, INC.,
Plaintiff

VS.

CENTEX MATERIALS, INC.,
Defendant

X
X
X
X
X
X
X
X
X

Jack C. Silver, Clerk
U. S. DISTRICT COURT

NO. 77-C-229-B

ORDER OF DISMISSAL

On this 29th day of March, 1978, came on for consideration the above styled and numbered cause, and the Court having been advised by counsel for Plaintiff and Defendant that they had settled their disputes and desired that this action be dismissed with prejudice;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the above styled cause, ^{of action} including all claims and counterclaims, be and the same hereby is dismissed with prejudice to the refiling of same.

SIGNED AND ENTERED this 29th day of March, 1978.

Celen E. Garow
UNITED STATES DISTRICT JUDGE

AGREED AND APPROVED AS
TO FORM AND SUBSTANCE:

Ben T. Owens
Ben T. Owens
Wallace & Owens
P. O. Box 1168
Miami, Oklahoma 74354

Marshall Simmons
Marshall Simmons
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2200 First National Bank Building
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Tulsa, Oklahoma 74119

Frederick N. Schneider III
Frederick N. Schneider III
Boone, Ellison & Smith
900 World Building
Tulsa, Oklahoma 74103

Attorneys for Plaintiff/
Counter Defendant

Attorneys for Defendant/
Counter Plaintiff

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

TIMOTHY WAYNE THOMAS,)
)
) Plaintiff,)
)
 vs.)
)
) DAVID YOUNG, DISTRICT)
) ATTORNEY; THE HONORABLE)
) STREETER SPEAKMAN, JR.;)
) BRICE COLEMAN, SHERIFF OF)
) CREEK COUNTY, OKLAHOMA; AND)
) THE STATE OF OKLAHOMA,)
)
) Defendants.)

No. 77-C-531-C ✓

FILED

MAR 29 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

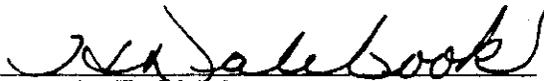
O R D E R

This is a civil rights action brought pursuant to 42 U.S.C. §§ 1983 and 1985. The Court has before it for consideration the motion of defendant State of Oklahoma to dismiss for failure to state a claim upon which relief can be granted.

The Court has previously held that the plaintiff has failed to state a cause of action against any of the defendants under 42 U.S.C. § 1985. It is now settled that a state is not a "person" within the meaning of 42 U.S.C. § 1983, Meredith v. State of Arizona, 523 F.2d 481 (9th Cir. 1975); Cheramie v. Tucker, 493 F.2d 586 (5th Cir. 1974), and the plaintiff therefore has no claim against the State of Oklahoma under that statute.

For the foregoing reasons, the motion to dismiss of defendant State of Oklahoma is hereby sustained.

It is so Ordered this 28th day of March, 1978.


H. DALE COOK
United States District Judge

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

GENEVA JEFFRIES,)
)
 Plaintiff,)
)
 VS.)
)
 JOSEPH CALIFANO, Secretary)
 of Health, Education and)
 Welfare,)
)
 Defendant.)

No. 77-C-301-C ✓

FILED

MAR 29 1978 *hm*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

Plaintiff in this action has petitioned the Court to review a final decision of the Secretary of the Department of Health, Education and Welfare denying her the disabled widows' benefits provided for in Section 202(e) and 223 of the Social Security Act, as amended (42 U.S.C. §§ 402(e), 423). She asks that the Court reverse this decision, or in the alternative, that the Court remand this action to the Secretary for further evidentiary proceedings.

This matter was first heard, on record, by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration, whose written decision was issued March 14, 1977. The Administrative Law Judge found that plaintiff was not entitled to disabled widows' benefits under Sections 202(e) and 223 of the Social Security Act, as amended. Thereafter, that decision was appealed to the Appeals Council of the Bureau of Hearings and Appeals, which Council on June 1, 1977 issued its findings that the decision of the Administrative Law Judge was correct and that further action by the Council would not result in any change which would benefit the plaintiff. Thus the decision of the Administrative Law Judge became the final decision of the Secretary of the Department of Health, Education and Welfare.

Judicial review of the Secretary's denial of Social

Security Disability Benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo, Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the Courts if there is substantial evidence to support them. 42 U.S.C. § 405(g); Atteberry v. Finch, supra. Substantial evidence has been defined as

"more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relas. Bd. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939), the Court, interpreting what constitutes substantial evidence, stated:

"It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Cited in Atteberry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Celebrezze, 351 F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957). However, even though the findings of the Secretary are supported by substantial evidence, a reviewing court may set aside the decision if it was not reached pursuant to the correct legal standards. See Knox v. Finch, 427 F.2d 919 (5th Cir. 1970); Flake v. Gardner, 399 F.2d 532 (9th Cir. 1968); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967); Garrett v. Richardson, 363 F.Supp. 83 (D.S.C. 1973).

Plaintiff contends that the Administrative Law Judge relied exclusively on the reports of consultive physicians

appointed by the Secretary who did not physically examine the plaintiff, but instead based their opinions on the reports of those physicians who did physically examine the plaintiff. Plaintiff further contends therefore that the findings of the Administrative Law Judge are not supported by substantial evidence. Plaintiff also contends that the Administrative Law Judge did not apply the correct legal standards in making said findings.

The applicable legal standards are more strict when a claimant seeks disabled widows' benefits than when a claimant seeks ordinary Social Security disability benefits. To qualify for disabled widows' benefits under the Social Security Act, a claimant must satisfy four requirements:

(1) The claimant must establish that she is at least fifty years of age, and (2) that she is the widow of a wage earner who died fully insured, and (3) that she has physical or mental impairments which, under regulations promulgated by the Secretary, are deemed to be of such severity as to preclude her from engaging in any gainful activity, and (4) that such disability began before the end of a "specified period." 42 U.S.C. §§ 402(e) and 423(d)(2)(B). See also Sullivan v. Weinberger, 493 F.2d 855 (5th Cir. 1974); Clarke v. Mathews, 420 F.Supp. 1050 (D.Md. 1976); Zanoviak v. Finch, 314 F.Supp. 1152 (W.D. Pa. 1970). The only requirement in dispute here is the third, relating to the level of disability.

Whether a claimant is under a disability which prevents her from engaging in "any gainful activity", 42 U.S.C. § 423(d)(2)(B), is determined by reference to the "Listing of Impairments" promulgated by the Secretary, 20 C.F.R., Appendix to Subpart P, §§ 404.1501 et seq. If the claimed disability is not found in the listed impairments, the claimant may still qualify for disabled widows' benefits if she can establish that her claimed disability is "medically the

equivalent of a listed impairment." 20 C.F.R. § 404.1504.

Plaintiff's claimed disability is phlebitis. The medical evidence before the Administrative Law Judge included the reports of three examining physicians, Dr. Lawrence K. Johnson, D.O., Dr. L. W. Hickman, D.O., and Dr. Paul N. Atkins, Jr., M.D., and the reports of two consultive physicians appointed by the Secretary who rendered opinions as to plaintiff's condition based upon the reports from Dr. Johnson and Dr. Hickman, respectively.

Relying upon a medical history, laboratory tests, and several days observation, Dr. Johnson diagnosed plaintiff's condition, insofar as is relevant here, as phlebitis. See pages 91 and 106. In his medical report at pages 103-104 he reports that plaintiff's chief complaint was marked edema from the ankle to the knee of her left leg.

Dr. Johnson referred plaintiff to Dr. Hickman at Oklahoma Osteopathic Hospital. Dr. Hickman took a medical history from plaintiff and performed a general physical examination. Dr. Hickman also directed that a venography be performed on plaintiff's legs. The results of that test are as follows:

"BILATERAL LOWER EXTREMITY VENOGRAPHY
Bilateral lower extremity venography shows evidence of varicosities and incompetent perforators in the lower half of legs bilaterally. Some incompetence is noted in the upper leg on the left side. The upper leg on the right side is normal. No evidence of venous thrombosis is detected." Page 111.

Dr. Hickman's final diagnosis, insofar as is relevant here, was chronic left iliofemoral thrombophlebitis, with recurrent episodes. See page 110. He also notes in his report at page 109 that plaintiff exhibited lower extremity swelling, but that there was minimal discoloration in that area.

A consultive physician reviewed Dr. Johnson's report and rendered this opinion at page 88:

"This woman has had one known episode of phlebitis without evidence of chronic obstruction

of deep venous return, recurrent ulceration or extensive brawny edema. The physician whose signature appears on this determination, having considered all the medical evidence, concludes that the claimants' [sic] impairment does not meet or equal the level of severity described in the listing of impairments, appendix to subpart P of regulations number 4."

A second consultive physician reviewed Dr. Hickman's report and the opinion of the first consultive physician and rendered this opinion at page 90:

"Medical evidence shows chronic thrombophlebitis which resolves with proper treatment. Evidence also shows exogenous obesity which significantly affects the thrombophlebitis. There is no evidence of chronic obstruction of deep venous return or of recurrent ulceration or extensive brawny edema. The physician whose signature appears on this determination, having considered all the medical evidence, concludes that the claimant's impairment does not meet or equal the level of severity described in the listing of impairment's [sic], Appendix to Sub-Part P of Regulations No. 4. Therefore disability is not established."

Dr. Atkins took a brief medical history from plaintiff, and took x-rays and performed a physical examination of plaintiff's left leg. Dr. Atkins also considered the reports of Dr's. Johnson and Hickman. Dr. Atkins concluded that plaintiff had suffered an injury to her left leg which had aggravated a pre-existing thrombophlebitis of the left leg. He also noted that plaintiff's left leg was swollen from the foot to the groin and that there were indications of poor circulation. Page 147. Dr. Atkins' deposition was also included in the evidence before the Administrative Law Judge. He there elaborated upon his diagnosis as follows at pages 154-155:

"The injury that she suffered at that time in my opinion was an aggravation of a pre-existing femoral thrombophlebitis of the left leg. The two things, one, you have a history of a thrombophlebitis and you aggravate this, the thrombophlebitis itself being an inflammatory process of the blood vessel itself as opposed to what is known as a phlebothrombosis which is an actual thrombus or a block of the phlebus. An injury or an aggravation of that thrombophlebitis causes the wall to become thicker due to aggravation of the pre-existing condition and makes for the possibility of the

phlebothrombosis to occur. If the phlebothrombosis does occur and it is very apt to occur at sometime at a later date following the injury and the narrowing of the lumen of the vessel, the patient is then subject to the possibilities of emboli with these emboli causing coronary thrombosis or any kind of mesenteric embolic phenomena or pulmonary embolus or an actual CVA due to lodging in the cranium."

The Court finds that the Administrative Law Judge applied the correct legal standards in making his findings in regard to plaintiff's claim for disabled widows' benefits. The Court further finds that the medical evidence before the Administrative Law Judge satisfied the requirements of 20 C.F.R. § 404.1505 ("Determining Medical Equivalence"), and 20 C.F.R. § 404.1506 ("Listing of Impairments in Appendix") and that said evidence constitutes substantial evidence in support of his findings.

The Court cannot accept plaintiff's argument that the Administrative Law Judge relied exclusively on the opinions of the consultive physicians appointed by the Secretary in making his findings. He found, at page 10, that

"[c]laimant has phlebitis affecting the left lower extremity but a severe condition was not demonstrated by a venogram, and there has been no evidence of a chronic obstruction of a deep venous return recurrent ulceration, or extensive brawny edema."

This finding as to plaintiff's condition, even though it contains much the same language as the opinions of the consultive physicians, is confirmed by the reports of the examining physicians. The similarity in language is obviously due to the use of one of the impairment listings as a common point of reference. Impairment listing 4.12 provides:

"Chronic venous insufficiency, lower extremity. With chronic obstruction of the deep venous return, superficial varicosities, recurrent ulceration, and extensive brawny edema."

Plaintiff cites the case of Webb v. Weinberger, 371 F.Supp. 793 (N.D. Ind. 1974), in support of her contention that the reports of non-examining consultive physicians cannot constitute substantial evidence. That case elaborated upon the holding in Richardson v. Perales, supra, where the

Supreme Court approved the use of such medical advisors in disability cases presenting complex medical problems. Webb is distinguishable from the case at bar in several respects. Most importantly, in that case the opinion of the consultive or advisory physician appointed by the Secretary was contrary to the opinions of the examining physicians. See Richardson v. Perales, supra, at page 408; Ehrenreich v. Weinberger, 397 F.Supp. 693, 696-97 (W.D.N.Y. 1975); Zanoviak v. Finch, supra, at page 1156. Furthermore, Webb involved an application for ordinary Social Security disability benefits. A claim for disabled widows' benefits requires an evaluation of the "medical equivalence" of the claimed disability to the listed impairments. A finding of medical equivalence must be based upon

"medical evidence demonstrated by medically acceptable clinical and laboratory diagnostic techniques, including a medical judgment furnished by one or more physicians designated by the Secretary, relative to the question of medical equivalence. A "physician designated by the Secretary" shall include a physician in the employ of or engaged for this purpose by the Administration, the Railroad Retirement Board, or a State agency authorized to make determinations of disability." 20 C.F.R. § 404.1505(b).

Therefore, in the case of an application for disabled widows' benefits, a physician appointed by the Secretary is specifically required to render an independent opinion on the evidence. See Sullivan v. Weinberger, supra, at pages 860-61.

Because the findings of the Administrative Law Judge are supported by substantial evidence and because said findings are based upon the correct legal standards, it is the determination of the Court that the plaintiff is in fact not entitled to disabled widows' benefits under the Social Security Act. Judgment is so entered on behalf of the defendant.

It is so Ordered this 29th day of March, 1978.

H. Dale Cook
H. DALE COOK
United States District Judge

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

JOANN McDONALD,

Plaintiff,

vs.

JESS O. WALKER, ROBERT M.
THOMPSON, FLOYD MOSS, HAROLD
D. MORGAN, KENNETH McDONALD,
ARCHIE JONES, EMMETT HULL, JOE
DAVENPORT, LARRY D. STUART,
JOHN DOE, Unknown Police Officer
for the City of Vinita, Oklahoma,
and SOUTHWESTERN BELL TELEPHONE
COMPANY,

Defendants.

No. 75-C-469-B

FILED

MAR 28 1978

ORDER

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Plaintiff, JoAnn McDonald, having moved the Court for an Order dismissing the above-entitled action with prejudice as to defendant, Jess O. Walker; and it appearing that settlement discussions between the parties have been completed and an amicable agreement between the parties has been reached; that said agreement has been made by the parties solely and for the purpose of compromising and settling the matters involved in this action, without the expense and inconvenience of trial; that as a result of the agreement, a release of all claims both present and future against defendant, Jess O. Walker, arising out of the events enumerated in plaintiff's complaint has been executed by plaintiff and delivered to defendant's counsel, O. B. Johnston III; that in exchange for plaintiff's release, she has received payment from defendant, Jess O. Walker, in the amount of \$1,000.00; and it appearing to the Court that defendant's attorney joins with and concurs in this request for dismissal, and that such motion is made for good cause, it is

ORDERED that Jess O. Walker is dismissed from the above-entitled action with prejudice.

Allen E. Bonaw

United States District Judge

MAR 28 1978

Dated: _____

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

JOANN MCDONALD,

Plaintiff,

-vs-

JESS O. WALKER, ROBERT M.
THOMPSON, FLOYD MOSS, HAROLD D.
MORGAN, KENNETH MCDONALD,
ARCHIE JONES, EMMETT HULL, JOE
DAVENPORT, LARRY D. STUART,
JOHN DOE, Unknown Police Officer for
the City of Vinita, Oklahoma, and
SOUTHWESTERN BELL TELEPHONE
COMPANY,

Defendants.

FILED

MAR 28 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

No. 75-C-469-B

ORDER

Plaintiff, JoAnn McDonald, having moved the Court for an Order dismissing the above-entitled action without prejudice as to defendant, Robert M. Thompson;

And it appearing that defendant, in his answer, made no counterclaim against plaintiff and will not be substantially prejudiced by a dismissal; and it further appearing to the Court that defendant's attorney joins with and concurs in this request for dismissal; therefore,

IT IS ORDERED that the above-entitled action be, and it is hereby, dismissed without prejudice as to Robert M. Thompson.

Dated MAR 28, 1978.



United States District Judge

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

MAR 28 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

EMMETT LAVERNE MUNDEN,

Movant.

)
)
) NOS. 78-C-66-B
) 77-CR-9
)
)

O R D E R

The Court has for consideration a motion pursuant to 28 U.S.C. § 2255 filed pro se, in forma pauperis, by Emmett Laverne Munden. The cause has been assigned civil Case No. 78-C-66-B and docketed in his criminal Case No. 77-CR-9.

Movant is a prisoner in the Federal Correctional Institution, El Reno, Oklahoma, pursuant to sentence upon revocation of probation in the criminal cause. In his § 2255 motion, Movant demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights guaranteed by the Constitution of the United States of America. In particular, Movant claims that:

He has been twice placed in jeopardy for the same offense when probation, for technical violations, was not revoked and the Movant required to serve the remaining period of the thirty month probation sentence, but rather was sentenced to three years confinement to be followed by three years probation.

Because of this Court's ruling on that issue, the remaining issue presented need not be considered.

In his criminal cause, Case No. 77-CR-9, the Movant was charged by two-count indictment in the United States District Court in Kansas with a Dyer Act in violation of 18 U.S.C. § 2312 in Count One, and with selling and disposing of a stolen vehicle in violation of 18 U.S.C. § 2313 in Count Two. He entered a plea of guilty upon transfer to this District from Kansas under Rule 20, Federal Rules of Criminal Procedure. On February 15, 1977, he was sentenced on each count in accordance with 18 U.S.C. § 3651 to thirty-three months with the condition that he be confined in a jail-type institution for a period of three months, and the execution of the remainder of the sentence was suspended and he was placed on probation for thirty months, the sentence on Count Two to run concurrently with the sentence on Count One.

On November 15, 1977, following probation revocation hearing, probation was revoked and the Movant was sentenced to the custody of the Attorney General for three years on Count One and the imposition of sentence

was suspended and he was placed on probation for three years on Count Two, the probationary period to follow the incarceration in Count One.

The Court having carefully reviewed the § 2255 motion finds that response and evidentiary hearing are not required and that the motion should be sustained in part. That is, the sentence imposed November 15, 1977, at probation revocation in excess of thirty months should be vacated, set aside and held for naught. Further, Movant should receive credit for the time served to date in jail-type custody on said thirty-month period. Imposition of sentence in excess of what the law permits does not render the sentence or authorized portion of the sentence void. Browning v. Crouse, 356 F.2d 178 (10th Cir. 1966) cert. denied 384 U. S. 973 (1966).

18 U.S.C. § 3653 provides in pertinent part:

"As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed."

Pursuant to that section of the Federal Code, since the original sentence on February 15, 1977, was to thirty-three months, this Court was limited on probation revocation to the term of the original sentence or a lesser sentence. However, within that limit, sentencing on revocation of probation does not place the defendant in double jeopardy. Further, the full thirty-month probationary term may be imposed with no credit on said period for the time released on probation. Thomas v. United States, 327 F.2d 795 (10th Cir. 1964) cert. denied 377 U. S. 1000 (1964).

IT IS, THEREFORE, ORDERED that the motion pursuant to 28 U.S.C. § 2255 of Emmett Laverne Munden be and it is hereby sustained in part, and the sentence imposed upon revocation of probation on November 15, 1977, in so far as it exceeds thirty (30) months is vacated, set aside and held for naught.

IT IS FURTHER ORDERED that the Movant, Emmett Laverne Munden, receive credit on the term of thirty months for all jail-type custody served to date in connection with the revocation of his probation.

Dated this 28th day of March, 1978, at Tulsa, Oklahoma.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

MAR 28 1978

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

Jack C. Silver, Clerk
U. S. DISTRICT COURT

PHILLIP BRADLEY POLK, # 92858,)	
)	
v.	)	NO. 77-C-451-B
)	
RICHARD A. CRISP, Warden,)	
Oklahoma State Penitentiary,)	
)	
Respondent.)	

ORDER

The Court has for consideration the pro se, in forma pauperis, petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Phillip Bradley Polk. Petitioner is a prisoner in the Oklahoma State Penitentiary serving a sentence of ten years imprisonment upon conviction by jury of robbery with firearms after former conviction of a felony in the District Court of Tulsa County, State of Oklahoma, in Case No. CRF-76-399. On direct appeal, Case No. F-76-892, the Oklahoma Court of Criminal Appeals affirmed the conviction and modified the original sentence of fifty years to ten years imprisonment. Polk v. State, Okl. Cr., 561 P.2d 558 (1977). Thereafter, Petitioner filed an application for post-conviction relief, Case No. CRF-76-399, which was denied by the District Court of Tulsa County, and the denial was affirmed on appeal by the Oklahoma Court of Criminal Appeals, Case No. PC-77-648. Petitioner's State remedies have been exhausted.

Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights under the Constitution of the United States of America. In particular, Petitioner claims:

1. There was reasonable doubt to convict Petitioner of the crime of robbery with firearms in that the victim identified Petitioner from a photograph at which time she told the police officer the robber had a defective eye, which Petitioner does not have.
2. The jury verdict was based solely on the prejudicial remarks of the prosecutor.
3. There was insufficient evidence to support robbery with firearms in that no firearm was produced or recovered from Petitioner.
4. The second stage of the proceeding regarding the after former conviction of a felony was conducted without Petitioner being present and no proof was offered that Petitioner and the person named on the certified copy of the prior conviction were one and the same person.

The Court having carefully reviewed the petition, response, and transcripts and records of the State proceedings, and being fully advised in the premises, finds that there is no necessity for an evidentiary hearing herein and that the petition for writ of habeas corpus should be denied and the case dismissed.

Petitioner's first contention is totally without merit. The victim identified Petitioner on three occasions. She selected his picture from some 60 to 75 shown her by police officers within minutes after she had been robbed. Two days later she pointed him out in a five-man lineup at the police station. She identified him at trial. Her identification in each instance, as clearly appears from the preliminary hearing and trial transcripts, was based on her observation of the Petitioner at the time of the commission of the crime, despite valiant efforts by defense counsel to create doubt in the minds of the jury as to the identification. There is no hint of impermissible suggestiveness in regard to the identification of the Petitioner by the victim. There is simply not present in the record the slightest possibility of a misidentification under all the circumstances. Neil v. Biggers, 409 U. S. 188 (1972). Further, the credibility of witnesses is within the province of the triers of facts, and where, as here, the Petitioner's contention goes only to the credibility of the witness and the weight to be given her testimony, there is no proper ground for habeas corpus relief. Trujillo v. Tinsley, 333 F.2d 185 (10th Cir. 1964).

The second assertion also fails. This issue as to prejudicial remarks by the prosecutor in appealing to the passions and prejudices of the jury was considered by the highest State Court on direct appeal. That Court found the remarks complained of were error and that the Trial Court should have granted defense counsel's request for an admonition to the jury, but that the error was not so serious as to result in a miscarriage of justice or require reversal. As to the prosecutor's same type remarks made in the second stage of the trial regarding sentence, after guilt had been established, the Appellate Court modified the sentence from fifty years to ten years imprisonment. This Court agrees with the State Appellate Court, and having carefully reviewed the trial transcript finds that the comments of the prosecutor were not so prejudicial or offensive as to deprive the Petitioner a fair trial. Chapman v. California, 386

U. S. 18 (1967); Berger v. United States, 295 U. S. 78 (1935); Alexander v. Daugherty, 286 F.2d 645 (10th Cir. 1961); Poulson v. Turner, 359 F.2d 588 (10th Cir. 1966) cert. denied 385 U. S. 905 (1966); Sanchez v. Heggie, 531 F.2d 964 (10th Cir. 1976).

Petitioner's third contention that the evidence was insufficient to convict because no firearm was recovered from him or produced at trial raises no constitutional question cognizable in this habeas corpus proceeding as the conviction was not so devoid of evidentiary support as to raise a due process issue. Johnson v. Turner, 429 F.2d 1152 (10th Cir. 1970); Mathis v. People of the State of Colorado, 425 F.2d 1165 (10th Cir. 1970).

His fourth and last issue that the second stage of his trial regarding enhanced punishment for former conviction of a felony was conducted without his presence or without proving that he was the same person as named on the certified copy of the prior conviction is also without merit. A first offense, with no prior convictions, of robbery with firearms in violation of 21 O.S.A. § 801 provides for a sentence to any term of years not less than five. Petitioner's sentence has been reduced from fifty to ten years. His defense counsel stipulated that the name of the person on the certified copy of the prior Judgment and Sentence and that of the Defendant, Petitioner herein, were one and the same. After being found guilty of robbery with firearms, Defendant was being returned to Court following a recess for the second stage of the proceedings and escaped from custody. The Trial Court continued the jury proceedings until the next day, took testimony in chambers regarding the matter, and ruled that the Defendant had escaped, had voluntarily absconded, and thereby waived his rights to be present for the second stage of the proceedings, relying on Warren v. State, Okl. Cr., 537 P.2d 443 (1975). Actual sentence was not imposed until the Petitioner had been returned to custody and was present before the Court. This Court finds no error in said ruling and the State procedure in these circumstances. Any other course would be to invite attempted escapes and the resultant danger to lives in such chicanery. There can be no doubt that the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward. See, Diaz v. United States, 223 U. S. 442 (1912); Illinois v. Allen, 397 U. S. 337 (1970).

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Phillip Bradley Polk be and it is hereby denied and the case is dismissed.

Dated this 28th day of March, 1978, at Tulsa, Oklahoma.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

MAR 28 1978

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMAJack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,)	
	Plaintiff,)
v.	)	NOS. 78-C-59-B
	)	77-CR-62
WILLIE PAUL SMITH,)	
	Movant.)

O R D E R

The Court has for consideration the motion pursuant to 28 U.S.C. § 2255 filed by counsel on behalf of Willie Paul Smith. The cause has been assigned civil Case No. 78-C-59 and docketed in his criminal Case No. 77-CR-62.

Movant is a prisoner in the Creek County Jail, Sapulpa, Oklahoma, pursuant to State convictions and sentences imposed January 31, 1978, of two years in CRF-77-67 and one year in CRF-74-38. He will thereafter serve a sentence of eighteen months imposed August 23, 1977, by this Court in Case No. 77-CR-62 pursuant to his conviction on plea of guilty to Count One of an indictment charging interstate transportation of stolen firearms in violation of 18 U.S.C. § 922(i). The Movant was charged in one additional count which was dismissed.

Movant in his § 2255 motion demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights guaranteed by the Constitution of the United States of America. In particular, Movant claims that:

His plea of guilty was not knowing and voluntary in that he understood at sentencing that the sentence imposed would be served in a Federal penitentiary and any sentence received in pending State cases would run concurrently with the federally imposed time.

The Court has carefully reviewed this matter and being fully advised in the premises finds that a response and evidentiary hearing are not necessary and that the motion should be denied.

When taking his plea of guilty, the Court fully explained to the Defendant, Movant herein, the maximum sentence that could be imposed for the crime, that the Court was not bound by any agreement regarding sentence, and could impose any sentence permitted by law including the maximum. Movant was then given the maximum sentence pursuant to 18 U.S.C. §§ 4216:5010(e) for study, report and recommendation to the Court as to the appropriate sentence. Following receipt of that report, which was

reviewed with Movant and his counsel in open Court, definitive sentence was imposed August 23, 1977, to three years eligible for parole in the discretion of the Parole Commission pursuant to 18 U.S.C. § 4205(a). Further, it was recommended that the Movant receive vocational training during his period of incarceration.

Defense counsel reminded the Court after sentence had been imposed that the Movant was still facing charges in the State of Oklahoma. It was recognized in open Court in the Movant's presence by the sentencing Judge and defense counsel that under State of Oklahoma law the State Trial Judge could not impose his sentence, if any, to run concurrently with the Federal sentence, but that this was a matter that could be called to this Federal Court's attention if necessary by appropriate motion. Further, it was discussed in open Court that the Movant had been at all times before this Court on ad prosequendum writ, borrowed from the State of Oklahoma, and that any sentence imposed by the State Court would run first in time. Therefore, Movant's contention that his plea to this Court was not knowing and voluntary is without merit. All of the discussion as to the possibility of a concurrent sentence occurred long after the plea and after definitive sentence had been imposed.

This Court did not impose the Federal sentence to run concurrently with the prospective State sentences. Even had it done so, the applicable Federal statutes provide in pertinent part:

18 U.S.C. § 3568: "The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. . . . No sentence shall prescribe any other method of computing the term."

18 U.S.C. § 4082: "(A) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served."

Pursuant to these Federal Statutes, the Attorney General has the exclusive power to designate the place where Federal sentences shall be served. Stillwell v. Looney, 207 F.2d 359 (10th Cir. 1953); Werntz v. Looney, 208 F.2d 102, 103 n. 2 (10th Cir. 1953). The United States District Court must be cognizant of and give effect to all applicable United States statutes. Miller v. Willingham, 400 F.2d 873 (10th Cir. 1968).

Our Tenth Circuit Court of Appeals has held that the place of confinement is no part of the sentence, but is a matter for the determination of the Attorney General; and therefore, that it is beyond the power of a Federal Court to order that its sentence be served concurrently with a State sentence. The concurrency language is surplusage or a recommendation as to place of confinement. It is equally clear that the initial concurrence, although beyond the power of the Court, does not render a Federal sentence so imposed invalid. Bowen v. United States, 174 F.2d 323 (10th Cir. 1949); Joslin v. Moseley, 420 F.2d 1204 (10th Cir. 1969); Sluder v. Malley, No. 77-1454 unpublished (10th Cir. filed Dec. 22, 1977). The Attorney General has the discretion, may, and frequently does, honor the recommendation that the Federal sentence be served concurrently with a State sentence in a State institution. See, Stillwell v. Looney, Supra.; Werntz v. Looney, Supra. However, the Attorney General is under no obligation to do so and could disregard the sentencing Court's recommendation. See, Bowen v. United States, Supra.

Further, this motion under consideration if treated as a motion for modification of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure, is out of time. The 120-day jurisdictional period within which a Rule 35 motion may be considered has expired.

IT IS, THEREFORE, ORDERED that the motion pursuant to 28 U.S.C. § 2255 on behalf of Willie Paul Smith be and it is hereby denied and the case is dismissed.

Dated this 28th day of March, 1978, at Tulsa, Oklahoma.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

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

UNITED STATES OF AMERICA,)
)
) Plaintiff,)
)
 vs.)
)
 BETTY LEE GRAY a/k/a BETTY GRAY)
 a/k/a BETTY J. GRAY, FIRST)
 NATIONAL BANK AND TRUST COMPANY,)
 a Corporation, TULSA ADJUSTMENT)
 BUREAU, INC., COUNTY TREASURER,)
 Tulsa County, and BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
)
 Defendants.)

CIVIL ACTION NO. 78-C-38-C

FILED

MAR 28 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 28th
day of March, 1978, the Plaintiff appearing by Robert P. Santee,
Assistant United States Attorney; and the Defendants, County
Treasurer, Tulsa County, and Board of County Commissioners, Tulsa
County, appearing by their attorney, Andrew B. Allen, Assistant
District Attorney; the Defendant, Tulsa Adjustment Bureau, Inc.,
appearing by its attorney, D. Wm. Jacobus, Jr.; the Defendant,
First National Bank and Trust Company, a Corporation, appearing
by its attorney, Jim D. Shofner; and, the Defendant, Betty Lee
Gray a/k/a Betty Gray a/k/a Betty J. Gray, appearing not.

The Court being fully advised and having examined the
file herein finds that Defendants, First National Bank and Trust
Company, a corporation, Tulsa Adjustment Bureau, Inc., County
Treasurer, Tulsa County, and Board of County Commissioners, Tulsa
County, were served with Summons and Complaint on January 25, 1978;
and, that Defendant, Betty Lee Gray a/k/a Betty Gray a/k/a Betty J.
Gray, was served with Summons and Complaint on February 19, 1978;
all as appears on the United States Marshal's Service herein.

It appearing that the Defendants, County Treasurer, Tulsa
County, and Board of County Commissioners, Tulsa County, have duly

filed their Answers herein on February 14, 1978; that Defendant, First National Bank and Trust Company, a Corporation, has duly filed its Answer and Disclaimer on February 7, 1978, that Defendant, Tulsa Adjustment Bureau, Inc., has duly filed its Disclaimer on January 27, 1978; and, that Defendant, Betty Lee Gray a/k/a Betty Gray a/k/a Betty J. Gray, has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-Five (25), Block Four (4), SUBURBAN ACRES SECOND ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof,

THAT the Defendant, Betty Lee Gray, did, on the 20th day of March, 1975, execute and deliver to the Administrator of Veterans Affairs, her mortgage and mortgage note in the sum of \$9,500.00 with 9 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendant, Betty Lee Gray, made default under the terms of the aforesaid mortgage note by reason of her failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendant is now indebted to the Plaintiff in the sum of \$9,358.86 as unpaid principal with interest thereon at the rate of 9 percent per annum from July 1, 1977, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Defendant, Betty Lee Gray, the sum of \$ 16.00 plus interest according to law for personal property taxes for the year(s) 1976 and

that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendant, Betty Lee Gray, in personam, for the sum of \$9,358.86 with interest thereon at the rate of 9 percent per annum from July 1, 1977, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Defendant, Betty Lee Gray, for the sum of \$ 16.⁰⁰ as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property

or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

J. H. Dale Cooks
UNITED STATES DISTRICT JUDGE

APPROVED

Robert P. Santee
ROBERT P. SANTEE
Assistant United States Attorney

Andrew B. Allen
ANDREW B. ALLEN
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County

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

F I L E D

WILLIAMS BROTHERS WASTE)
CONTROL, INC., a Delaware)
corporation,)
)
Plaintiff,)
)
v.)
)
ROYSTER COMPANY, a Virginia)
corporation,)
)
Defendant.)

MAR 28 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

No. 77-C-213-B

ORDER

The Court has for consideration Defendant's Motion to dismiss for lack of jurisdiction and venue and Defendant's alternative Motion for transfer to the Middle District of Florida as a more convenient forum pursuant to Title 28, U.S.C., § 1404 and has reviewed the file, the briefs and all of the recommendations concerning the motions, and being fully advised in the premises, finds:

That Defendant's alternative Motion for transfer to the Middle District of Florida should be sustained and that Defendant's Motion to Dismiss for Lack of Jurisdiction and venue should be overruled.

The controversy between Plaintiff and Defendant arises out of the design, fabrication and installation of certain air pollution control equipment installed pursuant to a written contract, by Plaintiff, at Defendant's sulphuric acid plant located in the Middle District of Florida, at Mulberry, Florida. Plaintiff, Williams Brothers Waste Control, Inc. (WILLIAMS) is a Delaware corporation with its principal place of business in Tulsa, Oklahoma. Defendant, Royster Company (ROYSTER) is a Virginia corporation, with its principal executive offices located in Norfolk, Virginia. ROYSTER owns and operates a chemical manufacturing complex at Mulberry, Florida. One of the components of ROYSTER'S

Mulberry, Florida complex is the sulphuric acid plant where Plaintiff installed the air pollution control facility. In 1973, the State of Florida and the United States Government's Environmental Protection Agency tested air emissions from ROYSTER'S sulphuric acid plant, the result was to require ROYSTER to install air pollution control facilities sufficient to reduce the sulfur dioxide emitted to prescribed levels. In 1973 WILLIAMS proposed to ROYSTER at its Florida plant that WILLIAMS design and install the air pollution control facilities, which were to be capable of reducing the sulfur dioxide emissions to the desired level.

On June 14, 1974 a written contract was entered into between WILLIAMS and ROYSTER which contract constitutes the basis for WILLIAMS' claims against ROYSTER and ROYSTER'S claims against WILLIAMS. Pursuant to the contract WILLIAMS designed the facilities which facilities were fabricated by various subcontractors and then installed at ROYSTER'S Florida plant. WILLIAMS provided the materials and equipment and performed all labor. WILLIAMS was to deliver to ROYSTER a "turnkey" job not later than July 1, 1975.

ROYSTER claims that the facilities were not completed in the prescribed time thereby requiring it to pay fines to the State of Florida for failing to control its sulfur dioxide emissions to the prescribed level within the period given. ROYSTER further contends that after WILLIAMS completed the work of installation that the facility, as designed and installed by WILLIAMS, failed to meet the performance standards required by the contract between the parties; that the facility as installed did not operate efficiently or satisfactorily; and that it was necessary to develop new designs and facilities to correct the deficiencies in the equipment installed by WILLIAMS. ROYSTER

claims it has sustained damages amounting to \$450,299.35 and that additional damages by way of fines and expenses are anticipated.

ROYSTER filed suit against WILLIAMS in the United States District Court for the Middle District of Florida, Tampa Division, Civil Action 77-505-T-H. In that action ROYSTER seeks to recover damages it claims it has sustained, less the amount of \$232,038.00 which ROYSTER had retained from WILLIAMS contract payment. ROYSTER'S damage claims in the Florida action is \$218,261.35 which represents the excess of its claimed expenses over the contract retainage.

In this action filed by WILLIAMS, it seeks to recover from ROYSTER the \$232,038.00 which ROYSTER has retained, and it additionally claims that ROYSTER is liable for other expenses incurred by WILLIAMS for completion of the project so that the total damages claimed by WILLIAMS is \$318,153.84, plus interest at 6% per annum from November 4, 1976 until date of judgment.

WILLIAMS has moved to abate the action pending against it in the Middle District of Florida, contending that ROYSTER'S claim against it constitutes a mandatory counterclaim which must be made in this proceeding. ROYSTER has moved to dismiss for lack of jurisdiction and venue. Alternatively, ROYSTER has requested this Court to transfer this suit to the Middle District of Florida, Tampa Division, as a more convenient forum in which to try the controversy.

The issues in dispute will involve evidence concerning the equipment installed and its relationship to other equipment used in the processing of sulphuric acid at ROYSTER'S facility. It is probable that extensive testimony will be necessary concerning the technical nature of equipment, the need, if any for replacement or modification of some of the

equipment installed by WILLIAMS, and, its interrelationship with other processes and equipment in use. The trier of the facts may find that a personal view of the facility may be desirable in order to more fully understand the technical testimony that is anticipated.

There are a substantial number of witnesses who are not employees of either WILLIAMS or ROYSTER, who are residents of Florida and whose testimony may be essential to the trial of this case who could not be subpoenaed as trial witnesses, except by deposition, if the trial were to be held in the Northern District of Oklahoma. Transfer of this case to the Middle District of Florida will make it possible to exert compulsory process over such witnesses and will likewise facilitate a view of the premises if the Court deems that to be desirable.

For the reasons stated above, the Court finds that in the interest of justice the Middle District of Florida is a more convenient forum in which to try the controversies between the parties. Title 28 U.S.C.A. § 1404(a).

Although the jurisdictional question is very close, the Court finds that the Defendant has had sufficient minimum contacts with the State of Oklahoma to subject itself to the jurisdiction of this Court. As disclosed by the Affidavit of Roland W. Knapp filed herein there were substantial exchanges of correspondence, numerous telephone calls and at least one visit by defendant's plant manager to Tulsa in connection with the contract. "Long arm" jurisdiction in this Court thus meets the requirements both of significant "contact" and "fair play", as the Oklahoma Courts have defined them, under 12 O.S.A. §1701.03(7). Yankee Metal Products Company v. District Court, 528 P.2d 311 (Okla.

1974); International Shoe Co. v. Washington, 326 U.S. 310
(1945); McGee v. International Life Insurance Co., 355 U.S.
220 (1957).

IT IS, THEREFORE, ORDERED that Defendant's Motion to
Dismiss for Lack of Jurisdiction and Venue be and is hereby
overruled and Defendant's Alternative Motion to Transfer to
the Middle District of Florida be and is hereby sustained.

Dated this 28th day of March, 1978.



CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA.

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

MAR 29 1978

SMOKEY'S OF TULSA, INC.,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
AMERICAN HONDA MOTOR CO., INC.;)
SCHOLFIELD, SCHOLFIELD AND NELMS,)
INC. d/b/a HOUSE OF HONDA, an)
Arkansas corporation; HARRISON)
MOTOR-SPORTS, INC. d/b/a HARRISON)
HONDA, an Arkansas corporation;)
BLUFF MOTORCYCLE SERVICE, INC.,)
a Missouri corporation d/b/a)
BLUFF HONDA; ABERNATHY MOTORCYCLE)
SALES, INC., a Tennessee corporation;)
BILL BENNETT d/b/a BILL'S CYCLES,)
)
Defendant.)

Jack C. Silver, Clerk
U. S. DISTRICT COURT

NO. 76-C-623-B

NOTICE OF DISMISSAL

TO: Bluff Motorcycle Service, Inc., and Charles S. Holmes,
its attorney.

Notice is hereby given that whereas the above entitled
action was commenced by the Plaintiff, Smokeys of Tulsa, Inc.,
and whereas the Defendant, "Bluff" has neither filed an Answer
nor Motion for Summary Judgment herein, Plaintiff hereby dis-
misses the above styled action without prejudice.

Dated this 23 day of March, 1978.


LAWRENCE A. JOHNSON
Attorney for Plaintiff
SMOKEYS OF TULSA

CERTIFICATE OF MAILING

I, Lawrence A. Johnson, do hereby certify that on the
27 day of March, 1978, I mailed a true and correct copy of the
above and foregoing Notice of Dismissal to: Sam Moles to William
A. Storey, STOREY & McCORD, P.O. Box 1405, Fayetteville, Arkansas
72701, Paul H. Johnson, 212 Beacon Building, Tulsa, Oklahoma
74103, DOYLE, HOLMES, GASAWAY & GREEN, P.O. Box 1679, Tulsa, Oklahoma
74101, James R. Elder, 201 West 5th, Suite 500, Tulsa, Oklahoma
74103, Creekmore Wallace II, 315 Berryhill Building, Sapulpa,
Oklahoma 74066 and Roland N. Smoot, 9th Floor, 800 Wilshire
Building, Los Angeles, California 90017, by placing the same in
the U.S. Mail with postage thereon fully prepaid.


LAWRENCE A. JOHNSON

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

TULSA MACHINE WORKS, INC.,)
)
) Plaintiff,)
)
vs.)
)
CHAMBERSBURG ENGINEERING CO.,)
A & A MACHINERY CORP. and)
R. L. JEFFRIES TRUCKING CO., INC.,)
)
) Defendants.)

No. 76-C-388-C

FILED

MAR 28 1978

O R D E R

Jack C. Silver, Clerk
U. S. DISTRICT COURT

The Judgment entered in this action on December 30, 1977 included awards of attorney fees to some of the parties.

Statements of services rendered, and responses to those statements, have now been filed by all interested parties.

Pursuant to the Judgment entered on December 30, 1977, the Court finds and awards the following sums as reasonable attorney fees representing services rendered as set forth in the Judgment:

1. The sum of \$3,780.00 is awarded in favor of Chambersburg Engineering Co. and against Tulsa Machine Works, Inc.

2. The sum of \$3,000.00 is awarded in favor of A & A Machinery Corp. and against Tulsa Machine Works, Inc.

It is so Ordered this 28th day of March, 1978.


H. DALE COOK
United States District Judge

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

DENNY C. WHINERY and CONNIE L. WHINERY,)
)
)
 Plaintiffs,)
)
 vs.)
)
 SWINSON CHEVROLET, INC.,)
)
 Defendant and Third-)
 Party Plaintiff,)
)
 vs.)
)
 JAMES E. LOGAN, d/b/a Jim Logan)
 Motors,)
)
 Third-Party Defendant)
 and Third-Party Plaintiff))
)
 and)
)
 FLOYD HAUGHE AUTO AUCTION, INC.,)
)
 and)
)
 GUNNER NANCE, d/b/a Gunner Used)
 Cars,)
)
 Third-Party Defendants.)

FILED

MAR 28 1978

**Jack C. Silver, Clerk
U. S. DISTRICT COURT**

No. 77-C-155-C

ORDER OF DISMISSAL

On this 28 day of March, 1978, Third-Party Defendant and Third-Party Plaintiff James E. Logan's Motion for Dismissal comes on for consideration and counsel for James E. Logan herein representing and stating that all issues, controversies, debts and liabilities between James E. Logan, d/b/a Jim Logan Motors and Third-Party Defendants Floyd Haughe Auto Auction, Inc., and Gunner Nance, d/b/a Gunner Used Cars, have been paid, settled and compromised.

IT IS THE ORDER OF THIS COURT that the action be dismissed with prejudice to the bringing of another or future action between the Third-Party Defendant and Third-Party Plaintiff James E. Logan, d/b/a Jim Logan Motors, and Third-Party Defendants Floyd Haughe Auto Auction, Inc., and Gunner Nance, d/b/a Gunner Used Cars.

JUDGE

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

LAVERNE BUTTERFIELD,)
)
 Plaintiff,)
)
 vs.) No. 77-C-132-C
)
 JOSEPH CALIFANO, JR.,)
 Secretary of Health,)
 Education and Welfare,)
)
 Defendant.)

FILED

MAR 28 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

This is an action brought by the plaintiff, LaVerne Butterfield, to review the final determination of the defendant, Secretary of the Department of Health, Education and Welfare, denying disability benefits under Sections 216(i) and 223 of the Social Security Act, as amended. (42 U.S.C. §§ 416(i) and 423.)

The Court in its review has been granted power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the case for a rehearing period. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. In this action, the plaintiff alleges the record does not support the determination of the Secretary by substantial evidence.

The plaintiff filed a previous application for disability benefits on August 24, 1971, which was denied on initial and reconsidered determinations. A hearing was held, and on September 19, 1972 a decision was entered affirming the reconsidered determination. The case was reviewed by the Appeals Council of the Bureau of Hearings and Appeals which dismissed the appeal, and the decision of the Administrative Law Judge became final. The application which initiated the

proceedings now before this Court was filed on February 16, 1973. The matter was first heard, on record, by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration whose written decision was issued November 6, 1974, in which it was found that the claimant was not entitled to a period of disability or to disability insurance benefits under §§ 216(i) and 223, respectively, of the Social Security Act, as amended. Thereafter, the decision of the Administrative Law Judge denying permanent disability was appealed to the Appeals Council which on March 24, 1975 issued its Order finding that the decision of the Administrative Law Judge was correct and that further action by the Council would not result in any change which would benefit the plaintiff. Thus the decision of the Administrative Law Judge became the final decision of the Secretary of the Department of Health, Education and Welfare. The plaintiff filed a complaint in this Court, in case number 75-C-202, on May 22, 1975, seeking judicial review of the final decision of the Secretary. The case was remanded for further administrative action on October 22, 1975, at the request of the Secretary. On February 8, 1977, the Appeals Council reaffirmed the decision of the Administrative Law Judge. The present action was commenced on April 7, 1977.

Judicial review of the Secretary's denial of Social Security disability benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo. Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the courts if there is substantial evidence to support them. 42 U.S.C. § 405(g); Atteberry v. Finch, supra. Substantial evidence has been defined as ". . . such relevant evidence as a reasonable mind might

accept as adequate to support a conclusion, and it must be based on the record as a whole." Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300, 59 S.Ct. 501, 83 L.Ed. 660 (1939), the Court, interpreting what constitutes substantial evidence, stated:

"It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Atteberry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Celebrezze, 351 F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957).

The transcript of the entire record of proceedings relating to the application of the plaintiff, LaVerne Butterfield, and filed of record in this cause has been carefully reviewed. The principal issue presented herein is whether the record, by substantial evidence, sustains the finding that the plaintiff is not under a disability as defined by the Social Security Act at any time prior to the date of that decision.

Section 223(d)(1) of the Social Security Act defines disability, as pertinent to the matters here in issue, as the "inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." Section 223(d)(2)(A) further provides that "an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy, regardless of whether he would be hired if he

applied for work." The term "disability" is further defined in Section 223(d)(3), which provides that "[f]or purposes of this subsection, a 'physical or mental impairment' is an impairment that results from anatomical, physiological, psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." If the claimant sustains the burden of showing that he is incapable of working at his former job, the burden shifts to the Secretary to show that there is another kind of substantial gainful activity in the national economy that the claimant could perform. Russell v. Secretary of Health, Education & Welfare, 540 F.2d 353 (8th Cir. 1976); McLamore v. Weinberger, 538 F.2d 572 (4th Cir. 1976); Noe v. Weinberger, 512 F.2d 588 (6th Cir. 1975).

A review of the medical evidence relating to plaintiff's physical condition indicates that he was admitted to the Ponca City Hospital in February, 1973. During that stay, the following tests were performed, the results of which were negative and within normal limits: Chem 14 series; urinalysis; V.D.R.L.; thyroid profile; tubeless gastric analysis; glucose tolerance; gallbladder series; chest x-ray; colon x-ray; intravenous urogram. An upper G.I. series was negative except for a hiatus (sic) hernia. There were moderate degenerative changes of the lumbar spine. In September, 1973, plaintiff was admitted to the Franklin Memorial Hospital in Broken Arrow. The results of all tests performed during that stay were negative, with the exception of those which revealed a hiatal hernia and some evidence of degenerative disc disease. On May 10, 1974, Dr. Harvey J. Blumenthal, a neurologist, reported that he was unable to make a diagnosis of stroke and found no impairment of speech or mental function. He also suspected a strong functional component. The only evidence of disability comes from Dr. G. E. Moots, who reported on March 12, 1974 that the plaintiff was totally disabled. This opinion is not supported by any

medically acceptable clinical or laboratory diagnostic data or findings. Consequently, it does not meet the standards contained in Section 223(d)(3) and was properly discountable as insubstantial. Sykes v. Finch, 443 F.2d 192 (7th Cir. 1971).

Following the remand of this case to the Secretary, the plaintiff underwent a psychiatric examination on January 26, 1976 by Dr. Ronald C. Passmore. Dr. Passmore concluded:

"I feel basically Mr. Butterfield shows evidence of a passive-aggressive personality with many somatic complaints and some paranoid thinking. At this time he does appear to be depressed. This appears to be of a chronic nature and contributes to his somatizing. In my opinion he has had this complaint for so long that it is chronic and would be difficult to treat. I feel that he is disabled. . . ." (Tr. p. 241-242)

Dr. Passmore reaffirmed his diagnosis on April 6, 1976, saying that "[t]he major contributing factor of Mr. Butterfield's being disabled is his inability to relate to other people and his feeling that they are doing things to him or against him." (Tr. p. 247) Dr. Passmore's diagnosis is not supported by any medically acceptable clinical or laboratory diagnostic data or findings. On January 2, 1976, Dr. Helen C. Zusne, a clinical psychologist, performed several psychological tests on the plaintiff. She found him to be functioning in the average range of intelligence and noted that "[t]here is some inconsistency in his functioning which suggests interference of an emotional or organic nature. Test results, however, do not present any very clear signs of organicity." (Tr. p. 246) Dr. Zusne found the plaintiff to be depressed. The Appeals Council requested Dr. Randolph A. Frank, a psychiatrist and neurologist, to independently review the record. Dr. Frank reviewed all of the medical evidence concerning plaintiff's physical and mental condition. He concluded in his report of July 6, 1976:

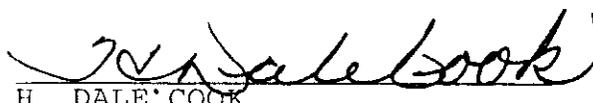
"The medical evidence of record suggests that the claimant has a passive-aggressive personality

disorder. This is a chronic, lifelong low grade disorder which would not preclude substantial gainful activities. . . . The medical evidence of record does not suggest a severe emotional impairment which would preclude sustained vocational activity. The claimant would appear to have the residual functional capacity for sustained vocational activity if so motivated." (Tr. p. 251-252)

Dr. Robert G. Sanders, a vocational expert, testified at the administrative hearing that the plaintiff has some transferrable skills that would permit him to be employed in the occupations of tollbooth attendant, hand-packager and security officer. In its decision of February 8, 1977, the Appeals Council considered all of the medical evidence, obtained subsequent to the hearing, relating to plaintiff's medical condition and found that "[t]he claimant had the residual functional capacity to perform the light or sedentary work activities as described by the vocational expert." (Tr. p. 9)

The Court finds that the determination of the Appeals Council to the effect that the plaintiff is not under a disability as defined in the Social Security Act is supported by substantial evidence. The determination of the Secretary is therefore affirmed, and Judgment is hereby entered on behalf of the defendant.

It is so Ordered this 28th day of March, 1978.


H. DALE COOK
United States District Judge

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

RAY MARSHALL, Secretary of Labor,)
United States Department of Labor,)

Plaintiff,)

-vs-

L. C. SINOR, doing business as)
L. C. SINOR TRUCKING COMPANY,)
L. C. SINOR SAND COMPANY, INC.,)
a corporation, and J. D. BRADSHAW,)

Defendants.)

Civil Action

No. 72-C-227

FILED

MAR 27 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

On November 13, 1974, the Court entered a judgment in favor of Plaintiff and against the Defendants for overtime compensation withheld from Defendants' employees in violation of the Fair Labor Standards Act of 1938 (Act), 29 U.S.C. §201 et seq. The Defendants failed to comply with this judgment and Plaintiff subsequently filed a Petition for Adjudication in Civil Contempt to which Defendants have responded. On September 16, 1977, Defendant J. D. Bradshaw (Bradshaw) filed herein a Plea in Abatement wherein he asserts that the judgment against him in this case will be discharged in bankruptcy as he listed Plaintiff's judgment against him in his Petition for Bankruptcy filed in Case No. 77-B-882 in this Court on September 16, 1977. Therefore, Defendant Bradshaw contends that further action in the instant case should be held in abeyance until the final discharge in 77-B-882 is granted. Plaintiff has responded to Defendant Bradshaw's Plea in Abatement and opposes the same on the ground that Plaintiff's judgment against said Defendant is not dischargeable in bankruptcy.

Brennan v. T & T Trucking, Inc., 396 F.Supp. 615 (N.D. Okla. 1975), was an action brought by the Secretary of Labor under §17 of the Act to enjoin the defendants from violating the provisions of §§15(a)(2) and 15(a)(5) of the Act and to restrain any withholding

of payment of overtime compensation found by the court to be due to the defendants' employees under the Act. Judge Cook noted that:

"The repeated assertion by the courts that an action brought by the Secretary of Labor is primarily directed to promote a strong public policy of protecting employers who pay a lawful wage is convincing authority for a finding by the Court that this action is not brought to collect a debt which otherwise might be dischargeable under the Bankruptcy Act. While the indirect benefit of restraining the withholding of overtime compensation may accrue to the employees of those in violation of the FLSA, the public good is served when the employer is enjoined from further violations and forced to produce those wages he has misappropriated." 396 F.Supp. at 618.

As the instant case is virtually identical to Brennan, the Court finds Brennan dispositive of Defendant Bradshaw's contentions and determines that this action was not brought to collect a debt dischargeable under the Bankruptcy Act, 11 U.S.C. §1 et seq. Where the action is not founded on a dischargeable debt, it should not be stayed. Brennan v. T & T Trucking, Inc., *supra*; In re Mountjoy, 368 F.Supp. 1087 (W.D. Mo. 1973); In re Feifer, 22 F.Supp. 541 (S.D. N.Y. 1937). Therefore, the Court finds and concludes that Defendant Bradshaw's Plea in Abatement should be overruled.

It is so ordered this 27th day of March, 1978.


Fred Daugherty
United States District Judge

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

UNITED STATES OF AMERICA,)
)
 v.) No. 77-C-486-C
) No. 76-CR-53
)
 PATRICK DEAN SHAW,)
 # 39815-115)
)
 Movant.)

FILED
MAR 27 1978
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The above-named Movant (defendant), a prisoner in the United States Penitentiary at El Reno, Oklahoma has filed herein a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. After a plea of guilty to having violated Title 21, U.S.C. § 846, this Court on July 23, 1976, sentenced defendant Patrick Dean Shaw, to two (2) years imprisonment and an additional special parole term of three (3) years, to commence at the expiration of the two (2) year sentence. The Court further ordered that the defendant may become eligible for parole at such time as the U. S. Parole Commission may determine as provided in Title 18, U.S.C. § 4205(b)(2).

Ground One of defendant's motion claims that his "Conviction (was) obtained by a violation of the protection against double jeopardy." In support of his claim the defendant states that he "went to court (state) twice on this original crime and it was dismissed each and every time as the record will reflect. Now we have the Federal, United States District Court changing the wording on the same crime and calling it a conspiracy in order to take this defendant to trial after this named defendant (sic) had been to court twice and the case dismissed each time in the one and only crime that was committed." Movant cites in support of his claim the case of Brown v. Ohio, 432 U.S. 161 (1976). The Brown court stated:

"The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in Blockburger v. United States, 284 U.S. 299, 304 (1932):

'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not"

"This test emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . .' Iannelli v. United States, 420 U.S. 770, 785 n. 17 (1975)."

In his motion the Defendant does not state that he was tried on the state court charges. He only states in a conclusory way that he went "to Court (state) twice" and that the charges were "dismissed each and every time". Defendant has not established that he was ever placed in jeopardy in the state court proceedings on the offense for which defendant was convicted in the case before this Court.

In Bell v. State of Kansas, 452 F.2d 783 (10th Cir. 1971) Cert.Den. 92 S.Ct. 2421, 406 U.S. 974, the Court stated:

"* * * for the double jeopardy provision to apply, the offense charged and tried in the first case and the offense charged in the second case must be identical in fact and law."

Therefore, the defendant's first ground for relief is without merit.

As his second ground for relief, the defendant alleges that his court appointed counsel, Phil Frazier, was ineffective in his representation of the defendant. In particular, the defendant claims that his lawyer told him "that

he would not have to go to prison and that if he plead guilty, which (sic) this defendant (sic) did do, that the maximum he would get would be a suspended sentence and time on probation." Defendant further states that he "entered his the defendant's (sic) plea of guilty only after he the defendant (sic) was promised by his attorney who represented the Federal Government that all he the defendant (sic) would receive would be a probated sentence."

A reading of the transcript of the proceedings in this Court at the time of the Arraignment and Plea on June 21, 1976 and June 22, 1976 and the Sentencing on July 23, 1976 clearly show that the defendant understood what he was charged with in the indictment; that he had discussed the plea with his attorney; that he had the right to trial by jury; that his plea of guilty was voluntarily made and completely and exclusively of his own free will and accord; that he had not been forced, coerced, threatened or promised anything to cause him to enter a plea of guilty; that the maximum sentence the Court could impose was imprisonment not to exceed Fifteen years, a fine not to exceed \$25,000, or both fine and imprisonment and that the Court must also impose a special parole term of no less than three years; and that he was satisfied with his counsel, Mr. Frazier.

After being advised by the Court of his rights and the consequences of his plea of guilty, the defendant entered a plea of guilty. The defendant then under oath detailed the facts surrounding his participation in the alleged conspiracy to distribute certain non-narcotic controlled substances and narcotic controlled substances.

Concerning the alleged plea bargaining, the transcript of the proceedings reveals the following statements by the

Court, counsel for the government, counsel for the defendant, and the defendant:

"THE COURT: I will ask counsel for the government and Mr. Frazier, as counsel for the defendant: Has there been any plea bargaining?

MR. BAKER: No, Sir.

MR. FRAZIER: There has been none, Your Honor.

THE COURT: Mr. Shaw, the Court has been informed there has been no plea bargaining, agreements, nothing at all like that. Is that your understanding, also?

THE DEFENDANT: Yes, sir.

THE COURT: Well, the Court would want you to know that even though there hasn't been any, even if there had of, even if there had of, the Court wouldn't have been a party to them, wouldn't have participated in them and did not do so and would be in no way bound by any such agreements or plea bargaining or discussions. You understand that?

THE DEFENDANT: Yes, sir.

(Tr. 19.) * * * * *

THE COURT: You have informed the Court that your plea would be voluntarily given, of your own free will and accord, and that you have not been in any way coerced, forced, threatened or promised anything for a plea of guilty. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Do you have any questions whatsoever before the Court asks you what your plea is?

THE DEFENDANT: None.

THE COURT: All right. How do you plead to Count I of the indictment?

THE DEFENDANT: Guilty.

(T. 20.) * * * * *

THE COURT: All right.

All right, Mr. Shaw. Based upon your statements as to the factual matters and the statement of your counsel and the government counsel, the Court finds that there is a factual basis for your plea of guilty; that your plea is made voluntarily. And that's true, is it not?

THE DEFENDANT: Yes, sir.

THE COURT: And with an understanding of the charge against you and with the possible consequences of a plea of guilty. And all that's true also, is it not?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Therefore, the Court accepts your plea of guilty and finds that you are guilty as charged." (Tr. 24.)

At the time of sentencing the Court stated to the defendant that he would hear anything he had to say in his own behalf and would receive any additional information that the defendant desired the Court to consider before pronouncing sentence. The defendant responded that he had no comment other than as to his employment; that he had been employed steadily over the last 11 years, 4-1/2 years with his present employer and that he didn't have time to be a drug dealer because his job kept him too involved. Following the imposition of sentence by the Court the defendant made no comment about the sentence but did ask that the Court stay the execution of the sentence for 30 days which the Court granted but only for a stay of approximately two weeks.

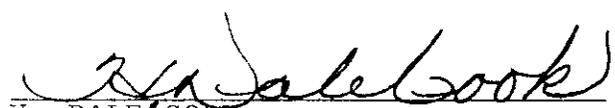
It is thus apparent that the defendant's second claim for relief is totally insubstantial and devoid of merit. The guidelines for determining when defense counsel was ineffective or incompetent were set forth in Ellis v. State, 430 F.2d 1352, 1356 (10th Cir. 1970).

"It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation. Goforth v. United States (10th Cir. 1963), 314 F.2d 868 ***.' Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965). And this test is applicable to cases in which counsel is retained by or for an accused as well as to cases in which counsel is appointed to represent an indigent defendant. Bell v. State of Alabama, 367 F.2d 243 (5th Cir. 1966).

The files and record of the proceedings of the Arraignment, Plea and Sentencing of the defendant unequivocally support the conclusion that the defendant fully understood the nature of the proceedings and the consequences of his guilty plea. Under these circumstances it is unnecessary to hold a factual hearing in connection with defendant's motion. Semet v. United States, 369 F.2d 90 (10th Cir. 1966).

Accordingly, defendant's motion for relief herein is denied.

It is so Ordered this 27th day of March, 1978.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

FILED

MAR 27 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

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

RICHARD L. HUDSON,)
)
Plaintiff,)
)
vs.) 75-C-151-B
)
SWAN ENGINEERING AND SUPPLY)
COMPANY, INC., a Kansas)
corporation, SEALCO, INC., an)
Oklahoma corporation, H.A.)
SMITH and EUGENE P. MITCHELL,)
)
Defendants.)

O R D E R

The Court has for consideration the Motion to Reconsider and Brief in support thereof filed by the plaintiff; and the defendant's Response thereto; and, having carefully perused the entire file and being fully advised in the premises, finds:

This Court, by Order dated September 29, 1977, ordered that plaintiff remit the sum of \$100,000. of the \$200,000. verdict rendered in this action, or the Court would grant the defendants' Motion for a New Trial. In response thereto, plaintiff filed this Motion to Reconsider showing that the testimony given at trial with regard to the question of damages was not seriously challenged nor impeached by evidence to the contrary.

The Court has reconsidered its prior action in this case, and agrees with plaintiff's contention that the Order of Remittitur entered September 29, 1977 was improper as not supported by the evidence. The Court finds that the sum awarded by the jury (\$200,000.) is within the maximum award which is reasonably supported by the evidence. Rather than put the parties to the expense of a new trial, the Court finds that the interests of justice will best be served by overruling the request for a new trial. Therefore, the verdict of \$200,000. is reinstated, and the motion for a new trial is overruled.

IT IS, THEREFORE, ORDERED that plaintiff's Motion to Reconsider should be sustained, that the jury verdict of \$200,000. should be reinstated, and that the motion for a new trial should be overruled.

ENTERED this 27th day of March, 1978.

Alan E. Barrow

CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

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

BRUCE A. COLLOM, etc.,
et al.,

Plaintiff,

vs.

DAVID BOREN, etc., et al.,

Defendants.

)
)
) 77-C-512-B
)
)
) FILED
)
) MAR 27 1978

ORDER

Jack C. Silver, Clerk
U. S. DISTRICT COURT

On December 7, 1977, this Court allowed the plaintiff, Bruce A. Collom, to institute this action by approving a Pauper's Oath. On December 9, 1977, a Minute Order was entered as follows:

"IT IS ORDERED that the Clerk of this Court submit summons to the plaintiffs for completion and when said summons are returned that they be served, pursuant to the pauper's oath heretofore approved, at the cost of the United States."

On the same date, the Clerk advised Mr. Collom by letter of such minute order and requested: "If you will advise us the exact number of summons needed, they will be provided for you to complete." The file does not reflect that Mr. Collom ever requested the Clerk to send him the number of summons he required.

On January 19, 1978, the following letter was written to Mr. Collom by the Court Clerk:

"At the direction of the Court we are returning the papers received from you on January 16, 1978.

"Your proposed amendment to the above captioned case will be considered by the Court when properly presented on the enclosed form (XE-2)."

No response to this letter has been received as of the date of this order.

The Court finds that this action should be dismissed for "failure to prosecute". What constitutes "failure to prosecute", of course, depends on the facts and circumstances of the particular case, and the Court must consider all the pertinent circumstances in exercising its discretion. The operative condition of the Rule is lack of due diligence on the part of the plaintiff--not a showing by the defendant

of prejudice.

See Link v. Wabash Railroad Co., 370 U.S. 626 (1962); Moore's Federal Practice, Volume 5, ¶41.11[2]; Stanley v. Continental Oil Company (decided June 23, 1976, 10th Cir., No. 75-1613).

IT IS, THEREFORE, ORDERED, SUA SPONTE, that this cause of action and complaint are dismissed for failure to prosecute.

ENTERED this 27th day of March, 1978.

Allen E. Barron

CHIEF UNITED STATES DISTRICT JUDGE

FILED

MAR 24 1978 *rm*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America,)	
)	
Plaintiff,	)	CIVIL ACTION NO. 76-C-342
)	
vs.	)	This action applies only to
	)	the Working Interest in the
37.05 Acres of Land, More or	)	Oil Leasehold Interest in
Less, Situate in Osage County,	)	the estate taken in:
State of Oklahoma, and R. W.)	
Coburn, et al., and Unknown	)	Tract No. 611ME
Owners,)	
	)	(Included in D.T. filed in
Defendants.	)	Master File #401-2)

J U D G M E N T

On the first of March, 1978, this matter came on for non-jury trial, before the Honorable H. Dale Cook, Judge of the United States District Court for the Northern District of Oklahoma. Plaintiff, United States of America, appeared by Hubert A. Marlow, Assistant United States Attorney for the Northern District of Oklahoma. Mr. Delbert Brock, Attorney, appeared for the defendants R. W. Coburn and Petroleum Resource Operating Company. Mr. R. W. Coburn also was present in person. After hearing the statements of counsel presented at the trial and being fully advised in the premises, the Court finds and concludes that:

1.

This judgment applies to the entire estate condemned by this action in Tract No. 611ME, as such estate and tract are described in the Complaint filed in this action.

2.

The Court has jurisdiction of the parties and the subject matter of this action.

3.

Service of Process has been perfected by personal service upon each of the defendants in this case, as provided by Rule 71A of the Federal Rules of Civil Procedure.

4.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power and authority to condemn for public use the property described above in paragraph 1. Pursuant thereto, on June 24, 1976, the United States of America filed its Declaration of Taking of such property, and title thereto should be vested in the United States of America, as of the date of filing such instrument.

5.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court as estimated compensation for the taking of subject property a certain sum of money, and none of this deposit has been disbursed, as set out below in paragraph 11.

6.

On the date of taking of the subject property the owners thereof, as shown by the land records of Osage County, State of Oklahoma, were R. W. Coburn 1/2, and Petroleum Resource Operating Company 1/2. However, at the trial Mr. R. W. Coburn advised the Court that he had no interest in subject property and that the said company was the full owner. No other defendants appeared at the trial to make any claim for compensation for the subject taking. Therefore, Petroleum Resource Operating Company should be entitled to receive the just compensation awarded in this case.

7.

At the trial of this case the Court was advised that Mr. Joe Wanenmacher, Jr. was present and ready to testify as a witness for the Plaintiff. Mr. Wanenmacher is a petroleum engineer, in the consulting business, and is qualified by training and experience to testify as an expert witness regarding the market value of the oil leasehold interest in the subject tract of land. If called, his testimony would be that immediately before the date of taking in this case the fair market value of the working interest in the oil lease from which the subject tract was subordinated was \$1,552.00, and that immediately after the taking

in this case the fair market value of the working interest in said lease was \$1,227.00, which resulted in a loss in value of the working interest in the amount of \$327.00.

Counsel for the owner declined to offer any additional evidence as to value and indicated he would not object to Plaintiff's valuation. Thus the sum of \$327.00 should be adopted by the Court as just compensation for the estate condemned in this action.

8.

Entry of judgment based upon the findings in paragraph 7 will create a deficiency between the amount deposited as estimated just compensation for the estate taken in subject property and the amount fixed by the Court as just compensation, and a sum of money sufficient to cover such deficiency should be deposited by the Government. This deficiency is calculated below in paragraph 11.

9.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use Tract No. 611ME, as such tract is described in the Complaint filed herein, and such tract, to the extent of the estate described in such Complaint, is condemned and title to such estate is vested in the United States of America, as of June 24, 1976, and all defendants herein and all other persons are forever barred from asserting any claim to such estate.

10.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking in this case, the owner of the estate taken hereby in subject tract was the defendant whose name appears below in paragraph 11, and the right to receive the just compensation for the taking of such estate is vested in the owner so named.

11.

It Is Further ORDERED, ADJUDGED and DECREED that the award of just compensation for the estate taken in subject tract is fixed in the amount as shown in the following schedule:

TRACT NO. 611ME

[Subordination of Working Interest (31/32)
in the Oil Leasehold (5/6) Interest Only]

OWNER:

Petroleum Resource Operating Company

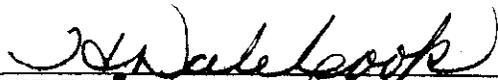
<u>Award</u> of just compensation -----	\$327.00	\$327.00
<u>Deposited</u> as estimated compensation -----	143.00	
<u>Disbursed</u> -----		<u>None</u>
<u>Balance</u> due to owner -----		\$327.00 plus interest
Deposit deficiency -----	\$184.00	

12.

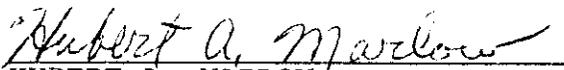
It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall pay into the Registry of this Court for the benefit of the owner the deposit deficiency for the subject tract as shown in paragraph 11, in the amount of \$184.00, together with interest on such deficiency at the rate of 6% per annum from June 24, 1976, until the date of deposit of such deficiency sum; and such sum shall be placed in the deposit for subject tract in this civil action.

After such deficiency deposit has been made, the Clerk of this Court shall disburse the entire sum then on deposit for the subject tract to:

Petroleum Resource Operating Company.


UNITED STATES DISTRICT JUDGE

APPROVED:


HUBERT A. MARLOW
Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 24 1978 *1/ML*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

United States of America,)	
)	
Plaintiff,	)	CIVIL ACTION NO. 76-C-343 ✓
)	
vs.	)	This action applies only to
	)	the Overriding Royalty Inte-
37.05 Acres of Land, More or	)	rest in the Oil Leasehold
Less, Situate in Osage County,	)	Interest in the estate
State of Oklahoma, and KRM	)	taken in:
Petroleum Corporation, et al.,)	
and Unknown Owners,	)	Tract No. 611ME
)	
	)	(Included in D.T. filed in
Defendants.	)	Master File #401-2)

J U D G M E N T

On the 1st day of March, 1978, this matter came on for non-jury trial, before the Honorable H. Dale Cook, Judge of the United States District Court for the Northern District of Oklahoma. Plaintiff, United States of America, appeared by Hubert A. Marlow, Assistant United States Attorney for the Northern District of Oklahoma. None of the defendants appeared either in person or by counsel. After hearing the evidence presented at the trial and being fully advised in the premises, the Court finds and concludes that:

1.

This judgment applies to the entire estate condemned in the tract listed in the caption hereof, as such estate and tract are described in the Complaint filed in this action.

2.

The Court has jurisdiction of the parties and the subject matter of this action.

3.

Service of Process has been perfected by personal service upon each of the defendants in this case, as provided by Rule 71A of the Federal Rules of Civil Procedure.

4.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the

right, power and authority to condemn for public use the property described above in paragraph 1. Pursuant thereto, on June 24, 1976, the United States of America filed its Declaration of Taking of such property, and title thereto should be vested in the United States of America, as of the date of filing such instrument.

5.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court as estimated compensation for the taking of subject property a certain sum of money, and none of this deposit has been disbursed, as set out below in paragraph 12.

6.

On the date of taking of the subject property the owner thereof, as shown by the land records of Osage County, State of Oklahoma, was the person whose name is shown below in paragraph 12. No other defendants appeared at the trial to make any claim for compensation for the subject taking. Therefore, the person named below in paragraph 12 is entitled to receive the just compensation awarded by this judgment.

7.

At the trial of this case counsel for Plaintiff advised the Court that Mr. Joe Wanenmacher, Jr. was present and prepared to testify on behalf of the Plaintiff. If called, his testimony would be that immediately before the date of taking in this case the fair market value of the overriding royalty interest in the oil lease from which the subject tract was subordinated was \$221.00, and that immediately after the taking in this case the fair market value of said overriding royalty interest in said lease was \$175.00, which resulted in a loss in value of the overriding royalty interest in the amount of \$46.00.

The Court takes notice that Mr. Wanenmacher is a petroleum engineer, in the consulting business, and is qualified by training and experience to testify as an expert witness regarding the market value of oil properties.

8.

The Court further takes notice that the Court held a pretrial in this case on February 2nd; that all parties, including the purported interest owners, were so notified. KRM Petroleum Corporation was notified of the pretrial. The Court, at the pretrial, was informed by Mr. Marlow that he had personally contacted KRM, not only to determine that notice had, in fact, been received, but to personally give notice of the fact that the pretrial was to be held. The Court was advised at that time that the defendant interest owner, KRM Petroleum Corporation, did not intend to appear or contest the Government's appraisal.

Subsequent to that, the Court set the matter for trial of the issue of just compensation and determination of interest holders. The defendants have failed to appear pursuant to appropriate notice.

Therefore, the award of just compensation should be based upon Mr. Wanenmacher's proposed testimony, as stated above in paragraph 7.

9.

Entry of judgment based upon the findings made in paragraphs 7 and 8 will create a deficiency between the amount deposited as estimated just compensation for the estate taken in subject property and the amount fixed by the Court as just compensation, and a sum of money sufficient to cover such deficiency should be deposited by the Government. This deficiency is calculated below in paragraph 12.

10.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use Tract No. 611ME, as such tract is described in the Complaint filed herein, and such tract, to the extent of the estate described in such Complaint is condemned, and title to such estate is vested in the United States of America as of June 24, 1976, and all defendants herein and all other persons are forever barred from asserting any claim to such estate.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking in this case, the owner of the estate taken hereby in subject tract was the defendant whose name appears below in paragraph 12, and the right to receive the just compensation for the taking of such estate is vested in the owner so named.

12.

It Is Further ORDERED, ADJUDGED and DECREED that the award of just compensation for the estate taken in subject tract is fixed in the amount as shown in the following schedule:

TRACT NO. 611ME

[Subordination of ORRI (1/32) only in
the Oil Leasehold Interest (5/6)]

OWNER:

K.R.M. Petroleum Corporation

<u>Award</u> of just compensation -----	\$46.00	\$46.00
<u>Deposited</u> as estimated compensation -----	5.00	
<u>Disbursed</u> to owner -----		<u>None</u>
<u>Balance</u> due to owner -----		\$46.00 plus interest
<u>Deposit</u> deficiency -----	\$41.00	

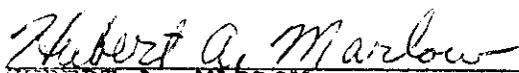
13.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall pay into the Registry of this Court for the benefit of the owner the deposit deficiency for the subject tract as shown in paragraph 12, in the amount of \$41.00, together with interest on such deficiency at the rate of 6% per annum from June 24, 1976, until the date of deposit of such deficiency sum; and such sum shall be placed in the deposit for subject tract in this civil action.

After such deficiency deposit has been made, the Clerk of this Court shall disburse the entire sum then on deposit for the subject tract to K.R.M. Petroleum Corporation.


UNITED STATES DISTRICT JUDGE

APPROVED:


HUBERT A. MARLOW
Assistant United States Attorney

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

DENNY C. WHINERY and CONNIE L.
WHINERY,)
)
)
Plaintiff,)
)
)
vs.)
)
)
SWINSON CHEVROLET, INC.,)
)
)
Defendant and Third-)
Party Plaintiff,)
)
)
vs.)
)
)
JAMES E. LOGAN, d/b/a Jim Logan)
Motors,)
)
)
Third-Party Defendants)
and Third-Party Plaintiff)
)
)
and)
)
)
FLOYD HAUGHE AUTO AUCTION, INC.,)
)
)
and)
)
)
)
GUNNER NANCE, d/b/a Gunner Used)
Cars,)
)
)
Third-Party Defendants.)

FILED

MAR 23 1978

Jack C. Silver
U. S. DISTRICT COURT

No. 77-C-155-C

ORDER OF DISMISSAL

NOW on this 23rd day of March, 1978,
Swinson Chevrolet, Inc., Defendant and Third-Party Plaintiff's
Motion For Dismissal coming on for consideration and counsel for
Swinson Chevrolet, Inc., Defendant and Third-Party Plaintiff
herein representing and stating that all issues, controversies,
debts and liabilities between Swinson Chevrolet, Inc., Defendant
and Third-Party Plaintiff and James E. Logan d/b/a Jim Logan
Motors, Third-Party Defendant and Third-Party Plaintiff, have been
paid, settled and compromised.

IT IS THE ORDER OF THIS COURT That said action be, and
the same is, hereby dismissed with prejudice to the bringing of
another of future action between the two parties, Swinson Chevrolet,
Inc., and James E. Logan, d/b/a Jim Logan Motors, herein.

12/11 Dale Cook
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 23 1978

110

Jack C. Silver, Clerk
U. S. DISTRICT COURT

RAY MARSHALL, Secretary of Labor,)
United States Department of Labor,)
Petitioner,)
v.)
EVANS PLATING WORKS, INC.,)
Respondent.)

Civil Action File

No. 77-C-176-B ✓

ORDER

The Court has for consideration petitioner's Motion for reinstatement of Petition for Order for Entry, Inspection and Investigation under the Occupational Safety and Health Act of 1970, and its Motion for Order Compelling Entry, Inspection and Investigation under the Occupational Safety and Health Act of 1970, and Respondent's request to the Court to show cause why a warrant for inspection should issue. The Court having carefully perused the entire file, the briefs and the findings and recommendations of the Magistrate, and being fully advised in the premises, finds:

That Petitioner's motion for reinstatement of its Petition for Order for Entry and its Motion for Order Compelling Entry should be sustained and that Respondent has waived its right to challenge the validity of the warrant, for the reasons stated herein.

I

Statement of Case

This case is brought pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq.). Following an attempted inspection of Respondent's establishment and subsequent refusal of entry, application was made for, and an inspection warrant issued to, Derl W. Houghton, Compliance Officer, Occupational Safety and Health

Administration, for an inspection of Respondent's premises on March 30, 1977. Inspection pursuant to the warrant was again denied by Respondent's representative, James Evans, on April 4, 1977. Petitioner filed on May 2, 1977, a Petition for Order for Entry, Inspection and Investigation under the Occupational Safety and Health Act of 1970, to compel Evans Plating Works, Inc. to honor the search warrant. At a show cause hearing on May 31, 1977, Respondent announced to the Court that it would voluntarily agree to an inspection. Petitioner then filed its Motion to Dismiss its Petition for Order for Entry, and that motion was granted June 8, 1977. On June 9, 1977, an authorized representative of the Occupational Safety and Health Administration attempted to conduct an inspection of Respondent's premises pursuant to its agreement to allow voluntary inspection. Entry was again refused by Mr. James Evans. Petitioner then filed on June 29, 1977, its Motion for Reinstatement of Petition for Order for Entry and its Motion for Order Compelling Entry. All of the foregoing facts and events are not disputed by the parties.

The Respondent does not object to Petitioner's Motion for Reinstatement. It does resist the Motion for Order Compelling Entry on the following grounds:

1. Respondent challenges the validity of the warrant issued March 30, 1977, on the ground that no employee of Evans Plating Works, Inc. filed a complaint with the Occupational Safety and Health Administration.

2. Respondent asserts that it no longer has employees within the meaning of the Occupational Safety and Health Act of 1970, and thus, is not covered as an employer under Section 3(5) of the Act. Respondent claims that its alleged lack of coverage now moots any need for an inspection to be conducted.

At the hearing, Mr. James Evans, former president of Evans Plating Works, Inc., testified. He testified that sometime following the attempted inspection on June 9, 1977, that the corporation, Evans Plating Works, Inc., had been dissolved and that he was operating the business as a sole proprietorship. He stated that there were still individuals working at the plant, that they worked under his supervision, that the work they did benefited himself and the customers of the business and that their work was an integral part of the business activities of the plant.

On cross-examination by Petitioner's counsel, Mr. Evans stated that he was present at the show cause hearing on May 31, 1977, that he understood the effect of agreeing to a voluntary inspection and that his attorney had advised him to allow the inspection voluntarily because of the financial expense in resisting.

An in camera inspection was made by the Court of the Evans Plating Works, Inc. employee complaint which was filed with the Occupational Safety and Health Administration prior to the initial attempted inspection.

The parties having been fully heard, evidence and briefs having been received and due consideration having been given, the Magistrate makes the following findings of fact and conclusions of law:

II

Findings of Fact

1. An employee of Evans Plating Works, Inc., filed a formal written complaint with the Occupational Safety and Health Administration regarding the Respondent's workplace at 22 North Cheyenne, Tulsa, Oklahoma.

2. Derl W. Houghton, Compliance Officer of the Occupational Safety and Health Administration, attempted entry into Respondent's workplace on February 16, 1977, to investigate allegations of the written employee complaint. Entry onto the premises was denied by James Evans, president of Evans Plating Works, Inc.

3. An inspection warrant was applied for and issued to Compliance Officer Houghton on March 30, 1977, by the U.S. Magistrate Claudine Barnes.

4. On April 4, 1977, Compliance Officer Houghton attempted to execute the warrant by presenting himself at Respondent's establishment for the purpose of making an inspection. Entry was again refused by Mr. Evans.

5. On May 2, 1977, the Secretary of Labor, United States Department of Labor, filed its Petition for Order for Entry, Inspection and Investigation under the Occupational Safety and Health Act of 1970, in the U.S. District Court, Northern District of Oklahoma, Civil Action No. 77-C-176-B, to compel Respondent to honor the inspection warrant. An Order to Show Cause was issued setting a hearing on May 31, 1977.

6. At the show cause hearing on May 31, 1977, both Petitioner Ray Marshall, Secretary of Labor, and Respondent Evans Plating Works, Inc., were represented by counsel. James Evans was present in the courtroom at all times during the hearing.

7. At the show cause hearing on May 31, 1977, the parties announced to the Court that Respondent agreed to a voluntary inspection by the Occupational Safety and Health Administration. The Petitioner agreed to move for dismissal of its petition for order for entry if Respondent would allow the inspection to proceed.

8. On the strength of Respondent's representation as to settlement, Petitioner moved for dismissal of its petition on June 6, 1977, and the motion was granted on June 8, 1977.

9. On June 9, 1977, Compliance Officer Houston presented himself at Evans Plating Works, Inc. and was again refused the right to enter the business premises to conduct an inspection by Mr. James Evans.

10. The Secretary of Labor filed Motions for Reinstatement of Petition for Order for Entry, Inspection and Investigation Under the Occupational Safety and Health Act of 1970, and for Order Compelling Entry, Inspection and Investigation under the Act of July 1, 1977.

11. At the hearing on Petitioner's motions, Mr. James Evans testified that subsequent to the issuance of the warrant, the corporation, Evans Plating Works, Inc., was dissolved and the business was currently being operated as a sole proprietorship by Mr. Evans.

12. Evans testified that since the corporate dissolution, individuals were continuing to perform plating work at the plant, that they did so under his supervision and that the work they performed was an integral part of the business activities of the plant calculated to benefit Evans and his customers.

13. Prior to the initial attempted inspection on February 16, 1977, an employee of Evans Plating Works, Inc. filed a written complaint with the Occupational Safety and Health Administration concerning working conditions at the plant.

III

Conclusions of Law

1. Jurisdiction of this action is conferred upon the Court by 28 U.S.C. Section 1337 and 28 U.S.C. 1345.

2. Respondent, James Evans, doing business as Evans Plating Works, and Evans Plating Works, Inc. prior thereto, has been, and is, an employer engaged in a business affecting commerce who has employees within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970.

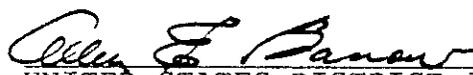
3. A valid, formal written complaint, filed by an employee of Evans Plating Works, Inc., with the Occupational Safety and Health Administration, formed the basis of a finding of probable cause in the issuance of the warrant on March 30, 1977. The warrant was properly issued.

4. Respondent waived its right to question the validity of the warrant or the finding of probable cause to issue the warrant when it represented to the Court in the May 31, 1977 show cause hearing that an inspection of the worksite would be allowed voluntarily. Glus v. Brooklyn Eastern District Terminal 79 S. Ct. 760, 359 U.S. 295 (1965); Shurland Robin Demergue Bell v. Nutmeg Airways Corp. (D. Conn. 1976) 407 F. Supp. 1254; Winter v. Welker (E.D. Penn. 1959) 174 F. Supp. 836; Minneapolis Brewing Co. v. Merritt (D. N.D. 1956) 143 F. Supp. 146; Copco Steel Engineering Co. v. U.S. 341 F2nd 590 (1965).

It is THEREFORE ORDERED, ADJUDGED, and DECREED, that Petitioner's Motion for Reinstatement of Petition for Order for Entry, Inspection and Investigation under the Occupational Safety and Health Act of 1970 be and is hereby GRANTED.

It is further ORDERED that Petitioner's Motion for Order Compelling Entry, Inspection and Investigation under the Occupational Safety and Health Act of 1970 be and is hereby GRANTED and that Respondent be and is hereby ORDERED to admit an authorized representative of Occupational Safety and Health Administration to its premises for the purpose of conducting an inspection.

DATED this 23rd day of March, 1978.


UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 1978,
I served one copy of the foregoing order upon respondent
by depositing same in the United States mail addressed to:

Mr. William Drapala
124 S. Denver
Tulsa, Oklahoma 74103

Marigny A. Lanier

MARIGNY A. LANIER
Attorney

IT IS SO ORDERED.

ENTERED this 2nd day of March, 1978.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

equal legal protections as a defendant with money. The only difference, as previously noted, is that the transcript is not the personal property of the indigent but of the State, the one who paid for it. This procedure deprives the indigent of no legal right or privilege. He is equally protected under the law with any other defendant, and there is adequate access to his transcripts and records regarding his contentions in any legal proceeding, even though he does not have a copy in his personal possession.

Petitioner asserts only that the State's refusal to provide him with his transcripts and records prevents him from presenting his Washington v. Texas, 388 U. S. 14 (1967) and Powell v. Alabama, 287 U. S. 45 (1932) claims. Washington deals with compulsory process for obtaining witnesses in one's favor and Powell deals with the right to appointed counsel. From reading the reported decision of Petitioner's case, Petitioner was both represented by counsel and called defense witnesses. Petitioner does not present to this Court and did not present to the State Court the specific issues he wishes to advance in a contemplated Petition for Certiorari and post-conviction proceeding. It is well settled in this Circuit that transcripts will not be furnished in order to permit prisoners to comb the record for proposed or prospective litigation. Hines v. Baker, 422 F.2d 1002 (10th Cir. 1970); Jackson v. Turner, 422 F.2d 1303 (10th Cir. 1971); Sides v. Tinsley, 333 F.2d 1002, 1003 (10th Cir. 1964); also see, in connection with transcripts at Government expense for § 2255 proceedings, United States v. MacCollom, 426 U. S. 317 (1976); United States v. Hereferd, Unpublished 75-1116 (10th Cir. filed May 14, 1975); United States v. Hereferd, Unpublished 75-1757 (10th Cir. filed May 19, 1976); contra. Rush v. United States, 559 F.2d 455 (7th Cir. 1977).

Having carefully read the petition, response, and "traverse", and being fully advised in the premises, the Court finds that an evidentiary hearing herein is not required, that the motion for appointment of counsel should be overruled, and that the petition under consideration is without merit under the rule of law followed in this Circuit on the issue presented, and that the petition should be denied.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Forrest Fisher Jones be and it is

hereby denied, his motion for appointment of counsel is overruled, and the case is dismissed.

Dated this 22nd day of March, 1978, at Tulsa, Oklahoma.

William F. Barrow

CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

FILED

MAR 22 1978 ph

Jack C. Silver, Clerk
U. S. DISTRICT COURT

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

LERoy TIFFEY, # 76681)
)
 Petitioner,)
)
 v.)
)
 RICHARD A. CRISP, ET AL.,)
)
 Respondents.)

No. 77-C-426-C

ORDER

This is a proceeding brought pursuant to the provisions of Title 28 U.S.C. § 2254, by a state prisoner confined at the Oklahoma State Penitentiary, McAlester, Oklahoma. Respondent has filed a Response pursuant to the Order of the Court directing it to show cause why the Writ of Habeas Corpus should not be granted.

Petitioner attacks the validity of the judgment and sentence rendered and imposed on February 9, 1968 in the District Court of Tulsa County, State of Oklahoma, in Case No. 22,768. In that case, Petitioner was convicted by a jury for the offense of Robbery with Firearms, After Former Conviction of a Felony, and sentenced to a term of thirty (30) to ninety (90) years. A direct appeal of his conviction was perfected to the Oklahoma Court of Criminal Appeals for the State of Oklahoma, Case No. 14,866, which affirmed the judgment and sentence on September 30, 1970. Tiffey v. State, 476 P.2d 84 (1970). Thereafter, a Petition for Rehearing was denied by Order dated October 21, 1970. On July 30, 1974, petitioner filed an Application for Post-Conviction Relief in the District Court of Tulsa County, Case No. 22,768, which was denied by Order dated October 7, 1974. On May 10, 1977, petitioner filed a second Application for Post-Conviction Relief in the District Court of Tulsa County, Case No. 14,866, which was denied by Order dated July 25, 1977. An appeal of the District Court's

denial of post-conviction relief was perfected to the Oklahoma Court of Criminal Appeals, Case No. PC-77-605. On September 23, 1977, the Oklahoma Court of Criminal Appeals affirmed the District Court's Order denying post-conviction relief.

Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights under the Constitution of the United States of America. In particular, petitioner claims:

1. "The alleged confession in this case was obtained after Petitioner had received Miranda Rights, but was subsequent to an arrest made by the authorities of the State of Kansas, without probable cause and without a warrant. It was indicated that the arrest was investigatory and subsequently thereafter in-custody inculpatory statements were allegedly made by Petitioner."

2. "In Imposing sentence upon Petitioner, the jury gave explicit consideration to the Petitioner's previous convictions. It was later determined that one of the five previous convictions was constitutionally invalid, having been obtained in violation of GIDEON V. WAINWRIGHT.

"Modification of Petitioner's sentence from thirty (30) to ninety (90) years to twenty (20) to sixty (60) years, by the Oklahoma Court of Criminal Appeals was error, this case, pursuant to UNITED STATES V. TUCKER, should have been remanded to the District Court for reconsideration of the sentence."

3. "In light of UNITED STATES V. TUCKER, Petitioner's 1946 convictions, being 31 years old, Title 21 O.S. Supp.1976, Section 51(A) should have been considered retroactive."

4. "The District Court of Tulsa County and the Oklahoma Court of Criminal Appeals ignored existing material issues of fact; failed to conduct a full and fair evidentiary hearing; failed to make specific findings of fact; and failed to state expressly its conclusions of law, relating to each issue presented, in accordance with Title 22 O.S. 1970, Section 1094."

Petitioner has exhausted all those remedies available to him in the courts of the State of Oklahoma with respect to the claims herein asserted.

Petitioner contends in his first allegation that his conviction was in contravention of Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). He asserts in conclusory fashion that his arrest by the authorities of Kansas was without probable cause or a warrant. However, he admits that he received his Miranda warnings from the Oklahoma authorities who picked up the petitioner from the Montgomery County Jail at Independence, Kansas, with a felony arrest warrant from Tulsa County Court of Common Pleas and transported him and the co-defendant to Tulsa. Petitioner further admits that he and the co-defendant were advised of their Miranda rights at the point in time when the petitioner started a conversation with the co-defendant. The officer interrupted the conversation to inform the two of their rights. After ascertaining that they understood, they stated that they wished to continue. Subsequent to this exchange, petitioner directed the officers to a side road where he claimed he threw a hatchet used in the robbery. A search was made but the hatchet was not found. Petitioner was placed in the Tulsa County Jail upon return to Tulsa. On the following day, the petitioner requested to see the officer. Subsequent to being again informed of his rights, the petitioner related that he had robbed the store; that he had purchased a shotgun and shells the day before the robbery to use in the robbery; that he, a friend and the co-defendant took the gun and shells to Chandler Park and sawed off the shotgun and test-fired the gun into a log and a beer can and that the sawed off portion of the gun had been placed under some rocks. The officer identified a gun obtained at the

Independence, Kansas, jail which was returned to Tulsa in his custody and two men's shirts which were wrapped around the gun which the officers stated were described by the petitioner as the shirts worn during the robbery. The sawed off portion of the shotgun barrel, discharged shotgun casings and a shell-pierced beer can found in Chandler park were identified at the trial by the officer and admitted into evidence. There was no pre-trial motion to suppress the statements on the grounds that the petitioner's arrest and detention had been illegal.

The instant case is distinguishable from Brown v. Illinois, 442 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), relied upon by the petitioner. The petitioner was arrested under a valid felony arrest warrant issued from the Tulsa County Court of Common Pleas. The remarks made by the petitioner were voluntary in nature after he had been apprised of his Miranda rights. The inculpatory statements were made subsequent to a legal arrest with a warrant. There is no contention that the statements were made involuntarily. Therefore, the admission of petitioner's statements into evidence was proper.

In his second allegation, petitioner claims that his sentence was in contravention of United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), in that one of the prior convictions considered by the jury in the sentencing stage of the proceedings was constitutionally invalid and thus the case should have been remanded to the District Court for resentencing rather than modified by the Oklahoma Court of Criminal Appeals. Upon direct appeal, the Oklahoma Court of Criminal Appeals held that the jury's consideration of the void judgment and sentence could not have influenced the jury in their determination of the defendant's guilt, but would be a basis for modification of

the sentence. That Court then modified the petitioner's sentence from thirty (30) years to ninety (90) years imprisonment to a term of twenty (20) to sixty (60) years imprisonment. In petitioner's case, the jury considered the petitioner's record of prior convictions only after they had already found the petitioner guilty of the charge of Robbery with Firearms. As stated by the Oklahoma Court of Criminal Appeals in its Order Affirming Denial of Post-Conviction Relief:

"...Furthermore, on appeal, this Court modified Petitioner's sentence to reflect the fact that one of the prior conviction (sic) was gained without counsel. U.S. v. Tucker, supra, does not require that such a case be remanded to a lower court for resentencing; it merely upheld the Court of Appeals decision remanding a case for re-sentencing under similar conditions. In this case, particularly in view of the passage of time, the interest of fairness and justice are equally well served by the modification of sentence imposed by this Court in the case on appeal."

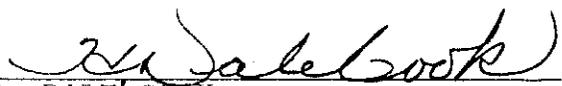
In his third allegation, the petitioner asserts that Title 21 O.S. Supp. 1976, §51A should be held retroactive in view of the fact that the petitioner's 1946 convictions are thirty-one years old. That statute prohibits using a former conviction of a felony to enhance punishment where the sentence was entirely served more than ten years before the crime for which one is being sentenced. This allegation is totally without merit. As stated by both the District Court of Tulsa County in its Order Denying Application for Post-Conviction Relief and by the Oklahoma Court of Criminal Appeals in its Order Affirming Denial of Post-Conviction Relief, this statute is not retroactive and thus is inapplicable in the instant case. Moreover, the Oklahoma Court of Criminal Appeals in its Order affirming Denial of Post-Conviction Relief also pointed out that the petitioner

did not allege that his sentences were fully served more than ten years ago, only that the convictions were obtained more than ten years ago.

In his final allegation, the petitioner asserts that the Oklahoma Courts failed to conduct a full and fair hearing and to make findings of fact and conclusions of law in regard to the petitioner's Application for Post-Conviction Relief. Allegations of inadequate post-conviction procedures do not raise federal constitutional questions. Curtis v. Perini, 301 F.Supp. 444 (D.C. Ohio 1968), affirmed 413 F.2d 546. There is no federal constitutional requirement that the State provide a means of post-conviction review of State Court convictions. McKane v. Durston, 153 U.S. 684 (1894); Griffin v. Illinois, 351 U.S. 12 (1956). The unavailability or adequacy of state post-conviction procedures are material only in the context of exhaustion of state remedies on federally protected rights. Errors or defects in the State post-conviction proceeding do not render a prisoner's detention unlawful. Noble v. Zigler, 351 F.2d 673 (8th Cir. 1965).

The Petition for Writ of Habeas Corpus is denied.

IT IS SO ORDERED this 22nd day of March, 1978.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 22 1978 *ph*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

United States of America,)	
)	
Plaintiff,	)	CIVIL ACTION NO. 76-C-332
)	
vs.	)	This action applies only to
	)	the Oil Leasehold Interest
23.95 Acres of Land, More or	)	in the estate taken in:
Less, Situate in Osage County,)	
State of Oklahoma, and R. W.	)	Tracts Nos. 418ME,
Coburn, et al., and Unknown	)	419ME-1, 419ME-2, 419ME-3
Owners,	)	423ME
)	
	)	(Included in D.T. filed in
Defendants.)	)	Master File #401-2)

J U D G M E N T

On the first of March, 1978, this matter came on for non-jury trial, before the Honorable H. Dale Cook, Judge of the United States District Court for the Northern District of Oklahoma. Plaintiff, United States of America, appeared by Hubert A. Marlow, Assistant United States Attorney for the Northern District of Oklahoma. Mr. Delbert Brock, Attorney, appeared for the Defendant R. W. Coburn. Mr. Stephen R. Clark, Attorney, appeared for the Defendant Bank of Commerce of Tulsa. No other defendants appeared. After hearing the statements of counsel, having examined the file, and being fully advised in the premises, the Court finds and concludes that:

1.

This judgment applies to the entire estate condemned by this case in the tracts listed in the caption hereof, as such estate and tracts are described in the Complaint filed in this action.

2.

The Court has jurisdiction of the parties and the subject matter of this action.

3.

Service of Process has been perfected by personal service upon each of the defendants in this case, except Robert M. Scott, Russ O'Donoghue, and Jim L. Buck, and has been perfected as to them by publication, as provided by Rule 71A of the Federal Rules of Civil Procedure.

4.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power and authority to condemn for public use the property described above in paragraph 1. Pursuant thereto, on June 24, 1976, the United States of America filed its Declaration of Taking of such property, and title thereto should be vested in the United States of America, as of the date of filing such instrument.

5.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court as estimated compensation for the taking of subject property a certain sum of money, and none of this deposit has been disbursed, as set out below in paragraph 10.

6.

On the date of taking of the subject property the owners thereof, as shown by the land records of Osage County, State of Oklahoma, were the persons whose names are shown below in paragraph 10. No other defendants appeared at the trial to make any claim for compensation for the subject taking. Therefore, the persons named below in paragraph 19, (subject to the exception noted below), are entitled to receive the just compensation awarded by this judgment. The total award should be allocated to the respective owners according to the percentage of interest held by each, with the following exception:

As to the interest owned by R.W. Coburn, the mortgage held by Bank of Commerce of Tulsa is prior and superior to all other mortgages, liens and claims. Thus the portion of the total award allocated to this interest should be paid to said Bank of Commerce of Tulsa.

7.

At the trial of this case the Defendants in appearance declined to offer any evidence as to value of subject property, but instead advised the Court they would rely on the Plaintiff's evidence.

Mr. Joe Wanenmacher, Jr. testified as a witness for the Plaintiff. Mr. Wanenmacher is a petroleum engineer, in the consulting business, and is qualified by training and experience to testify as an expert witness regarding the value of the oil leasehold interest in the subject property.

Mr. Wanenmacher testified that immediately before the date of taking the fair market value of the leasehold unit from which the subject tracts were subordinated was \$74,888.00. He further testified that immediately after the date of taking in this case the fair market value of the remainder unit was \$74,162.00. Thus the loss in market value caused by subject taking was \$726.00. Such sum should be adopted by the Court as the award of just compensation in this case.

8.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use the tracts listed in the caption hereof, as such tracts are described in the Complaint filed herein, and such tracts, to the extent of the estate described in such Complaint, are condemned and title to such estate is vested in the United States of America, as of June 24, 1976, and all defendants herein and all other persons are forever barred from asserting any claim to such estate.

9.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking in this case, the owners of the estate taken hereby in subject tracts were the defendants whose names appear below in paragraph 10; the interest held by each owner is shown following his or her name; and the right to receive his or her respective share of the just compensation for the taking of such estate is vested in the owners so named, with the following exception:

For the reasons found in paragraph 6 above the right to receive the portion of the total award which is allocated to the interest owned by R.W. Coburn is hereby vested in Bank of Commerce of Tulsa.

It Is Further ORDERED, ADJUDGED and DECREED that the sum of \$726.00 is fixed as the total award of just compensation for the estate taken in subject tracts and such award is allocated to the respective owners according to the percentage of interest held by each, as shown in the schedule which follows, to-wit:

TRACTS NOS. 418ME, 419ME-1, 419ME-2,
419ME-3 and 423ME, Combined

(Oil Leasehold Interest Only)

(Subordination)

OWNERS:

- 1. R. W. Coburn -----40%
Subject to claims as follows:
A. Mortgage owned by:
Bank of Commerce of Tulsa
B. Mortgage and preferential right
of purchase for 3 years from
2-21-74 owned by:
B. M. Gamble and
E. Ralph Daniel
C. Mortgage owned by:
Mercantile Leasing Corp.
D. Mortgage owned by:
King Oil Company, Inc.
- 2. Robert M. Scott -----12.5%
- 3. Peter W. Conrad and
Marguerite K. Conrad ----- 5.0%
- 4. Russ O'Donoghue
a/k/a Ross O'Donoghue ----- 5.0%
- 5. Charles A. Hufnagel ----- 25.0%
- 6. B. Howell Hill ----- 10.0%
- 7. Jim L. Buck ----- 2.5%

<u>Total Award</u> of Just Compensation -----	\$726.00	\$726.00
<u>Deposited</u> as estimated compensation -----	<u>\$726.00</u>	
<u>Disbursed</u> to owners -----		<u>None</u>
<u>Balance</u> due to owners -----		\$726.00

11.

It Is Further ORDERED that the Clerk of this Court now shall disburse from the funds on deposit in the Registry of the Court for this civil action to certain defendants in this case certain sums as follows:

Bank of Commerce of Tulsa -----	\$290.40
Peter W. Conrad and Marguerite K. Conrad, jointly ----	\$36.30
Charles A. Hufnagel -----	\$181.50
B. Howell Hill -----	<u>\$72.60</u>
	\$580.80

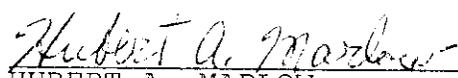
12.

It Is Further ORDERED that the balance of the deposit for this case, in the amount of \$145.20 shall not be disbursed at this time, because the addresses or whereabouts of the defendant owners who are entitled to receive this sum (Robert M. Scott, Russ or Ross O'Donoghue, and Jim L. Buck) are wholly unknown. In the event that any of these owners are located the Court will enter an appropriate order of disbursal.

In the event that the balance due to such defendants, or any part of it, remains on deposit for a period of five years from the date of filing this judgment, then, after that period, the Clerk of this Court, without further order, shall disburse the balance then on deposit for subject tracts to the Treasurer of the United States of America, pursuant to the provisions of Title 28, Section 2042, U.S.C.


UNITED STATES DISTRICT JUDGE

APPROVED:


HUBERT A. MARLOW
Assistant United States Attorney

FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MAR 22 1978 *ph*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

United States of America,)
)
 Plaintiff,)
)
 vs.)
)
 75.00 Acres of Land, More or)
 Less, Situate in Osage County,)
 State of Oklahoma , and Petro-)
 leum Resource Operating Com-)
 pany, et al., and Unknown)
 Owners,)
)
 Defendants.)

CIVIL ACTION NO. 76-C-329

This action applies only to
the Oil Leasehold Interest
in the estate taken in:

Tract No. 403ME

(Included in D.T. filed in
Master File #401-2)

J U D G M E N T

On the first of March 1978, this matter came on for non-jury trial, before the Honorable H. Dale Cook, Judge of the United States District Court for the Northern District of Oklahoma. Plaintiff, United States of America, appeared by Hubert A. Marlow, Assistant United States Attorney for the Northern District of Oklahoma. The Defendant, Petroleum Resource Operating Company appeared by its attorney, Delbert Brock. No other defendants appeared. After hearing the statements of counsel, having examined the file, and being fully advised in the premises, the Court finds and concludes that:

1.

This judgment applies to the entire estate condemned by this civil action in the tract listed in the caption hereof, as such estate and tract are described in the Complaint filed in this action.

2.

The Court has jurisdiction of the parties and the subject matter of this action.

3.

Service of Process has been perfected by personal service upon each of the defendants in this case, as provided by Rule 71A of the Federal Rules of Civil Procedure.

4.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power and authority to condemn for public use the property described above in paragraph 1. Pursuant thereto, on June 24, 1976, the United States of America filed its Declaration of Taking of such property, and title thereto should be vested in the United States of America, as of the date of filing such instrument.

5.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court as estimated compensation for the taking of subject property a certain sum of money, and all of this deposit has been disbursed, as set out below in paragraph 12.

6.

On the date of taking in this action, the owners of the estate taken in subject property were the defendants whose names are shown below in paragraph 12. Such named defendants are the only persons asserting any interest in the estate taken in such property. All other persons having either disclaimed or defaulted, such named defendants are entitled to receive the just compensation awarded by this judgment.

7.

At the time this case was filed on June 24, 1976, the Plaintiff's title evidence showed that the subject property was owned by Petroleum Resources Operating Company. On August 6, 1976, the Plaintiff and Mr. Delbert Brock, attorney for the said company, executed and filed herein a Stipulation As To Just Compensation. The stipulation was based upon the understanding by the parties signing the same that said company was the owner of the entire estate taken in this case. The amount of the stipulation, \$7,425.00, which was also the full amount deposited as estimated compensation, was disbursed to said company.

When the Plaintiff's title evidence was continued to the date of taking, it revealed that on the date of taking there was an outstanding 1/16 of 5/6 overriding royalty interest, which was owned by KRM Petroleum Corporation, Guaranty Bank Building, 817 19th Street, Denver, Colorado.

On December 9, 1976, KRM Petroleum Corporation was made a party defendant by Order of Court and Notice of Condemnation was served upon it on December 14, 1976.

8.

At the trial of this case on March 1, 1978, there was offered and received in evidence a letter from KRM Petroleum Corporation, dated January 30, 1978, signed by E. J. Henderson as Executive Vice President, which letter read as follows:

"K.R.M. Petroleum Corporation hereby acknowledges receipt of Petroleum Resource Operating Company's check in the amount of \$389.69 representing full compensation for K.R.M. Petroleum Corporation's 1/16 of 5/6 overriding royalty interest involved in the subject condemnation suit."

9.

The parties present at the trial advised the Court that they were still willing to abide by their Stipulation As To Just Compensation (described above in paragraph 7).

Therefore, such stipulation should be approved as fixing the total award for both the Working Interest and the Overriding Royalty Interest in the estate taken in the subject tract. The payment of \$386.69 to KRM Petroleum Corporation by Petroleum Resource Operating Company, and KRM's acceptance of such sum as full compensation for its interest should be considered as the owners' voluntary allocation of the total award and such allocation should be adopted by the Court.

10.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power, and authority to condemn for public use the property particularly described in the Complaint filed herein; and such property, to the extent of the estate described in such Complaint is condemned, and title thereto

is vested in the United States of America, as of June 24, 1976, and all defendants herein and all other persons are forever barred from asserting any claim to such estate.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking in this case, the owners of the estate taken herein in subject tract were the defendants whose names appear below in paragraph 12, and the right to receive the just compensation for the taking of such estate is vested in the owners so named.

12.

It Is Further ORDERED, ADJUDGED and DECREED that the Stipulation As To Just Compensation described above in paragraph 7 hereby is approved and the sum therein stated is fixed as just compensation for all interests in the estate taken in this action. The payment of \$386.69 to KRM Petroleum Corporation by Petroleum Resource Operating Company, and KRM's acceptance of such sum as full compensation for its interest in this case is adopted by the Court as the proper allocation of the total award made in this action. The accounting for the subject case is set forth in schedule form as follows, towit:

TRACT NO. 403ME

Oil Leasehold Interest Only

(Subordination)

OWNERS:

1. Petroleum Resource Operating Company,
(15/16 of 5/6) Working Interest.
2. KRM Petroleum Corporation (1/16 of
5/6) Overriding Royalty Interest.

<u>Award of just compensation for all</u> interests, pursuant to Stipulation -----	\$7,425.00	\$7,425.00
--	------------	------------

Allocation of award:

To Working Interest -	\$7,038.31
To Overriding Royalty Interest -	386.69

Deposited as estimated compensation	<u>\$7,425.00</u>
-------------------------------------	-------------------

Disbursed:

From the deposit in this case, to
Petroleum Resources Operating Company ----- \$7,425.00

By personal check from Petroleum Resource
Operating Company to KRM Petroleum
Corporation ----- \$386.69

Balance due to owners ----- None


UNITED STATES DISTRICT JUDGE

APPROVED:


HUBERT A. MARLOW
Assistant United States Attorney

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

FILED

MAR 21 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

MARGARET GARNER,)
)
 Plaintiff,)
)
 vs.)
)
 SOUTHWESTERN BELL TELEPHONE)
 COMPANY, INC., and JOHN DOE,)
)
 Defendants.)

No. 77-C-412-C

ORDER OF DISMISSAL

This matter coming on for hearing on this 21st day
of March, 1978, upon the Stipulation for
Dismissal entered into by and between the Plaintiff, Margaret
Garner, and the Defendant, Southwestern Bell Telephone Company,
and upon the joint application of Plaintiff and Defendant for
an order of dismissal of the captioned cause, with prejudice
to the filing of a future action. Upon said Stipulation and
the application of the parties for said Order, and the Court
being advised that the parties have settled and compromised
the above styled cause:

IT IS ORDERED, ADJUDGED AND DECREED: That the above
entitled cause of action and Complaint are dismissed, with
prejudice to the filing of a future action.


United States District Judge

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

RONALD GEMINN, STEVE BRASELTON)
and RICK BRASELTON,)
)
Plaintiffs,)
)
-vs-)
)
THREE FOUNTAINS, INC., an)
Oklahoma Corporation, doing)
business as FOUNTAINS RESTAURANT,)
)
Defendant.)

No. 77-C-319

FILED

MAR 21 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

This action having been commenced on the 22nd day of June, 1977 by Michael J. Beard, attorney for the plaintiff, and the defendant, Three Fountains, Inc., an Oklahoma Corporation, doing business as Fountains Restaurant, having appeared after personal service of summons on them by and through their attorney, Jack R. Givens, of Jones, Givens, Brett, Gotcher, Doyle and Bogan, Inc..

That this matter has been fully plead by both parties and has been regularly set for trial for this court on the 21st day of March, 1978.

That the defendant has served upon the plaintiff Notice to Permit Judgment to be taken against the defendant in favor of the plaintiff, Ronald Geminn in the sum of \$731.80; the plaintiff, Steve Braselton, in the sum of \$708.49; and Rick Braselton, in the sum of \$615.69, together with costs accruing including the 17th day of March, 1978, and that the plaintiffs' attorney, Michael J. Beard, have judgment against the defendant in the sum of \$1,000.00 as a reasonable attorney fee for his prosecution of this action.

That the plaintiffs, and each of them, have duly accepted defendant's offer.

IT IS ORDERED, ADJUDGED AND DECREED BY THIS COURT that the plaintiff, Ronald Geminn, have judgment against the defendant for the sum of \$731.80.

IT IS ORDERED, ADJUDGED AND DECREED BY THIS COURT that the plaintiff, Steve Braselton, have judgment against the defendant for the sum of \$708.49.

IT IS ORDERED, ADJUDGED AND DECREED BY THIS COURT that the plaintiff, Rick Braselton, have judgment against the defendant for the sum of \$615.69.

IT IS ORDERED, ADJUDGED AND DECREED BY THIS COURT that the plaintiffs have judgment against the defendant for the sum of \$1,000.00 for the use and benefit of their attorney, Michael J. Beard, which represents his reasonable attorney fee for the prosecution of this action.

IT IS ORDERED, ADJUDGED AND DECREED BY THIS COURT that plaintiffs have judgment against the defendant for the costs of this action.

(Signed) H. Dale Cook

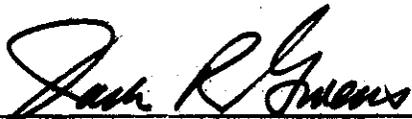
JUDGE

The foregoing proposed Judgment is approved as to form.

DATED this 20th day of March, 1978.



MICHAEL J. BEARD
Attorney for Plaintiffs



JACK R. GIVENS
Attorney for Defendant

MAR 21 1978

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMAJack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,)	
	Plaintiff,)
v.	)	NOS. 78-C-32-B
	)	75-CR-137
HAROLD LOUIS BOYD, # 40703-115,)	
	Movant.)

O R D E R

The Court has for consideration a motion pursuant to 28 U.S.C. § 2255 filed pro se, in forma pauperis, by the Movant, Harold Louis Boyd. Movant is a prisoner at the Federal Correctional Institution, El Reno, Oklahoma, pursuant to conviction in Case No. 75-CR-137 upon his plea of guilty to an information charging interstate transportation of a known falsely made and forged security in violation of 18 U.S.C. § 2314, filed in the Western District of Oklahoma and transferred to this District pursuant to Rule 20, Federal Rules of Criminal Procedure. He was sentenced therein on the 7th day of October, 1975, to three years imprisonment eligible for parole as the Parole Commission might determine pursuant to 18 U.S.C. § 4208(a)(2). At the same time, Movant pled guilty in Case No. 75-CR-138, to Count One of an indictment in the Northern District of Oklahoma, also charging a violation of 18 U.S.C. § 2314, and a similar charge in Count Two of that indictment was dismissed. In this latter case, on October 7, 1975, the imposition of sentence was suspended and the Movant was placed on probation for two years to begin at the expiration of the sentence imposed in Case No. 75-CR-137. Movant in his present § 2255 motion challenges only the conviction and sentence in Case No. 75-CR-137.

Movant in his § 2255 motion demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights guaranteed by the Constitution of the United States of America. In particular, Movant claims that:

He was sentenced in the United States District Court for the Northern District of Oklahoma on October 7, 1975. He was later on December 12, 1975, sentenced to five years for uttering a forged instrument in the District Court of Tulsa County, State of Oklahoma, and he was discharged on the State sentence on November 28, 1977, and delivered to the Federal institution to commence service of his Federal sentence. Since the Judgment and Commitment in the Federal Court did not provide that the Federal sentence was to run consecutively to the State sentence, Movant claims a right to credit on the Federal sentence for the time served in State custody.

Further, Movant requests that if the Court does not substantiate his contentions, that he be allowed to submit a memorandum of law supporting his § 2255 motion prior to its denial. Movant has been given this opportunity and he has not availed himself of it.

Having carefully reviewed the motion and criminal files, and being fully advised in the premises, the Court finds that there is no necessity for response, appointment of counsel, or evidentiary hearing, and the motion should be overruled and the case dismissed.

Should his motion be treated as a request for modification of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure, it is out of time. The jurisdictional period of 120 days from the date sentence is imposed within which a Rule 35 motion may be considered long ago expired.

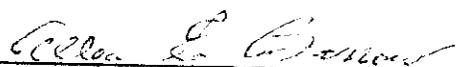
Treating the instrument before the Court as a § 2255 motion, it is without merit.

It is true that sentences on Federal charges in separate counts, or in separate cases, are presumed to run concurrently absent specific provisions to the contrary. Owensby v. United States, 385 F.2d 58 (10th Cir. 1967); Subas v. Hudspeth, 122 F.2d 85 (10th Cir. 1941). However, this rule of "presumptive concurrence" is not applicable where one sentence is imposed by a State Court and the other by a Federal Court. Verdigo v. Willingham, 198 F.Supp. 748 (M.D.Pa. 1961) affirmed 295 F.2d 506 (3rd Cir. 1961); Gomori v. Arnold, 533 F.2d 871 (3rd Cir. 1976); also see, Joslin v. Moseley, 420 F.2d 1204 (10th Cir. 1969).

Frequently, a State waives its right to its exclusive custody of a state prisoner in order that the United States might try him upon a Federal indictment. Then, the Defendant, on a plea of guilty, is sentenced by the Federal District Court and returned to the custody of the State. Thereafter, he is turned over to a United States Marshal by the State authorities and delivered to the warden of the Federal penitentiary, pursuant to commitment under the Federal sentence. The Federal sentence begins to run on such delivery to the United States Marshal. Rohr v. Hudspeth, 105 F.2d 747 (10th Cir. 1939); Lunsford v. Hudspeth, 126 F.2d 653 (10th Cir. 1942).

IT IS, THEREFORE, ORDERED that the motion pursuant to 28 U.S.C. § 2255 of Harold Louis Boyd be and it is hereby overruled and the cause is dismissed.

Dated this 21st day of March, 1978, at Tulsa, Oklahoma.



CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

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

FILED

MAR 21 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

WILHELMINA WOHLBEDACHT,
Plaintiff,

VS.

NO. 77-C-445-B

RAYMOND ALFRED ANDERSEN,
Defendant.

ORDER OF DISMISSAL

On the 21st day of March, 1978, upon the written application of the parties for a Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the plaintiff filed herein against the defendant be and the same hereby is dismissed with prejudice to any future action.

Allen E. Barrow

JUDGE OF THE DISTRICT COURT

APPROVED:

Don L. Dees

DON L. DEES, Attorney for the Plaintiff

RAY H. WILBURN, Attorney for the Defendant

1 BROAD, KHOURIE & SCHULZ
WILLIAM A. WINEBERG, JR.
2 STEPHEN C. THEOHARIS
One California Street, 14th Floor
3 San Francisco, California 94111
Telephone: (415) 986-0300
4 Attorneys for Plaintiffs and the Class
5
6
7

FILED

MAR 20 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF OKLAHOMA
10

11	In Re HOME-STAKE PRODUCTION COMPANY	)	MDL Docket No. 153
12	SECURITIES LITIGATION)	
<hr/>			
13	GEORGE A. HELMER and)	
14	WALTER MATTHAU, on behalf of	)	No. 75-C-430
15	themselves and all others)	
16	similarly situated,)	
	Plaintiffs,)	
17	vs.)	
18	THE FIRST NATIONAL BANK AND)	
19	TRUST COMPANY OF TULSA, a)	
20	national banking corporation,)	
	Defendant.)	
<hr/>			

21
22 STIPULATION AND ORDER OF DISMISSAL WITH
23 PREJUDICE AS TO DEFENDANT FIRST NATIONAL BANK
24 AND TRUST COMPANY OF TULSA

25 IT IS HEREBY STIPULATED that defendant First National
26 Bank and Trust Company of Tulsa, be and hereby is dismissed
27 . . .
28 . . .
29 . . .
30 . . .

1 with prejudice, each party to bear its own costs.

2 DATED: March 2, 1978.

3 BROAD, KHOURIE & SCHULZ
4 WILLIAM A. WINEBERG, JR.
5 STEPHEN C. THEOHARIS

6 BY *Stephen C. Theoharis*
7 Stephen C. Theoharis

8 Attorneys for Plaintiffs
9 and the Class

10 DATED: March 16, 1978.

11 CONNER, WINTERS, BALLAINE,
12 BARRY & MCGOWEN
13 JAMES R. RYAN
14 JAMES L. KINCAID
15 GARY H. BAKER
16 GARY C. CLARK

17 BY *151*
18 Gary H. Baker

19 Attorneys for Defendant

20 Pursuant to the above stipulation, IT IS ORDERED that
21 the defendant First National Bank and Trust Company of Tulsa, be
22 and hereby is dismissed with prejudice, each party to bear its
23 own costs.

24 DATED: March 16, 1978.

25 *George H. Boldt*
26 GEORGE H. BOLDT
27 United States District Judge

28
29
30

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

FILED

MAR 16 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JAMES C. BOONE, # 93623,)
)
 Movant,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Respondent.)

Nos. 77-C-434-C
76-CR-113

ORDER

The Court has for consideration Motion to Reconsider pursuant to 28 U.S.C. § 2255 filed pro se by James C. Boone.

On December 30, 1977 this Court entered an Order denying Movant's Motion under 28 U.S.C. § 2255. At the time the Order was entered the Movant was a prisoner at the Regional Treatment Center at Lexington, Oklahoma. From a review of the file, it appears that since the filing of Movant's Motion to Reconsider, Movant has been released from the Regional Treatment Center and is now serving the special parole term of 6 years.

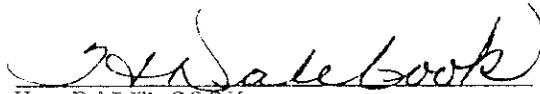
In his Motion to Reconsider, Movant has not stated any grounds for reconsideration other than those set forth in his original motion.

Title 28 U.S.C.A. § 2255 provides in part as follows:

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

Therefore, Movant's Motion to Reconsider is denied.

IT IS SO ORDERED this 16th day of March, 1978.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

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

PAUL A. BISCHOFF,

Plaintiff,

vs.

No. 77-C-343-C

GRUMMAN AMERICAN AVIATION
CORPORATION, GRUMMAN COR-
PORATION, CORWIN MEYER, ALBERT
GLENN, ALAN LEMLEIN, CHARLES
COPPI, NORMAN STEINER, JOSEPH
GAVIN, JR., RICHARD KEMPER, ROY
GARRISON, GEORGE WESTPHAL,
ROBERT HUMMEL, FRANK WISEKAL,
FRED KIDDER, FRED JOHNSON,
ROBERT FREESE, EMMY PICCARD,
ESTATE OF CLAUDE FLANIGAN,
DECEASED,

Defendants.

FILED

MAR 16 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

Plaintiff herein, having filed his Motion to dismiss the
above styled and numbered cause without prejudice as to the
following named defendants:

Joseph Gavin
Robert Hummel
Fred Kidder
Robert Freese,

for the reason that no service has been had upon them and that
they do not appear at this time to be necessary parties to this
action;

IT IS THEREFORE ORDERED that the above styled and num-
bered cause is dismissed without prejudice as to defendants
Joseph Gavin, Robert Hummel, Fred Kidder and Robert Freese.

Dated this 16 day of March, 1978.

H. DALE COOK
U. S. District Judge

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

HESS OIL VIRGIN ISLANDS
CORP., a United States
Virgin Islands corporation;
FEDERAL INSURANCE COMPANY,
a New Jersey corporation;
and INSURANCE COMPANY OF
NORTH AMERICA, a Pennsylvania
corporation,

Plaintiffs,

vs.

UOP, INC., a Delaware
corporation; WORD INDUSTRIES
PIPE FABRICATING INC., an
Oklahoma corporation; and
FISHER CONTROLS COMPANY, a
subsidiary of Monsanto
Corporation, a Delaware
corporation,

Defendants,

vs.

THE LITWIN CORPORATION,
a corporation,

Third Party
Defendant,

vs.

HESS OIL VIRGIN ISLANDS
CORP., a United States
Virgin Islands corporation;
FEDERAL INSURANCE COMPANY,
a New Jersey corporation;
and INSURANCE COMPANY OF
NORTH AMERICA, a Pennsylvania
corporation.

UOP, INC., a Delaware
corporation,

Cross-
Complainant,

vs.

FISHER CONTROLS COMPANY,
a subsidiary of Monsanto
Corporation, a Delaware
corporation, and WORD
INDUSTRIES PIPE FABRICATING,
INC., an Oklahoma Corporation,

Cross-
Defendants.

FILED

MAR 16 1978 *ph*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

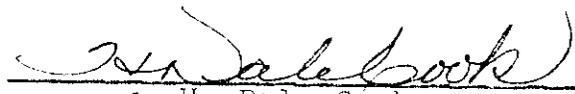
No. 75-C-383-C

ORDER DISMISSING CROSS-COMPLAINT
OF UOP, INC., AGAINST WORD INDUSTRIES PIPE FABRICATING, INC.

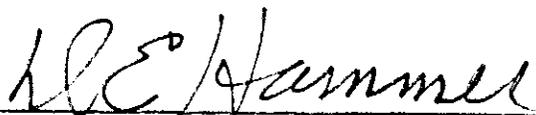
The Defendant Word Industries Pipe Fabricating, Inc., having filed herein its Motion to Dismiss the Cross-Complaint of UOP, Inc., for failure to state a claim upon which relief can be granted, and the Court having had the response of the Cross-Complainant UOP, Inc., and having heard argument of counsel on the 10th day of March, 1978, and the Cross-Complainant UOP, Inc., having filed and served a First Request for Admission of Facts upon Word Industries Pipe Fabricating, Inc., and a First Set of Interrogatories upon said Defendant, and the Court having fully considered the matter, it is

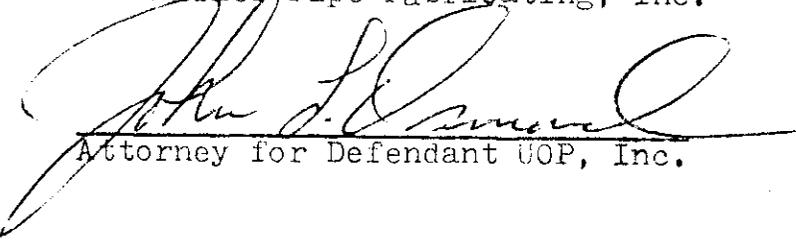
ORDERED that the Cross-Complaint of the Defendant UOP, Inc., against Word Industries Pipe Fabricating, Inc., be and the same is, together with this action, dismissed as to the Defendant Word Industries Pipe Fabricating, Inc., and it is determined and declared by the Court that the Defendant UOP, Inc.,'s First Request for Admission of Fact and First Interrogatories to former Defendant UOP, Inc., are moot and need not be answered by said former Defendant.

Entered this 16th day of March, 1978.


H. Dale Cook
District Judge

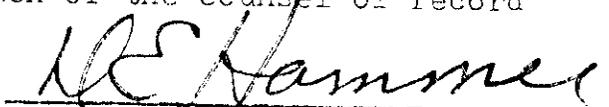
FORM APPROVED:


Attorney for Defendant Word
Industries Pipe Fabricating, Inc.


Attorney for Defendant UOP, Inc.

CERTIFICATE OF SERVICE

I certify that on the 16th day of March, 1978, a true and correct copy of the within and foregoing Order Dismissing Cross-Complaint of UOP, Inc., against Word Industries Pipe Fabricating, Inc., was mailed to each of the counsel of record listed on the following page.


D. E. Hammer

John J. Witous
Attorney at Law
5400 Sears Tower
Chicago, Illinois 60606

Richard Carpenter
Attorney at Law
Denver Building
Tulsa, Oklahoma 74119

John J. Costanzo
Attorney at Law
3345 Wilshire Boulevard
Los Angeles, California 90010

Dan Wagner
Attorney at Law
310 Beacon Building
Tulsa, Oklahoma 74103

John Tucker
Attorney at Law
2900 Fourth National Building
Tulsa, Oklahoma 74119

Douglas E. Friedman
Attorney at Law
One Hess Plaza
Woodbridge, New Jersey 07095

John L. Osmond
Attorney at Law
Suite 410 City Plaza West
5310 East 31st Street
Tulsa, Oklahoma 74135

John Athens
Attorney at Law
First National Tower
Tulsa, Oklahoma 74103

FILED

MAR 16 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

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

BILLY BURNS, IPM, "NEW MAYOR",)	
)	
Plaintiff,)	
	)	78-C-120-B
vs.)	
)	
CITY PIGS, MEDIA, US ACTION AGENCY)	
OUT OF DC,)	
)	
Defendants.)	

ORDER

The Court, ab initio, has for consideration the Original Complaint and Cause of Action of plaintiff, "Billy Burns, IPM, 'New Mayor', legal name of Accountability Burns, filed with leave of Court upon proper Forma Paupers Oath, against City Pigs, Media, US Action Agency out of DC.

This Court, on March 14, 1978, alloed the complaint of plaintiff to be filed without the payment of a filing fee.

In Forester v. California Adult Authority, 510 F.2d 58 (8th Cir. 1975) it was said:

It is well settled, however, that where the requirements of 28 U.S.C. §1915(a) are satisfied on the fact of the documents submitted, the better practice is for a district court to allow the action to be docketed without prepayment of costs and thereafter to dismiss it, if dismissal is appropriate, even though it may have been judicially determined earlier that the complaint did not state a claim upon which relief could be granted. Duhart v. Carlson, 469 F.2d 471, 473 (10th Cir. 1972), cert.denied 410 U.S. 958 (1973)[and other cases cited]."

Process has not been issued in this case. The designation by plaintiff of the defendants is so indefinite that it is impossible to ascertain who he desires to sue. ("City Pigs", "Media", "US Action Agency out of DC")

In Daves v. Scranton, 66 F.R.D. 5 (USDC ED Pa, 1975) it was said:

"Title 28 U.S.C. §1915 empowers any Court of the United States to authorize the commencement of any civil suit without the prepayment of fees and costs if the person seeking the authorization makes affidavit that he is unable to pay such costs. Under subsection (d) of the statute, 'the court may...dismiss the case...if satisfied that the action is frivolous or malicious.' The legal standard of 'frivolous or malicious' is not capable of precise definition for it is a standard intended for administration within the broad discretion of the court and to be applied with reasonable restraint but as a practical response to irresponsible litigation which would otherwise be subsidized and encouraged by the generosity of the in forma pauperis statute. As Judge Aldrich stated in *O'Connell v. Mason*, 132 F.2d 245, 247 (1st Cir. 1904):

"It is quite clear that Congress while intending to extend to poor and meritorious suitors the privilege of having their wrongs redressed without the ordinary burdens of litigation, at the same time intended to safeguard members of the public against an abuse of the privilege by evil-minded persons who might avail themselves of the shield of immunity from costs for the purpose of harassing those with whom they were not in accord, by subjecting them to vexatious and frivolous legal proceedings."

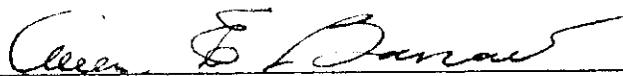
In *Daves v. Scranton*, supra, the following test is set forth:

"The judgment which I must make is whether the complaint states a claim which has a reasonable probability of succeeding on the merits. Cf. *Urbano v. Sondern*, 41 F.R.D. 355 (D.Conn. 1966). In evaluating this complaint I must assess inter alia, the merit of plaintiff's legal theory, the credibility of his allegations, as well as the existence of possible defenses. *Garner v. Raulston*, 390 F.2d 644 (6th Cir. 1968); *Jones v. Bales*, 58 F.R.D. 453, 465 (N.D.Ga.1972). I must also assess the character of the allegations insofar as they indicate a motive on the part of the plaintiff to merely harass or vex the defendants rather than to seek redress for a legitimate legal claim."

The Court finds that this action of plaintiff is frivolous; that the complaint fails to state a cause of action; and that the complaint must therefore be dismissed.

IT IS, THEREFORE, ORDERED that the complaint and cause of action be and the same are dismissed as being frivolous and failing to state a cause of action.

ENTERED this 16th day of March, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

That the plaintiff, Westinghouse Credit Corporation, has redeemed the subject aircraft from the defendant, Custom Air Motive, Inc., by satisfying the claim of said defendant in and to said aircraft. That the plaintiff is thereby subrogated to the benefits of said superior lien for the protection of its interests.

That the defendant, Custom Air Motive, Inc., has assigned, transferred and conveyed the benefits of its possessory lien to plaintiff and disclaimed any right, title, lien or interest in said aircraft.

That the plaintiff is entitled to immediate and permanent possession of the aircraft described as: Piber PA31-350, S/N 31-7405438, N54315, including accessories, as against the defendants, Custom Air Motive, Inc., and Mitchell Flight Center, Inc.

That plaintiff may not remove, transfer or dispose of said aircraft from the jurisdiction of this Court, until further order.

IT IS SO ORDERED.

EAGLETON, NICHOLSON & PATE

BY S. Kern Blaney
Attorneys for Plaintiff

H. Dale Cook
H. DALE COOK

T. Tom Mason
TOM MASON, Attorney for
Custom Air Motive, Inc.,
and Mitchell Flight
Center, Inc.

Eagleton, Nicholson & Pate
325 Northwest Third Street
Post Office Box 657
Oklahoma City, Oklahoma 73101
(405) 235-8445

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

KENNETH R. THOMAS and
LINDA R. THOMAS,

Plaintiff,

vs.

FERRELL INVESTMENT COMPANY,
INC., E. RAY FERRELL, SR.
AND MRS. E. RAY FERRELL,
SR.,

Defendants.

75-C-321-B

FILED

MAR 16 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration the Findings of Fact and Conclusions of Law and Recommendations of the United States Magistrate, duly appointed as Special Master in the above entitled cause after agreement between the parties that the matter should be referred to the Magistrate for non-jury trial pursuant to the provisions of 28 U.S.C. §636(b)(2), Rule 53 of the Federal Rules of Civil Procedure and the provisions of Miscellaneous Order M-128 and Rule 34 of the Rules of the Northern District of Oklahoma.

STATEMENT OF CASE:

This action was commenced by Kenneth R. Thomas and Linda R. Thomas, husband and wife, by and through their attorneys, Goodwin and McAllister, on the 21st day of July, 1975, against Ferrell Investment Company, Inc., a corporation, E. Ray Ferrell, Sr. and Mrs. E. Ray Ferrell, Sr., based upon the allegations contained in the complaint that the defendants, and each of them, were the owners of a rental residence located at 2436 East Fifth Street, Tulsa, Oklahoma; that on or about December 5 and 6, 1974, defendants refused to lease said property to plaintiffs on the ground that the plaintiff, Kenneth R. Thomas, was black; that said plaintiffs were, at said time, ready, willing, and able to rent said property, and that said property

was at said time available for rent; that because of such refusal, plaintiffs sought damages in the amount of \$20,000.00, together with reasonable attorney's fees and injunctive relief regarding such practices in violation of Title 42, Sections 1981, 1982 and 3601 of the U.S. Code. The claim for injunctive relief was abandoned by plaintiffs and no evidence was presented nor contention made regarding same.

The defendants answered denying the individuals were the owners of the property but alleged same was owned by said corporation; they denied they refused to lease said property to the plaintiffs, or either of them, because one of the plaintiffs was black; they asserted that an appointment had been made to show the premises to plaintiffs on a specific date at a specified time; that said property had been promised to others if plaintiff did not desire to rent same; that plaintiffs did not appear to view the premises at the agreed time nor did they inform defendants, or any of them, later that they were in fact the parties with whom prior arrangements had been made to see the rental house; and that because of their failure to appear and inform these defendants of their intended viewing, the premises were in fact rented to a couple which had desired to lease the property earlier on the day in question.

The Special Master found that the individual defendants failed to present evidence upon their cross-complaint which alleged malicious prosecution of a criminal case filed against them in the Municipal Criminal Court of Tulsa, which was dismissed for lack of evidence, but such cross-action was withdrawn during the trial and the Special Master made no findings in regard thereto.

In his report the Special Master stated that during the trial, defendants interposed demurrers to the evidence of plaintiffs and moved for judgment at the close of all testimony presented. The Special Master took such demurrers and motions under advisement until submission of briefs by the respective parties.

At the trial of this case before the Special Master, he heard evidence and testimony adduced. The parties submitted briefs and the Special Master filed his Findings of Fact, Conclusions of Law and Recommendations to the Court.

The plaintiffs have filed their objections and the Court has carefully reviewed the objections and the briefs in support thereof.

The Court has reviewed the file, the transcript of the testimony, exhibits the objections, the Findings of Fact and Conclusions of Law and Recommendations, and finds:

The District Court shall accept the master's findings of fact unless clearly erroneous. Moore's Federal Practice, Volume 5A, ¶52.03[4]

The Special Master found as Facts:

1. That plaintiffs were on December 5 and 6, 1974, husband and wife; that Linda Thomas is white and Kenneth Thomas is black; that on the morning of December 6, 1974, Linda Thomas made an appointment with Mrs. Ferrell to view the premises at 3:15 P.M. on the same day; that both she and her husband were to be together for such viewing; that Mrs. Ferrell would allow plaintiffs first refusal of the involved premises.

2. That on December 6, 1974, said property was owned by Ferrell Investment Company, Inc., a corporation, and the individual defendants were stockholders and officers of said firm, although they were not all of the stockholders nor did they comprise all of the officers thereof.

3. That Mrs. Ferrell, together with an electrician and a cleaning lady arrived at the subject premises on the morning of December 6, 1974, for the purpose of completing the installation of electrical fixtures and making the premises clean for immediate occupancy.

4. That during the day, numerous persons viewed the premises either because of a "For Rent" sign posted in the front yard, or because of an ad which appeared in the Tulsa Daily World on the morning of December 6, 1974.

5. That the Spencers had viewed said property before noon on December 6, 1974, and stated that they wished to rent same; that Mrs. Ferrell agreed that in event the Thomases who were to appear at 3:15 P.M. to see the premises did not contract to rent same, they, the Spencers, could be the tenants.

6. That Mr. and Mrs. Thomas did not appear to view the premises at the agreed time.

7. That while Mrs. Ferrell was in the front room, and with her back to the front door, and when assisting said electrician in the installation of a ceiling lamp or light, Mr. Thomas appeared on the porch outside the front door of said property at approximately 3:45 on December 6, 1976; that he inquired if the house was still for rent and he was advised that same was not. That Mr. Thomas did not disclose his name or that he and his wife were present to see the property pursuant to a previous arrangement. That they were the ones for whom the property was saved and that he and his wife were late for such appointment and were still interested in viewing and possibly renting such house. That Mr. Thomas left said porch, and he and his wife drove from the premises without further discussion with defendants regarding rental of the premises.

8. That the defendants were totally unaware that the man who appeared at the time in question was Mr. Thomas or that Mrs. Thomas had accompanied him to the property for the purpose of viewing and possibly renting the house.

9. That when plaintiffs failed to appear at the appointed time, the agreement to rent the house and ultimate signing of the lease by the Spencers through negotiations carried out by Mrs. Ferrell was proper and pursuant to her promise with the Spencers.

10. That there was not sufficient evidence to sustain the allegations of the Complaint filed by plaintiffs.

The Court finds that the Findings of Fact of the Special Master are not clearly erroneous and will be adopted as the Findings of Fact of this Court.

CONCLUSIONS OF LAW

1. That this Court has jurisdiction over the parties to this action and the subject matter herein.

2. Congress, in enactment of Civil Rights Statutes gives a remedy to parties deprived of constitutional rights and privileges in providing that all citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to lease real property. However, the plaintiffs must prove their entitlement to such relief by a preponderance of the evidence. 42 U.S.C. §1982; Hamilton v. Miller, 477 F.2d 908 (10th Cir. 1973); Haythe v. Decker Realty Co., 468 F.2d 336 (7th Cir. 1972).

3. Plaintiffs failed to prove the material allegations of their Complaint by the preponderance of the evidence.

4. Judgment should be awarded in favor of defendants and each of them, and against the plaintiffs, and each of them, upon the Complaint filed herein.

5. That the defendants' cross-complaint should be dismissed with prejudice.

6. That defendants' application to assess attorneys fees against the plaintiff be and the same should be denied.

7. That plaintiffs pay the costs of this action.

The Court finds that the Findings of Fact and Conclusions of Law of the Special Master should be and are adopted and affirmed.

ENTERED this 16th day of March, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

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

TERRY ENGENE McDONALD,
individually, and MILDRED
McDONALD, individually,

Plaintiffs,

vs.

SURETY MANAGERS, INC., a
California Corporation, d/b/a
IMPERIAL INSURANCE COMPANY:
FRED HOPKINS and RALPH JOHNSON,
d/b/a DEES BIAL BOND COMPANY:
WILLIAM DEES, DEWEY WARD, LAURA
MAE TURNER, GEORGE TRENT SPAHR
and FREDDIE MARIE QUICK,

Defendants.

FILED

MAR 16 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

No. 77-C-305-B

ORDER

NOW on this the 16th day of March,

1978, it appearing that the Plaintiffs and the Defendant
William James Dees have entered into a stipulation whereby
the Defendant Dees is to be dismissed from the above styled
and numbered cause with~~out~~ prejudice,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by
the Court that the Defendant William James Dees be and he is
hereby dismissed with~~out~~ prejudice from the above styled and
numbered action.



JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

I hereby certify that on the ___ day of _____,
1978, I deposited into the United States Mail, with proper
postage thereon, a true and exact copy of the above and fore-
going Order to Mr. James R. Elder, Attorney for Plaintiffs,
201 West 5th, Suite 500, Tulsa, Oklahoma 74103, and Mr. Martin
Tisdal, Attorney for Defendant Dees, 320 South Boston, Suite
920, Tulsa, Oklahoma 74103.

DISTRICT COURT CLERK

MOREHEAD, SAVAGE, O'DONNELL, McNULTY & CLEVERDON
ATTORNEYS & COUNSELORS
Suite 500, Two Hundred One Office Building
Tulsa, Oklahoma 74103
918 - 5844716

FILED

MAR 16 1978

Jack G. Silver, Clerk
U. S. DISTRICT COURT

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

CITIZENS MORTGAGE CORPORATION,)	
a Delaware Corporation,)	
)	
Plaintiff,)	
)	
vs.	)	75-C-175-B
)	
THE FOURTH NATIONAL BANK OF TULSA,)	
a National Banking Association;)	
T.I.G. DEVELOPMENT, LTD., a)	
North Carolina Limited Partnership;)	
and RAYMOND W. GRAHAM, District)	
Judge, Tulsa County, Oklahoma,)	
)	
Defendants.)	

ORDER

The Court has for consideration the following:

1. Plaintiff's Combined Motions for Judgment on the Pleadings and Motion to Dismiss directed at the Defendant, T.I.G.'s Second, Third, Fourth and Fifth Claims for Relief in its Counterclaim; to dismiss Defendant, T.I.G.'s Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth Defenses in its Answer; and for Judgment on the pleadings against the defendant, Fourth National Bank of Tulsa;
2. The briefs filed by the Parties;
3. The Findings and Recommendations of the Magistrate, made after oral argument;
4. T.I.G. Development, Ltd.'s Petition to Set Aside Findings and Recommendations of the Magistrate, with briefs in support and opposition thereto.

The Court has carefully perused the entire file, and, being fully advised in the premises, finds:

The Court finds that the Plaintiff's Motions, and each of them, should be sustained.

This is a diversity action brought pursuant to Title 28 U.S.C. §1332 by Citizen's Mortgage Corporation, a Delaware corporation, Plaintiff (hereinafter called "Citizen's"), against the Fourth National Bank of Tulsa, a National Banking Association with its banking house

located in the City of Tulsa, State of Oklahoma (hereinafter called "Bank"), and T.I.G. Development, Ltd., a North Carolina Limited Partnership, doing business and amenable to process in the State of Oklahoma (hereinafter called "T.I.G.") and Raymond W. Graham, District Judge in Tulsa County, Oklahoma (hereinafter called "Judge Graham"). The defendant, Judge Graham, is made a party to this action solely in his official capacity as a Judge for the purpose of enjoining continued prosecution of a certain lawsuit in Tulsa County District Court, No. C-75-1050, styled T.I.G. Development, Ltd. v. Fourth National Bank of Tulsa, in which the Tulsa County Court issued an ex parte restraining order restraining the payment on a letter of credit issued by the defendant, Fourth National Bank to the plaintiff, on which this action was instituted.

On February 18, 1975, the defendant, Fourth National Bank issued and delivered to plaintiff, its "Irrevocable Commercial Letter of Credit", up to an amount not exceeding \$25,000.00 by order of the Defendant, T.I.G.. On April 18, 1975, the plaintiff presented and delivered to the defendant Bank a sight-draft in the amount of \$24,387.50 drawn against said letter of credit. On April 21, 1975, the defendant, T.I.G. filed a lawsuit in the aforementioned Tulsa County District Court against the Fourth National Bank securing a temporary restraining order commanding the defendant Bank not to honor the draft. In this action, the plaintiff seeks judgment against the defendant Bank under said letter of credit in the amount of the draft in the sum of \$24,387.50. On May 9, 1975, the Court in the instant case, issued its restraining order directed to the defendant, T.I.G., the defendant Bank and the defendant, Judge Graham, restraining each of them from obeying the temporary restraining order issued against the defendant Bank in the Tulsa County District Court.

In its answer, the defendant Bank, set up as its only defense the issuance of the temporary restraining order issued out of the Tulsa County District Court case. The Defendant, T.I.G., set up in its answer and counterclaim, certain hereinafter enumerated defenses and claims for relief to which the plaintiff's combined Motions were directed.

1. DEFENDANT, FOURTH NATIONAL BANK'S ANSWER.

The only defense raised by the Bank in its answer was the issuance of the restraining order by the Tulsa County District Court which ordered it not to honor the draft drawn on the letter of credit. Under 12 O.S. 1971 §236, Plaintiff is an indispensable party to any action which would materially affect its rights under the defendant Bank's letter of credit issued to the plaintiff. The plaintiff was not served and is not before the Tulsa County District Court. For that reason the temporary restraining order issued against the defendant, Judge Graham, should be made permanent as that Court was without the jurisdiction over the person of the plaintiff. Therefore, the Court finds that the plaintiff's Motion for Judgment on the Pleadings against the defendant Bank should be sustained and that plaintiff should be granted judgment against the defendant Bank in the amount of \$24,387.50, plus interest as provided by law.

2. DEFENDANT, T.I.G.'S, SECOND, THIRD, FOURTH, FIFTH, SEVENTH, EIGHTH AND NINTH DEFENSES IN ITS ANSWER.

(a) Second Defense. For its Second Defense, T.I.G. pleads that Citizen's complaint fails to state a cause of action against T.I.G. Inasmuch as the defendant, T.I.G., was a party Plaintiff in the Tulsa County District Court action which sought and secured relief denying the Plaintiff its' property rights, i.e., preventing it from realizing upon and collecting the proceeds under the letter of credit, it requires no citation of authority to finds that the defendant's, T.I.G.'s, Second Defense should be stricken and denied.

(b) Third, Fourth and Eighth Defenses. Each of these defenses asserted by the defendant, T.I.G., are founded upon T.I.G.'s request that the Court interpret the language of the letter of credit as having incorporated by reference all of the conditions and provisions of the "Application/Commitment for Mortgage Loan" of February 20, 1975, and that by virtue of the allegation by the defendant, T.I.G., that this commitment contract was breached, such breach constituting a defense to an action on the letter of credit by reason of the fact that performance by Citizen's of all of its obligations under the commitment

contract were made conditions precedent to collecting on the letter of credit. The letter of credit is subject to interpretation and construction under the applicable Oklahoma Statutes, 15 O.S.1971, §154 et seq.; which, inter alia, provide that its meaning and the intention of the parties is to be determined from the writing. Defendant, T.I.G., would have the Court interpret the letter of credit as incorporating conditions precedent to be performed before there is any obligation to honor it. This is not the interpretation that the Court places upon the letter of credit. It seems clear on its face that the only conditions precedent are those which are explicitly stated on the face of the letter of credit and with which the plaintiff has complied. The letter of credit forms a clear and unambiguous obligation on the part of the defendant Bank to reimburse for any monies validly expended in investigating the proposed loan to the defendant, T.I.G. The letter of credit itself describes the procedure for disbursement and states that it shall be drawn upon "in accordance with the provisions of paragraphs 2 and 11" of the Application/Commitment Contract. Paragraphs 2 and 11 explicitly provide that plaintiff may draw on the letter of credit to reimburse itself for "all expenses and fees paid by CMC, directly related to the underwriting, commitment and/or closing of this loan", even if the loan does not close. The letter of credit forms an unambiguous contract independent of the commitment contract. The sole condition precedent in the documents to collection on the letter of credit was that the plaintiff present valid expense vouchers with a correct draft to the Bank when drawing upon it. This was done. Had the parties to the letter of credit intended that all of the provisions of the commitment be incorporated, they would not have referenced paragraphs 2 and 11 only. T.I.G.'s Third, Fourth and Eighth Defenses should be stricken and dismissed.

(c) Fifth Defense. In support of its Fifth Defense, T.I.G. argues that the sight-draft presented by plaintiff did not state as required by letter of credit that it is "drawn under letter of credit of the Fourth National Bank of Tulsa, No. 843, dated February 18,

1975". It does not assert that any of the requisite information was not given to the Bank. This defense is based purely on the fact that the precise wording of the draft did not mechanically and technically conform to the precise language called for in the letter of credit. It is a fact that the precise language which was used in the draft was not specified in the letter of credit. However, as a matter of law, it was not required to do so, as substantial compliance with specifications in the letter of credit are all that is required, see *The Bank of America v. Liberty National Bank*, 116 F.Supp. 323 (W.D.Okla. 1953), where the Court stated that it frowns upon mere technical defenses where in essence the contractual understanding between the parties has been met. The plaintiff's Motion with respect to defendant's Fifth Defense should be sustained and it should be stricken.

(d) Seventh Defense. Defendant, T.I.G., asserts as a grounds for defense to an action in the contract, that the failure of the plaintiff to close and fund a loan under the comitment contract resulted from its negligence. It is well-settled that a breach of duty existing under the terms of the contract is not a tort. There could be no question but what the cause of action underlying all of the issues raised by the parties to this lawsuit forms a basis of action in contract and for that reason there is no defense in tort. *Pitts. v. Southwestern Sales Croporation*, 65 P.2d 184 (Okla. 1936); *State of Missouri, ex rel, Cummins Missouri Diesel Sales Corporation v. Eversol*, 332 SW2d 53 (Mo.App.1960); *Allison v. American Airlines*, 112 F.Supp. 37 (N.D.Okla.1953); *Renfro v. Preferred Risk Mutual Insurance Company*, 296 F.Supp. 1137 (N.D.Okla. 1969); *Ledford v. Travelers Indemnity Company*, 318 F.Supp. 1333 (W.D.Okla. 1970). This defense should be stricken and dismissed.

(e) Ninth Defense. The defendant, T.I.G.'s, Ninth Defense is a prayer for attorneys' fees. It is not a defense. Moreover,

it is well-settled that the Federal Courts follow state law which reflects a substantial state policy to grant or deny attorneys' fees. *United States Pacific Insurance Company v. Northwestern National Insurance Company*, 185 F.2d 443 (10th Cir. 1950). Oklahoma law presents an uninterrupted long line of cases holding that the right to recover attorneys' fees does not exist at common law and is not allowable in the absence of the statute or some other agreement expressly authorizing attorneys' fees in addition to the ordinary statutory costs. *Keel v. Covey*, 241 P.2d 954 (Okl. 1952). The defendant does not state that the action is one in which any statute provides for attorneys' fees but alleges that it is entitled to it on "general equitable principal." As such, plaintiff's motion with respect to this defense should be granted and its Ninth Defense should be stricken and dismissed.

3. DEFENDANT, T.I.G., SECOND, THIRD, FOURTH AND FIFTH CLAIMS FOR RELIEF IN ITS COUNTERCLAIM.

(a) Second Claim for Relief. The defendant's Second Claim for Relief in its Counterclaim is based on the theory that under Section 5-111 of the Oklahoma Uniform Commercial Code, plaintiff warranted that all necessary conditions of the letter of credit had been complied with, and they had not. The theory of this claim for relief bottomed on T.I.G.'s allegation that the plaintiff had breached its obligation to close and fund the loan and that by virtue of its further hypothesis (embodied in its Third, Fourth, Seventh and Eighth Defenses referred to above) that the commitment application was incorporated by reference in the letter of credit in its entirety, the obligation to close was a condition. Having previously found that the letter of credit did not incorporate the entire commitment contract, but only the specific provisions which the plaintiff has met, the Court finds that the motion directed at Defendant's Second Claim for Relief should be sustained and it should be dismissed.

(b) Defendant's Third, Fourth and Fifth Claims for Relief.

These claims for relief are based upon the assumption that the commitment contract was a security under the Securities Act of 1933 and the Securities Exchange Act of 1934. The applicable and persuasive authority on this point indicates that it was not. Under the facts, the parties did not intend that it was. The document does not meet the tests laid out, *Zabriskie v. Lewis*, 507 F.2d 546 (10th Cir. 1974) and *Great Western Bank v. Cotz*, 532 F.2d 1252 (9th Cir. 1976). As was stated in *S.E.C. v. Howe Co.*, 328 U.S. 293 (1946),

"An investment contract for purpose of the Securities Act means a contract, transaction or scheme whereby a person invests his money in common enterprise and is led to expect profits solely from the efforts of the promoter or third party ***." (p. 298).

The contract before the Court in this case simply embodied a large commercial loan transaction. The letter of credit was intended by the parties, not as payment for a promise to loan, but as payment for the plaintiff's services and expenses in investigating the proposed loan. The letter of credit was issued before the commitment contract was accepted. There was no question of buying or selling anything. No risk capital was advanced. No repayment of the letter of credit was contemplated. There was but a single demand note issued to a single payee. T.I.G. gained no rights under the commitment other than to have Citizen's to go the expense of investigating the possibility of the proposed loan. The form and circumstances of the issuances of the commitment contract are sufficient evidence of the parties' intent to treat the transaction as an ordinary commercial loan. The recent case of *McGovern Plaza Joint Venture, et al. v. First of Denver Mortgage Investors, et al.*, (10th Cir. October 4, 1977) _____ F.2d _____, specifically held that two similar commitments, one for a construction loan and one for a permanent loan for which the plaintiff paid two large fees, were not securities under the Securities Act of 1933 or the Securities Exchange Act of 1934, holding that there is nothing to indicate that the transaction was anything other than a typical situation

where a real estate developer gives into the open market to secure financing of his venture. For this reason, the plaintiff's Motion with respect to defendant's Third, Fourth and Fifth Claims for Relief should be sustained and they should be dismissed.

IT IS, THEREFORE, ORDERED that plaintiff's Motions for Judgment on the Pleadings as to the Defendant's, T.I.G. Development, Ltd.'s, Second, Third, Fourth and Fifth Counterclaims be sustained and they are hereby dismissed.

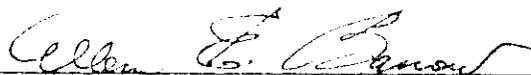
IT IS FURTHER ORDERED that the Plaintiff's Motions for Judgment on the Pleadings against the defendant, Fourth National Bank of Tulsa, be sustained and that judgment will be entered, by separate document, in favor of plaintiff in the sum of \$24,387.50, plus interest and costs.

IT IS FURTHER ORDERED that the plaintiff's Motions to Dismiss and Strike Defendant's, T.I.G. Development, Ltd.'s, Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth Defenses be sustained.

IT IS FURTHER ORDERED that the Temporary Restraining Order heretofore entered be made permanent.

IT IS FURTHER ORDERED that T.I.G. Development, Ltd.'s Petition to Set Aside Findings and Recommendations of Magistrate be and the same is hereby overruled.

ENTERED this 16th day of March, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

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

FILED

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Jack C. Silver, Clerk
U. S. DISTRICT COURT

SIKES CORPORATION,)
a Florida Corporation,)
)
Plaintiff,)
)
v.)
)
TEXAS WESTERN FINANCIAL CORPORATION,)
an Illinois Corporation, and)
BRISTOW CARPETS, INCORPORATED, an)
Oklahoma Corporation,)
)
Defendants.)

No. 77-C-200(B) ✓

DEFICIENCY JUDGMENT

On this 14th day of March, 1978 came on for hearing the Motion filed January 9, 1978 by Plaintiff for a deficiency judgment herein, which Motion has been duly served upon Defendant Bristow Carpets, Incorporated.

Upon consideration of said Motion and the evidence produced in open court, the Court finds that by foreclosure of its security interests Plaintiff has acquired cash proceeds of \$401,052.27 and accounts receivable of Bristow Carpets, Incorporated having a fair market value of \$337,198.18, the total value of all such assets recovered by Plaintiff being \$738,250.45. The Court further finds that the aggregate principal amount of Plaintiff's judgment herein against Bristow Carpets, Incorporated was \$7,048,100.00, plus pre-judgment interest of \$313,978.35 and accruing post-judgment interest, and that Plaintiff is entitled to a deficiency judgment against Defendant Bristow Carpets, Incorporated in the principal amount of \$6,623,827.90, together with post-judgment interest accrued to date in the amount of \$254,065.00 and interest continuing to accrue on said deficiency balance at the rate of 10% per annum.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff be, and it hereby is, granted a deficiency judgment against Defendant Bristow Carpets, Incorporated in the amount of \$6,623,827.90 plus interest accrued to date of \$254,065.00 and accruing interest on said deficiency balance at 10% per annum until paid.



UNITED STATES DISTRICT COURT JUDGE

24, 1977, within the Right-to-Sue period.

Defendant timely moved to dismiss the action as time-barred, as well as to strike certain allegations in the Complaint.

The bases advanced by the Defendant for the claim that the instant action is time-barred are that state statutes of limitations apply to actions under Title VII; that the proper limitations apply to actions under Title VII; that the proper state statute of limitations to be applied is the two-year tort limitation period contained in 12 O.S. §95(3); and that such two-year statute of limitations was not tolled by the pendency of the EEOC charge of Plaintiff. Plaintiff disputes the applicability of any state statute of limitations. He also argues that, assuming some state limitation period applies, the proper limitation is either the three-year period in 12 O.S. §95(2) or the five-year period in 12 O.S. §95(3). Finally, Plaintiff argues that any state limitation period was tolled during the pendency of his charge before the EEOC, and that his Complaint is, therefore, timely.

The Court finds, in agreement with the District Court in *Clayton v. McDonnell Douglas Corp.*, 419 F.Supp. 28 12 EPD ¶11,165 (C.D. Cal. 1976), that state statutes of limitations apply to private actions brought under Title VII. An analysis of that statute reveals that there is no set time limit for the institution of an action in federal district court under the statute. Therefore, absent conflict with compelling federal interests, the most closely analogous state limitation period should apply. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454; *Holmberg v. Armbrecht*, 327 U.S. 392; *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696.

Plaintiff argues that precisely such compelling federal interests apply here, and urges that the decision by the Supreme Court in *Occidental Life Insurance Co. v. EEOC*, _____ U.S. _____, 97 S.Ct. 2447 (1977) mandates the conclusion that there are no time

limitations on an individual Title VII action, other than the filing of a timely EEOC charge and the institution of suit with the 90-Day Right-to-Sue period. In *Occidental*, the Supreme Court held that state statute of limitations were not applicable to suits brought by the EEOC under Title VII, because the EEOC is powerless to bring suit until after conciliation measures are exhausted, and because the EEOC has a significant backlog of cases which would make exhaustive conciliation and suit within a relatively short time period virtually impossible. From these two factors, and especially because forcing the EEOC into premature suit would conflict with its conciliation responsibilities, the Court found that a Congressional intent to place no limitation on EEOC suits could be inferred.

However, simply because there is no time limitation on EEOC suits does not necessarily mean that there are no time limitations on individual actions under Title VII. Unlike the EEOC, a private plaintiff is not forced to postpone the institution of suit until all EEOC administrative efforts have been exhausted. Rather, a private party remains free to request a Right-to-Sue letter and to institute his or her suit in federal court, once the EEOC has been accorded an initial 180-day period in which to act on his or her charge.

Thus, under Title VII, a private party has two avenues for possible relief. Plaintiff had the option to leave his charge with the EEOC, and to rely upon the EEOC to investigate and possibly litigate on his behalf. However, there was no requirement that he do so, and he remained free to institute his own action at any time after his charge had been filed with the EEOC for the 180-day period.

Therefore, it is clear that Congress did not consider full resort to the EEOC administrative action to be essential to a private Title VII action. Rather, full resort to such administrative remedies is an alternative course of action which a Title VII plaintiff may 'elect' to pursue or to by-pass. *Occidental*, supra, 97 S.Ct. 2452. Because resort to full EEOC administrative efforts is

wholly optional and voluntary for a private individual, whereas it is mandatory for the EEOC, the Court concludes that there is no compelling federal policy comparable to that in *Occidental* to be preserved by refusal to apply state statutes of limitations to private Title VII actions.

This conclusion is buttressed by decisions of the Supreme Court as to the lack of availability of tolling of statutes of limitations during pursuit of permissive administrative remedies. It is a well-settled principle of law that, where one has an unfettered right to pursue a certain avenue of relief, but does not, the courts will decline to toll the running of a statute of limitations. *Soriano v. U.S.*, 352 U.S. 270 (1957); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Electrical Workers v. Robbins & Myer, Inc.*, _____ U.S. _____, 97 S.Ct. 441 (1976). Congress was certainly aware of these principles when it made full resort to EEOC administrative processes optional. Absent some clear evidence of contrary intent from the Congress, the Court concludes that Congress intended that state statutes of limitations apply to private Title VII actions and that no tolling of such limitation periods should occur during the time that a private plaintiff is pursuing optional EEOC administrative remedies.

Plaintiff argues that the proper statute of limitations is not the two-year tort limitation period of 12 O.S. §95(3). Rather, he contends that either the three-year period set forth in 12 O.S. §95(2) for unwritten contracts or for liabilities created by statute should apply. In the alternative, he claims that the five-year limitation period of 12 O.S. §95(3) for actions not otherwise provided for should be applied.

The Court concludes that the two-year tort statute of limitations is applicable to actions for racial discrimination in employment. There is a split among the Judges of this District Court as to whether the two-year tort statute or the three-year contract statute should apply. This Court held in *Allen v. St. John's Hospital*

76-C-11-B (unreported decision) that the two-year statute applied. Judge Cook, on the other hand, held that the three-year contract statute was applicable, in the case of *Wright v. St. John's Hospital*, 414 F.Supp. 1202, (N.J.D.Okla. 1976). However, Judge Thompson of the Western District of Oklahoma has joined this Court in concluding that the two-year tort statute applies, in the case of *Person v. St. Louis-San Francisco Ry. Co.*, _____ F.Supp. _____, 14 EPD ¶7713 (W.D.Okla. 1976).

The decision by Judge Cook in the *Wright* case, *supra*, was premised primarily upon dicta by the Fifth Circuit in the case of *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971), as to the applicability of a contract limitation to employment discrimination under 42 U.S.C. §1981. Thus, the rationale of the decision by Judge Cook is substantially undermined by the later Fifth Circuit decision in *Ingram v. Steven Robert Corp.*, 547 F.2d 1260 (5th Cir. 1977), holding that an action for racial discrimination in employment is essentially a tort action to which a tort statute of limitations is applicable.

The Court finds the reasoning of *Ingram*, *supra*, to be persuasive, and finds that such be followed by this Court. Further support for the application of the two-year tort limitation is found in *Curtis v. Loether*, 415 U.S. 189, at 195, wherein an action for racial discrimination in housing under Title VIII was described as being essentially tortious in character, and comparable to an action for defamation or intentional infliction of mental distress.

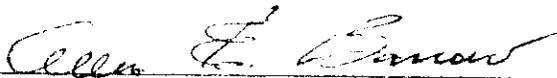
In addition, the Tenth Circuit has held that actions brought pursuant to 42 U.S.C. §1983 are governed by the two-year tort limitation period. *Crosswhite v. Brown*, 424 F.2d 495 (10th Cir. 1970). Actions under 42 U.S.C. §1983 are closely analogous to actions under 42 U.S.C. §1981 and 42 U.S.C. §2000e, as was recognized by Judge Thompson in the *Person* case, *supra*. The Court finds that it chooses to follow the holding of *Person* and of *Allen v. St. John's Hospital*, and hold that the two-year statute of limitations applies to actions under Title VII (42 U.S.C. §2000e).

Plaintiff's action was not commenced until some two years and six months after his cause of action accrued. Therefore, his action is barred by the two-year limitation period set forth in 12 O.S. §95(3).

IT IS, THEREFORE, ORDERED that the objections to Findings and Recommendations of the Magistrate are overruled.

IT IS FURTHER ORDERED that the Defendant's Motion to Dismiss be and the same is hereby sustained and this cause of action and complaint are hereby dismissed.

ENTERED this 14th day of March, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

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

ALVIN MAYBERRY,
Plaintiff,

vs.

AKRON RUBBER MACHINERY
CORPORATION, a corporation;
UNIROYAL, INC., a corporation;
and USM CORPORATION, a
corporation,

Defendants.

76-C-99-B

F I L E D

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Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration:

1. Motion for Summary Judgment filed by the defendant, Akron Rubber Machinery Corporation;
2. Motion for Summary Judgment filed by the defendant, Uniroyal, Inc;
3. Motion for Summary Judgment filed by the defendant, USM Corporation;
4. The Findings and Recommendations of the Magistrate;
5. The Petition of the defendant, Uniroyal, Inc., to Set Aside Findings and Recommendations of the Magistrate;
6. All of the briefs, depositions, interrogatories filed in this case.

The Court having carefully perused the entire file, and, being fully advised in the premises, finds:

That the Motion for Summary Judgment of the defendant, USM, should be sustained and that the Motions for Summary Judgment of the defendants, Akron and Uniroyal should be overruled for the following reasons:

This is an action for damages for alleged personal injuries resulting from an industrial accident. Plaintiff claims that he was an employee of Crest, Inc., a rubber component manufacturer; that on the 12th day of March, 1974, he was operating a rubber mixing mill

when his right hand became caught between two large rollers which were component parts of the mixing mill, causing his hand to be crushed and disfigured and causing severe burns to his abdomen; and that the height of the mill rollers prevented him from activating a safety cable located at the top of the mill once the plaintiff's had become entangled in the machinery.

Plaintiff's action is brought under theories of strict liability in tort charging that the defendants participated in the unsafe design and manufacture of the mixing mill which resulted in a piece of machinery which was unreasonably dangerous to plaintiff.

Specifically, defendant USM, is charged by the plaintiff with unsafe design and manufacture of the mixing mill and its failure to provide adequate and available safety devices and emergency control so that operation of the mill could be automatically stopped once an emergency comes into existence. Uniroyal is charged with the manufacture and distribution of an unreasonably dangerous product in its failure to provide adequate and available safety devices and emergency control mechanisms and with failure to provide warning of dangers and proper instructions regarding safe use of its product. Defendant Akron is charged with the manufacture and distribution of unsafe frames and castings in that the frame which held and positioned the rollers of the mill, required that the rollers be positioned at a height so great as to bring the operator's hands in close proximity to the interface of the roller mechanism, during its operation.

Each defendant has answered by way of general denial. Defendant Akron also denies specifically that plaintiff's injuries were caused by unsafe design or distribution of an unreasonably dangerous product and affirmatively pleads assumption of the risk. Defendant Uniroyal also specifically denies having manufactured and sold a dangerously defective product.

The Magistrate heard oral argument on the Motions for Summary Judgment.

The Court has before it the pleadings, answers to interrogatories submitted by the parties and the depositions of plaintiff and of Robert Gray, an employee of Crest, Inc. The completed discovery

tends to show that while USM and its predecessor, the Farrell Corporation, are responsible for the general design upon which the mixing mill in question was constructed, that USM has no direct connection with the design or assembly of the specific product in question. The testimony by deposition of Robert Gray reveals that as an employee of Crest, Inc. he undertook for his employer the assembly of the mixing mill; that pursuant thereto, a portion of the frame which was eventually installed and which consisted of two stanchions, was purchased by Crest, Inc. from defendant, Akron; that the cylindrical, steel rollers which were assembled into the mill, were purchased from the defendant, Uniroyal; that the component parts purchased from defendants Akron and Uniroyal were installed into a mixing mill which was generally patterned after the design developed by defendant USM and its predecessor, but that USM did not furnish any material or advice to Mr. Gray during assembly of same. The discovery also tends to show that neither Akron nor Uniroyal provided any instructions for use or warnings of dangers when the respective components were sold to Crest, Inc.; that in each instance, the product was merely taken out of stock and shipped; that Mr. Gray then set about to engineer and assemble the mixing mill in question; and that the dimensions, electrical circuitry and safety device were the responsibility of Crest, Inc., the assembler.

A manufacturer who distributes an unreasonably dangerous product is subject to strict liability in tort for damages resulting in injuries by reason of the unreasonably dangerous design or condition of the product. *Kirkland v. General Motors Corporation*, 521 P.2d 1353 (1974). Here the plaintiff seeks to impose liability on defendants for furnishing component parts which, when assembled, were of such a height to require that the operator places his hands in close proximity to the interface of the steel rollers. In addition, plaintiff contends that the furnished components were unreasonably dangerous by reason of the defendant's failure to provide adequate and available safety devices or to furnish warning of the dangers attendant to its products. This theory is grounded in the superior knowledge

of the defendants regarding the intended use of their products, and the dangers attendant thereto. Restatement of the Law of Torts 2d §204A Comment (h).

Defendants contend that the component parts as furnished were not unreasonably dangerous; that they were not responsible for the ultimate design of the mixing mill, and that they did not participate in the design or manufacture of same and cannot be held responsible for the damages to plaintiff, which they urge must be the responsibility of the assembler, Crest, Inc. It appears that a fact question, precluding summary judgment, has been sufficiently presented by plaintiff with regard to the knowledge of defendants Akron and Uniroyal as to intended use of the components which they furnished to Crest, Inc., and whether, under the circumstances, there arose a foreseeability of harm which would render the products furnished unreasonably dangerous in the absence of a warning as to the dangers attendant to their use. As respects the defendant, USM, the completed discovery established that USM and its predecessors had no connection with the assembly of the mixing mill in question, either by furnishing component parts or information as to design or manufacture of the mill.

Although the evidence as reflected by the completed discovery may at this time indicate that the defendants, Uniroyal and Akron, would prevail at the trial on the merits, in view of the showing of a genuine issue as to material fact in this matter, the motions of these defendants should be denied. *Butler v. Bensinger*, 377 F.Supp. 970; *Prince v. Pittson Company*, 63 FRD 28.

Further, as noted by the Court in *Pierce v. Ford Motor Company*, 190 F.2d 910 (4th Cir. 1971), even where the Judge is of the opinion that he must direct a verdict for one party or the other on the issues, he should follow the better practice of hearing the evidence and direct a verdict rather than to try the case in advance on a motion for summary judgment. All considerations of judicial economy set aside, summary judgment is improper where there remains the slightest doubt as to the facts, and the Court should exercise great care in proceeding to disposition of cases on summary judgment

in any situation other than where it plainly appears that there is no genuine issue as to any material fact and that the movant is entitled to judgment. Dohler Metal Furniture Co. v. U.S., 149 F.2d 130 (2nd Cir., 1945); Zig Zag Spring Co. v. Comfort Springs Corp., 89 F.Supp. 410 (C.D.N.J. 1950).

IT IS THEREFORE ORDERED that the Petition of the defendant, Uniroyal, Inc., to Set Aside Findings and Recommendations of the Magistrate be and the same is hereby overruled.

IT IS FURTHER ORDERED that the Motion for Summary Judgment of the defendant, USM Corporation be and the same is hereby sustained.

IT IS FURTHER ORDERED that the Motions for Summary Judgment of the defendant, Akron Rubber Corporation and Uniroyal, Inc. be and they are hereby overruled.

ENTERED this 14th day of March, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

Practice, Volume 6A, ¶57.23. Title 28 U.S.C. §1343 is the civil rights and elective franchise jurisdictional statute. Title 42 U.S.C.A. §1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Plaintiff's complaint may be bifurcated into a complaint against the police officer and a complaint against Dave Faulkner, Sheriff.

The crux of plaintiff's complaint against the defendant, Dave Faulkner, Sheriff, is:

"I was suppose to get medication three times a day, but only received it once or twice or no time at all." (Complaint, page 1)

Page 2 of the complaint reflects:

"Upon transferred to Tulsa Co. Jail I was perscribed medication three times a day, but only received it once or twice or no time at all. And by not receiving this medication my back is still hurting me.

"Personal injuries and medication I (was) taking and the medical records here at Tulsa Co. Jail."

and on page 3:

"Sheriff Dave Faulkner neglected in his duty to see that I received my medication three times a day. And as of today 10-24-77 my medication has been cut off for no reason at all."

"The Medical Records should show that I was taking muscles relaxers and pain pills."

and on page 4:

"I ask the Doctor here at Tulsa Co. Jail to send me to the Hospital and he sented me to Ostapata Hospital and they took x-rays which showed nothing which I never saw the x-rays. And I feel I wasn't given complete consideration for my back paind. And the medication I (was) receiving did not stop the pains."

The affidavits submitted by the defendant, Faulkner, reveal that a Doctor is available, as well as qualified paramedic for treatment of prisoners in the Tulsa County Jail. Dr. Claude McKewon's affidavits reflects that he saw plaintiff on numerous occasions; prescribed Parafon Forte (muscle relaxant) to be dispensed to plaintiff three times a day for muscle spasms but did not continue

Darvocett N (analgesic) previously given. Plaintiff was sent for x-rays and a urinalysis. Thereafter an SMA-14 examination was administered and reported (this was a battery of 14 tests, all of which showed normal tolerances. The Doctor states that during the periods mentioned by the plaintiff that he authorized Parafon Forte, not because his symptoms and physical status required it, but rather to accommodate his complaints and the possibility that he could be mistaken. He states that on October 14, 1977, plaintiff was sent again for x-rays of the spine and later for a third set. All three were returned negative and within normal limits. The Doctor could find no physical reason or explanation for plaintiff's complaint and advised him that minor exercise would be advisable, but he declined the request. The Doctor states that after finding nothing physically wrong with the plaintiff, that to continue to give medication after those three weeks, would potentially give rise to similar non-meritorious complaints from other inmates to received controlled drugs.

The affidavit of Frank Speer, a deputy sheriff and paramedic for the Tulsa County Jail, reflects that he acts under the medical supervision and direction of Dr. McKewon. His affidavit is basically similar to that of the Doctor. He also states that upon noticing that the plaintiff was wearing high "stacked heels" he advised him to refrain from wearing them as this could be a possible source of or aggravation of his condition; that plaintiff declined to do so and was still wearing them approximately one month thereafter.

A letter from Dr. W. R. Slater to Dr. McKewon, dated December 12, 1977, reflects that he examined the plaintiff for his complaints. He states, in part:

"It was noted on the exam that he would not stand in an erect position and stood flexed at approximately 30°. In attempting to ambulate he was reluctant to ambulate because of apparent pain. In a sitting position, a detailed exam of the lower extremities failed to reveal any evidence of atrophy, sensory deficit and the deep tendon reflexes were all intact. It took him approximately five minutes to lay flat and when doing so we performed the special tests such as Gensalens, Laseques, Fabre-Patricks and all produced back pain.

"Roentgen examination - review of x-rays failed to reveal any evidence of fracture. The disc spaces are preserved and there is good bone texture.

"Impression - Acute anxiety reaction.

"Comment - After this evaluation, I found no neurological deficit or anything to substantiate his problems and I do feel this an acute emotional overlay. Would possibly recommend heavy medication such as Thorazine and I did re-assure him."

In *Prins v. Bennett, Governor for Kansas, et al.*, No. 75-1616, Tenth Circuit Court of Appeals, decided March 8, 1976 (unpublished opinion) it was said:

"***In *Dewell v. Lawson*, 489 F.2d 877 (10th Cir. 1974), this court stated that the standard of liability in civil rights cases alleging cruel and unusual punishment relating to claimed omissions in medical care to a prisoner is whether the plaintiff proves exceptional circumstances and conduct so grossly incompetent, inadequate, or excessive, as to shock the conscience or be intolerable to basic fairness.

"In determining whether the physician's diagnosis and recommended treatment in this case constitutes cruel and unusual punishment, the court must ask whether a physician exercising ordinary care and skill would have concluded that the symptoms evidenced serious injury; whether the potential for harm was substantial; and whether such harm did result. *Stokes v. Hurdle*, supra; *Thomas v. Pate*, 493 F.2d 151 (7th Cir. 1974).

"Courts will not second guess physicians as to the propriety or adequacy of a particular course of treatment. Even if a physician is mistaken or negligent in his diagnosis, no constitutional issue is raised absent evidence of abuse or intentional mistreatment. *Robinson v. Jordan*, 355 F.Supp. 1228 (N.D.Tex. 1973), vacated on other grounds, 494 F.2d 793 (5th Cir. 1974).

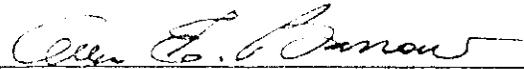
"And where a claim is merely a difference of opinion between the physician and the petitioner on matters of legitimate medical judgment, no constitutional question has been stated. *Coppinger v. Townsend*, 398 F.2d 392 (10th Cir. 1968). ***."

The Court, therefore, finds that the appropriateness of summary judgment in favor of Dave Faulkner, Sheriff, is evidence since the affidavits filed demonstrate no genuine issue of material fact necessary of resolution at trial. The primary question presented is whether or not the civil rights complaint as against Dave Faulkner, Sheriff, stated a claim for relief. It is clear from both the pleadings and the affidavits filed that plaintiff has been afforded extensive medical care. The difference of opinion between physicians and inmate patients regarding medical care do not give rise to constitutional rights or sustain claims under 42 U.S.C. §1983. Plaintiff has accordingly failed to state a claim for relief.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss Affidavit of W. R. Slater, Physician, be and the same is hereby overruled.

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by the defendant, Dave Faulkner, Sheriff, be and the same is hereby sustained, there being no genuine issue of material fact necessary of resolution at trial and the difference of opinion between physicians and inmate patients regarding medical care does not give rise to constitutional rights or sustain claims under 42 U.S.C. §1983.

ENTERED this 14th day of March, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America,)
)
 Plaintiff,)
)
 vs.)
)
 56.02 Acres of Land, More or)
 Less, Situate in Osage County,)
 State of Oklahoma, and Osage)
 County Commissioners, et al.,)
)
 Defendants.)

CIVIL ACTION NO. 75-C-510-^β

Tracts Nos. A, B, C, D, E,
F, G, H, and I

FILED

MAR 14 1978

140

J U D G M E N T

Jack C. Silver, Clerk
U. S. DISTRICT COURT

1.

NOW, on this 14th day of March, 1978, this matter comes on for disposition on application of Plaintiff, United States of America, for entry of judgment on a stipulation agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for the Plaintiff, finds:

2.

This judgment applies to the entire estates condemned in all tracts of land involved in this action, as such estates and tracts are described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause who are interested in subject property.

5.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power, and authority to condemn for public use the property described in said Complaint. Pursuant thereto, on

November 7, 1975, the United States of America filed its Declaration of Taking of certain estates in such described property, and title to the described estates in such property should be vested in the United States of America as of the date of filing said Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of the Court as estimated compensation for the taking of certain estates in subject property a certain sum of money and all of this deposit has been disbursed, as set out below in paragraph 11.

7.

On the date of taking in this action, the owner of the estate taken in subject property was the defendant whose name is shown below in paragraph 11. Such named defendant is the only person asserting any interest in the estates taken in such property. All other persons having either disclaimed or defaulted, such named defendant is entitled to receive the just compensation awarded by this judgment.

8.

The owner of the subject property and the Plaintiff, United States of America, have executed and on March 7, 1978, have filed herein a Stipulation, a copy of which is attached hereto as "Exhibit 1" and made a part of this judgment. By such Stipulation the parties have agreed that just compensation for the estates condemned in the subject property is cash in the amount of \$1,157,728.00 together with other valuable consideration in the form of mutual agreements by the parties as specified in the Stipulation. Such Stipulation appears to be in the best interest of both parties and should be approved by the Court.

9.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power, and authority to condemn for public use the property particularly described in

the Complaint filed herein; and such property, to the extent of the estates described in such Complaint, is condemned, and title to such described estates is vested in the United States of America as of November 7, 1975, and all defendants herein and all other persons interested in such estates are forever barred from asserting any claim to such property.

10.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking the owner of the estates condemned herein in subject property was the defendant whose name appears below in paragraph 11 and the right to receive the just compensation for the estates taken herein in this property is vested in the party so named.

11.

It Is Further ORDERED, ADJUDGED, and DECREED that the Stipulation described in paragraph 8 above, a copy of which is attached hereto as "Exhibit 1", is made a part of this judgment, and is confirmed and approved; and the sum of \$1,157,728.00 as therein stated is adopted as the cash award of just compensation for the estates condemned in subject property.

The ownership of subject property, the deposit, award and disbursal made in this case are shown in schedule form as follows, to-wit:

TRACTS NOS. A, B, C, D, E, F, G, H, & I

OWNER:

Osage County Commissioners

Award of just compensation:

Agreements recited in attached
Stipulation, and
Cash Award of ----- \$1,157,728.00 \$1,157,728.00

Deposited as estimated
compensation ----- \$1,157,728.00

Disbursed to owner ----- \$1,157,728.00

Allen E. Barrow
CHIEF UNITED STATES DISTRICT JUDGE

APPROVED:

Hubert A. Marlow
HUBERT A. MARLOW
Assistant U. S. Attorney

Approved:
William Wall
District atty; Osage County -

MAR 7 1978

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk
U. S. DISTRICT COURT

United States of America,)	
)	
Plaintiff,)	
	)	CIVIL ACTION NO. 75-C-510
vs.)	
	)	TRACTS NOS. A,B,C,D,E,F,
56.02 Acres of Land, More or	)	G,H, AND I
Less, Situate in Osage County,)	
State of Oklahoma, and Osage)	
County Commissioners, Et al.,)	
)	
Defendants.)	

S T I P U L A T I O N

It is hereby stipulated and agreed by and between the United States of America, hereinafter called the plaintiff and the Osage County Commissioners, hereinafter called the defendants, that:

WHEREAS, action in condemnation was commenced in the above Court on November 7, 1975, by the filing of a complaint in condemnation and a declaration of taking on behalf of the United States of America, at the request of the Secretary of the Army, and

WHEREAS, under the provisions of the Declaration of Taking Act (46 Stat. 1421), title to the estates condemned in Tracts Nos. A, B, C, D, E, F, G, H, and I, as such estates and tracts are described in the Declaration of Taking filed herein, vested in the United States of America, and the right to just compensation for the same was likewise, under the provisions of said Act, vested in the persons entitled thereto; and

WHEREAS, the Osage County Commissioners were the owners in fee simple of the land hereinabove described and have so represented to the Plaintiff; all other parties having any interest in or claim to said lands having heretofore filed proper disclaimers in this cause; and

WHEREAS, it is hereby stipulated and agreed by and between the parties hereto that the amount of deposit filed by the plaintiff herein in the sum of \$1,157,728 inclusive of interest, is the just compensation in full to be paid by the plaintiff for the estates condemned in subject tracts as such estates and tracts are described in the Declaration of Taking filed herein and it is agreed that from said sum there shall first be paid any and all liens, taxes and encumbrances against said lands; and

“ 3/11/78 ”

WHEREAS, the defendants have agreed to construct and maintain a road of approved specifications, which will provide access to the remainders of Kaw Lake Tracts 123, 127, 142, and 144, located in sections 17, 20, 21, and 29, Township 26, North, Range 4 East, Osage County, Oklahoma. Defendants may choose one of two routes for said road, at the defendants' sole option. One optional route, identified as "Road No. 1," is shown in its approximate location on Exhibit "A", attached hereto and made a part hereof. If this route is chosen by defendants, plaintiff agrees to provide free of charge, a 100-foot easement across Government property and to assign to defendants the Government's interest in Kaw Lake Tract 142E in connection with the construction and maintenance of this road. Any additional right of way for this road, if necessary, will be obtained by the defendants from adjacent landowners. The second optional route, identified as "Optional Road No. 1" is also shown on the attached Exhibit "A", in its approximate location. It is agreed that the actual beginning point of this road from the existing county road may be further south than actually shown, but that it will follow generally the route shown. If the defendants elect to construct "Optional Road No. 1", right of way need only be 70 feet wide. The defendants agree to complete the road within one year from the date final judgment is filed in subject case.

WHEREAS, the defendants have agreed to construct and maintain a road of approved specifications which will provide access to the remainders of Kaw Lake Tracts 217 and 223, located in Section 6 and 7, Township 26 North, Range 4 East, Osage County, Oklahoma. Any additional right-of-way needed for such road will be obtained by the defendants from adjacent landowners. No Government land will be involved with the construction of this road. The defendants agree to complete this road within two years from the date final judgment is filed in subject case. This road, identified as Road No. 2, is shown in its approximate location on Exhibit "A" attached hereto and made a part hereof; and

WHEREAS, the defendants do now propose to construct and maintain a certain loop road within the Kaw Lake area; and the plaintiff agrees that if such road is constructed by defendants, plaintiff will grant the required and specified easements across Government property as necessary for the construction of this road which is identified as Road No. 3, and shown in its approximate location on Exhibit "A

attached hereto and made a part hereof; and

WHEREAS, the defendants do now propose to construct and maintain a certain road and bridge to be located within the NE1/4 of Section 34, Township 28 North, Range 5 East, Osage County, Oklahoma, and within the Kaw Lake area; and the plaintiff agrees that if such road and bridge is constructed by defendants, plaintiff will furnish free of charge for removal by defendants from Government property approximately 50,000 cubic yards of fill dirt to be used in the construction of said bridge; said fill dirt to be removed below elevation 1044 feet and within an area of the N1/2NE1/4 of Section 34, the southeast diagonal one-half of the SE1/4 of Section 27, and the SW1/4 of Section 26, all Township 28 North, Range 5 East, Osage County, Oklahoma. In connection with the removal of said fill dirt, the defendants agree that the topsoil will be removed, stockpiled, and replaced upon completion of work; that the borrow area will be sloped to drain properly, and reseeded for revegetation to the same ground cover as currently exists on the land. The plaintiff will provide the necessary right-of-way easements as are required across Government property. This road, identified as Road No. 4, the bridge, borrow area, and easements, are shown in their approximate location on Exhibit "A" attached hereto and made a part hereof; and

WHEREAS, the defendants agree that in the construction of any and all roads covered by this stipulation, they will comply with the specifications of the Oklahoma Department of Transportation; and that if Road No. 4 is constructed they will construct the road and the bridge thereon to such levels and length as will not interfere with plaintiff's operation and maintenance of the Kaw Lake project; and

WHEREAS, the parties hereto agree that the defendants shall have the right to remove and salvage any and all bridge structures located in, on, over, or across roads to which title vested in plaintiff in subject case; and that all said structures will be removed by the defendants within one year from the date final judgment is filed herein; except that any bridge structures now in use in the area of road no. 4 may remain in use until the construction of the bridge and road contemplated, and that said structures may be removed by defendants within one year after Road No. 4 is completed.

WHEREAS, the parties hereto agree that the term "approved specif-

ications", when used herein, refers to standards and specifications adopted and approved by the Oklahoma Department of Transportation for county highways; and the defendants agree that they will comply with said standards and specifications.

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the above-named parties that the sum of \$1,157,728 inclusive of interest, is the just compensation in full to be paid by the plaintiff for the estates condemned in Tracts Nos. A, B, C, D, E, F, G, H, and I, as such estates and tracts are described in the Declaration of Taking filed herein, and it is agreed that from said sum there shall be paid first any and all liens, taxes and encumbrances, if any, against said lands.

IT IS HEREBY FURTHER STIPULATED AND AGREED that the defendants will construct and maintain a road of approved specifications, which will provide access to the remainders of Kaw Lake Tracts 123, 127, 142, and 144, located in sections 17, 20, 21 and 29, Township 26, North, Range 4 East, Osage County, Oklahoma. Defendants may choose one of two routes for said road, at the defendants' sole option. One optional route, identified as "Road No. 1", is shown in its approximate location on Exhibit "A", attached hereto and made a part hereof. If this route is chosen by defendants, plaintiff agrees to provide free of charge, a 100-foot easement across Government property and to assign to defendants the Government's interest in Kaw Lake Tract 142 E, in connection with the construction and maintenance of this road. Any additional right of way for this road, if necessary, will be obtained by the defendants from adjacent landowners. The second optional route, identified as "Optional Road No. 1", is also shown on the attached Exhibit "A", in its approximate location. It is agreed that the actual beginning point of this road from the existing county road may be further south than actually shown, but that it will follow generally the route shown. If the defendants elect to construct "Optional Road No. 1", right of way need only be 70 feet wide. The defendants agree to complete the road within one year from the date final judgment is filed in subject case.

IT IS HEREBY FURTHER STIPULATED AND AGREED that the defendants will construct and maintain a road of approved specifications which will provide access to the remainders of Kaw Lake Tracts 217 and 223;

that all right-of-way needed for such road will be obtained by the defendants; that no Government property will be involved in the construction and maintenance of this road; and that this road will be completed by the defendants within two years from the date final judgment is filed in this case.

IT IS HEREBY FURTHER STIPULATED AND AGREED that if the defendants herein construct a certain specified loop road within the Kaw Lake area, the plaintiff will grant and provide to the defendants the required specified easements across Government property as are necessary for the construction of said road.

IT IS HEREBY FURTHER STIPULATED AND AGREED that if the defendants herein construct a certain road or bridge in, on, or about the NE1/4 of Section 34, Township 28 North, Range 5 East, Osage County, Oklahoma, and within the Kaw Lake area, the plaintiff will furnish free of charge for removal by defendants from Government property approximately 50,000 cubic yards of fill dirt to be used in the construction of said bridge; that such fill dirt will be removed below elevation 1044 feet and within an area of the N1/2NE1/4 of Section 34, the southeast diagonal one-half of the SE1/4 of Section 27, and the SW1/4 of Section 26, all Township 28 North, Range 5 East, Osage County, Oklahoma; that the defendants will cause the topsoil in the borrow area to be removed, stockpiled, and replaced upon completion of work; that the defendants will cause the borrow area to be sloped and drained properly and reseeded for revegetation to the same ground cover as currently exists on the land; and that plaintiff will provide the necessary right-of-way easements as are required across Government property for the construction of this road.

IT IS HEREBY FURTHER STIPULATED AND AGREED that the defendants shall have the right to remove and salvage any and all bridge structures located in, on, over, or across roads to which title vested in the plaintiff in subject case; and that all said structures will be removed by the defendants within one year from the date final judgment is filed in this case; except that any bridge structures now in use in the area of Road no. 4 may remain in use until the construction of the bridge and road contemplated, and that said structures may be removed by defendants within one year after Road No. 4 is completed.

IT IS HEREBY FURTHER STIPULATED AND AGREED that the term "approved specifications", when used herein, refers to standards and specifications adopted and approved by the Oklahoma Department of Transportation for county highways; and the defendants agree that they will comply with said standards and specifications.

THE DEFENDANTS, the Osage County Commissioners, hereby enter their appearance in this action and expressly waive service of summons, complaint, and all right to a hearing on the complaint and pleadings filed in this action and the right to the appointment of a Jury or Commission for the determination of just compensation.

THE ABOVE-NAMED PARTIES HEREBY AGREE to the entering of a Judgment in conformity to this stipulation, and exhibit attached hereto, setting forth the conditions and provisions thereof.

EXECUTED on the 19th day of August, A.D., 1977.

John E. Bigg
OSAGE COUNTY COMMISSIONER, DEFENDANT

Fred Larson
OSAGE COUNTY COMMISSIONER, DEFENDANT

Charles Walker
OSAGE COUNTY COMMISSIONER, DEFENDANT

UNITED STATES OF AMERICA

by Hubert A. Marlow

APPROVED:

William Hall
ATTORNEY FOR DEFENDANTS

U.S. ARMY CORPS OF ENGINEERS

by Jack E. Hines

FILED

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

MAR 14 1978

**Jack C. Smith, Jr.
U. S. DISTRICT COURT**

KAY ELOISE ROBINSON,

Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,
WORLD-WIDE VOLKSWAGEN CORPORATION,
and SEAWAY VOLKSWAGEN, INC.,

Defendants.

78-C-7-B

GEORGE SAMUEL ROBINSON,

Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,
WORLD-WIDE VOLKSWAGEN CORPORATION,
and SEAWAY VOLKSWAGEN, INC.,

Defendants.

78-C-8-B

HARRY ROBINSON,

Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,
WORLD-WIDE VOLKSWAGEN CORPORATION,
and SEAWAY VOLKSWAGEN, INC.,

Defendants.

78-C-9-B

EVA MAE ROBINSON,

Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,
WORLD-WIDE VOLKSWAGEN CORPORATION,
and SEAWAY VOLKSWAGEN, INC.,

Defendants.

78-C-10-B

O R D E R

The Court has for consideration the Motion to Remand to State Court filed by all plaintiffs and the briefs in support thereof; and the briefs in response filed by all defendants; and, having carefully perused the entire file and being fully advised in the premises, finds:

Plaintiffs filed this action for damages for personal injury, property damage and related claims in District Court, Creek County, Bristow, Oklahoma. In their original Petitions, plaintiffs alleged that they were residents of the State of New York. Defendant Volkswagen of America, Inc., is a foreign corporation organized under the laws of the State of New Jersey; defendant World-Wide Volkswagen Corporation is a foreign corporation existing under the laws of the State of New York; and the defendant Seaway Volkswagen, Inc. is a foreign corporation existing under the laws of the State of New York. At first blush, it appeared to defendants that there was no diversity between the parties. However, on December 30, 1977, one of the plaintiffs, Harry Robinson, testified under oath in a deposition in this case, such deposition being marked as Exhibit 1 to the Petition for Removal.

Defendants contend, in their Petition for Removal, that Harry Robinson's testimony establishes that at the time of filing of this action, plaintiffs were not citizens of New York, but rather citizens of Arizona. Plaintiffs Harry and Kay Eloise Robinson had sold their home and business in New York and had purchased a home in Arizona. Plaintiffs were in the process of traveling to their new home in Arizona when the accident occurred in Oklahoma. Defendants assert that because plaintiffs were citizens of Arizona at the time of filing, there is diversity of citizenship between the parties, and removal is proper because the amount in controversy exceeds \$10,000. exclusive of interest and costs.

The applicable law to determine citizenship for diversity purposes is federal law. As stated in Moore's:

"In this instance, at least for purposes of diversity jurisdiction, to 'reside' means more than to be temporarily living in the state, it means to be 'domiciled' therein. . . . Whether or not one is a citizen of a particular state for diversity purposes is to be determined by federal law not the law of any state." 1 J. Moore,

(pt.1), Federal Practice ¶ 0.74[1] at pp. 707-707.1. In the leading case of *Stifel v. Hopkins*, 477 F.2d 1116 (6th Cir. 1973), the rule is stated as follows:

"The determination of a litigant's state citizenship for purposes of diversity jurisdiction is a matter of federal law, *Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir. 1968); *Taylor v. Milam*, 89 F. Supp. 880, 883 (W.D. Ark. 1950); see 1 J. Moore, Federal Practice (pt. 1) ¶ 0.74[1], at 707.1 (2d ed. 1972), although federal courts may look to state law for guidance in defining terms, formulating concepts, or delineating policies. . . . Thus, although it is settled that citizenship for purposes of 28 U.S.C. § 1332 (a) means domicile rather than residence, . . . considerations on which federal courts rely in determining domicile often derive from state choice-of-law rules that have been developed in such diverse contexts as probate jurisdiction, taxation of incomes or intangibles, or divorce law. . . . Although this importation of the law of conflicts into resolution of federal jurisdictional questions can have the unfortunate consequence of causing federal courts to lose sight of important federal interests that may be involved, conflicts law is useful in providing basic working definitions." *Id.* at 1120 (citations omitted).

For the purpose of determining the citizenship of the four plaintiffs, the citizenship of the husband and father, Harry Robinson is controlling. With regard to the wife, Kay Eloise Robinson, "[a] wife who lives with her husband has the same domicil as his unless the special circumstances of the wife make such a result unreasonable." Restatement of the Law of Conflicts 2d, Domicil § 21. "As a general rule, the domicile of a wife--and consequently, her citizenship for purpose of diversity of jurisdiction--is deemed to be that of her husband." 1 J. Moore, Federal Practice (pt. 1) ¶ 0.74[6.-1] at p. 708.51.

And with regard to the two children plaintiffs, George Samuel Robinson and Eva Mae Robinson, "[a] minor has the same domicil as the parent with whom he lives." Restatement of the Law of Conflicts 2d, Domicil § 22. "Until a person reaches the legal age of majority,

his domicile is generally derived from his parents. Normally the domicile of a minor is deemed to be that of his father.

1. J. Moore, Federal Practice (pt. 1) ¶ 0.74[6.-2], at p. 708.55. Therefore, the Court finds that the domicile of all four plaintiffs will be determined by the domicile of Harry Robinson, and such determination will be controlling in all four Motions to Remand.

Moore's sheds further light on the problem of domicile:

"[S]tate citizenship for diversity purposes is regarded as synonymous with domicile. Domicile normally requires the concurrence of physical presence in a state and the intent to make such state a home." 1 J. Moore, Federal Practice (pt. 1) ¶ 0.74[3.-1], at p. 707.50 (emphasis added).

"A fixed intention to acquire a new domicile does not make such acquisition operative until the physical transfer also takes place." *Id.* at ¶ 0.74[3.-3], at p. 707.59 (emphasis added).

Therefore, for diversity purposes, domicile (and therefore citizenship) does not change until the physical arrival in the new state of residence. This is also the general rule in conflicts of law rules. "A domicil once established continues until it is superseded by a new domicil." Restatement of the Law of Conflicts 2d, Domicil § 19. "Since a domicil once established continues until a new one is acquired and a new domicil is not acquired until there has been a concurrence of intent and physical presence, it is held that the domicil of one who is in itinere from an old to a new home continues to be the old domicil until the new one is reached." 25 AmJur 2d, Domicil § 35, at p. 26. Since the plaintiffs were in itinere at the time of filing of this suit, and were not yet physically present in Arizona, the old domicile in the State of New York continued, and therefore there is no diversity between the parties. The Court finds that the Motions to Remand filed by plaintiffs should be granted for lack of diversity.

IT IS, THEREFORE, ORDERED that the Motion to Remand filed by plaintiffs should be, and hereby is, granted and these cases are remanded to District Court, Creek County, Bristow Division.

ENTERED this 14th day of March, 1978.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

FILED

MAR 14 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

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

KAY ELOISE ROBINSON,)

Plaintiff,)

vs.)

78-C-7-B

VOLKSWAGEN OF AMERICA, INC.,)
WORLD-WIDE VOLKSWAGEN CORPORATION,)
and SEAWAY VOLKSWAGEN, INC.,)

Defendants.)

GEORGE SAMUEL ROBINSON,)

Plaintiff,)

vs.)

78-C-8-B

VOLKSWAGEN OF AMERICA, INC.,)
WORLD-WIDE VOLKSWAGEN CORPORATION,)
and SEAWAY VOLKSWAGEN, INC.,)

Defendants.)

HARRY ROBINSON,)

Plaintiff,)

vs.)

78-C-9-B

VOLKSWAGEN OF AMERICA, INC.,)
WORLD-WIDE VOLKSWAGEN CORPORATION,)
and SEAWAY VOLKSWAGEN, INC.,)

Defendants.)

EVA MAE ROBINSON,)

Plaintiff,)

vs.)

78-C-10-B

VOLKSWAGEN OF AMERICA, INC.,)
WORLD-WIDE VOLKSWAGEN CORPORATION,)
and SEAWAY VOLKSWAGEN, INC.,)

Defendants.)

O R D E R

The Court has for consideration the Motion to Remand to State Court filed by all plaintiffs and the briefs in support thereof; and the briefs in response filed by all defendants; and, having carefully perused the entire file and being fully advised in the premises, finds:

Plaintiffs filed this action for damages for personal injury, property damage and related claims in District Court, Creek County, Bristow, Oklahoma. In their original Petitions, plaintiffs alleged that they were residents of the State of New York. Defendant Volkswagen of America, Inc., is a foreign corporation organized under the laws of the State of New Jersey; defendant World-Wide Volkswagen Corporation is a foreign corporation existing under the laws of the State of New York; and the defendant Seaway Volkswagen, Inc. is a foreign corporation existing under the laws of the State of New York. At first blush, it appeared to defendants that there was no diversity between the parties. However, on December 30, 1977, one of the plaintiffs, Harry Robinson, testified under oath in a deposition in this case, such deposition being marked as Exhibit 1 to the Petition for Removal.

Defendants contend, in their Petition for Removal, that Harry Robinson's testimony establishes that at the time of filing of this action, plaintiffs were not citizens of New York, but rather citizens of Arizona. Plaintiffs Harry and Kay Eloise Robinson had sold their home and business in New York and had purchased a home in Arizona. Plaintiffs were in the process of traveling to their new home in Arizona when the accident occurred in Oklahoma. Defendants assert that because plaintiffs were citizens of Arizona at the time of filing, there is diversity of citizenship between the parties, and removal is proper because the amount in controversy exceeds \$10,000. exclusive of interest and costs.

The applicable law to determine citizenship for diversity purposes is federal law. As stated in Moore's:

"In this instance, at least for purposes of diversity jurisdiction, to 'reside' means more than to be temporarily living in the state, it means to be 'domiciled' therein. . . . Whether or not one is a citizen of a particular state for diversity purposes is to be determined by federal law not the law of any state." 1 J. Moore,

(pt.1), Federal Practice ¶ 0.74[1] at pp. 707-707.1. In the leading case of *Stifel v. Hopkins*, 477 F.2d 1116 (6th Cir. 1973), the rule is stated as follows:

"The determination of a litigant's state citizenship for purposes of diversity jurisdiction is a matter of federal law, *Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir. 1968); *Taylor v. Milam*, 89 F. Supp. 880, 883 (W.D. Ark. 1950); see 1 J. Moore, Federal Practice (pt. 1) ¶ 0.74[1], at 707.1 (2d ed. 1972), although federal courts may look to state law for guidance in defining terms, formulating concepts, or delineating policies. . . . Thus, although it is settled that citizenship for purposes of 28 U.S.C. § 1332 (a) means domicile rather than residence, . . . considerations on which federal courts rely in determining domicile often derive from state choice-of-law rules that have been developed in such diverse contexts as probate jurisdiction, taxation of incomes or intangibles, or divorce law. . . . Although this importation of the law of conflicts into resolution of federal jurisdictional questions can have the unfortunate consequence of causing federal courts to lose sight of important federal interests that may be involved, conflicts law is useful in providing basic working definitions." *Id.* at 1120 (citations omitted).

For the purpose of determining the citizenship of the four plaintiffs, the citizenship of the husband and father, Harry Robinson is controlling. With regard to the wife, Kay Eloise Robinson, "[a] wife who lives with her husband has the same domicil as his unless the special circumstances of the wife make such a result unreasonable." Restatement of the Law of Conflicts 2d, Domicil § 21. "As a general rule, the domicile of a wife--and consequently, her citizenship for purpose of diversity of jurisdiction--is deemed to be that of her husband." 1 J. Moore, Federal Practice (pt. 1) ¶ 0.74[6.-1] at p. 708.51.

And with regard to the two children plaintiffs, George Samuel Robinson and Eva Mae Robinson, "[a] minor has the same domicil as the parent with whom he lives." Restatement of the Law of Conflicts 2d, Domicil § 22. "Until a person reaches the legal age of majority,

his domicile is generally derived from his parents. Normally the domicile of a minor is deemed to be that of his father.

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Therefore, the Court finds that the domicile of all four plaintiffs will be determined by the domicile of Harry Robinson, and such determination will be controlling in all four Motions to Remand.

Moore's sheds further light on the problem of domicile:

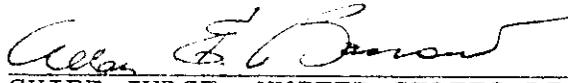
"[S]tate citizenship for diversity purposes is regarded as synonymous with domicile. Domicile normally requires the concurrence of physical presence in a state and the intent to make such state a home." 1 J. Moore, Federal Practice (pt. 1) ¶ 0.74[3.-1], at p. 707.50 (emphasis added).

"A fixed intention to acquire a new domicile does not make such acquisition operative until the physical transfer also takes place." Id. at ¶ 0.74[3.-3], at p. 707.59 (emphasis added).

Therefore, for diversity purposes, domicile (and therefore citizenship) does not change until the physical arrival in the new state of residence. This is also the general rule in conflicts of law rules. "A domicil once established continues until it is superseded by a new domicil." Restatement of the Law of Conflicts 2d, Domicil § 19. "Since a domicil once established continues until a new one is acquired and a new domicil is not acquired until there has been a concurrence of intent and physical presence, it is held that the domicil of one who is in itinere from an old to a new home continues to be the old domicil until the new one is reached." 25 AmJur 2d, Domicil § 35, at p. 26. Since the plaintiffs were in itinere at the time of filing of this suit, and were not yet physically present in Arizona, the old domicile in the State of New York continued, and therefore there is no diversity between the parties. The Court finds that the Motions to Remand filed by plaintiffs should be granted for lack of diversity.

IT IS, THEREFORE, ORDERED that the Motion to Remand filed by plaintiffs should be, and hereby is, granted and these cases are remanded to District Court, Creek County, Bristow Division.

ENTERED this 14th day of March, 1978.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

F I L E D

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

MAR 14 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

KAY ELOISE ROBINSON,)

Plaintiff,)

vs.)

78-C-7-B

VOLKSWAGEN OF AMERICA, INC.,)
WORLD-WIDE VOLKSWAGEN CORPORATION,)
and SEAWAY VOLKSWAGEN, INC.,)

Defendants.)

GEORGE SAMUEL ROBINSON,)

Plaintiff,)

vs.)

78-C-8-B

VOLKSWAGEN OF AMERICA, INC.,)
WORLD-WIDE VOLKSWAGEN CORPORATION,)
and SEAWAY VOLKSWAGEN, INC.,)

Defendants.)

HARRY ROBINSON,)

Plaintiff,)

vs.)

78-C-9-B

VOLKSWAGEN OF AMERICA, INC.,)
WORLD-WIDE VOLKSWAGEN CORPORATION,)
and SEAWAY VOLKSWAGEN, INC.,)

Defendants.)

EVA MAE ROBINSON,)

Plaintiff,)

vs.)

78-C-10-B

VOLKSWAGEN OF AMERICA, INC.,)
WORLD-WIDE VOLKSWAGEN CORPORATION,)
and SEAWAY VOLKSWAGEN, INC.,)

Defendants.)

O R D E R

The Court has for consideration the Motion to Remand to State Court filed by all plaintiffs and the briefs in support thereof; and the briefs in response filed by all defendants; and, having carefully perused the entire file and being fully advised in the premises, finds:

Plaintiffs filed this action for damages for personal injury, property damage and related claims in District Court, Creek County, Bristow, Oklahoma. In their original Petitions, plaintiffs alleged that they were residents of the State of New York. Defendant Volkswagen of America, Inc., is a foreign corporation organized under the laws of the State of New Jersey; defendant World-Wide Volkswagen Corporation is a foreign corporation existing under the laws of the State of New York; and the defendant Seaway Volkswagen, Inc. is a foreign corporation existing under the laws of the State of New York. At first blush, it appeared to defendants that there was no diversity between the parties. However, on December 30, 1977, one of the plaintiffs, Harry Robinson, testified under oath in a deposition in this case, such deposition being marked as Exhibit 1 to the Petition for Removal.

Defendants contend, in their Petition for Removal, that Harry Robinson's testimony establishes that at the time of filing of this action, plaintiffs were not citizens of New York, but rather citizens of Arizona. Plaintiffs Harry and Kay Eloise Robinson had sold their home and business in New York and had purchased a home in Arizona. Plaintiffs were in the process of traveling to their new home in Arizona when the accident occurred in Oklahoma. Defendants assert that because plaintiffs were citizens of Arizona at the time of filing, there is diversity of citizenship between the parties, and removal is proper because the amount in controversy exceeds \$10,000. exclusive of interest and costs.

The applicable law to determine citizenship for diversity purposes is federal law. As stated in Moore's:

"In this instance, at least for purposes of diversity jurisdiction, to 'reside' means more than to be temporarily living in the state, it means to be 'domiciled' therein. . . . Whether or not one is a citizen of a particular state for diversity purposes is to be determined by federal law not the law of any state." 1 J. Moore,

(pt.1), Federal Practice ¶ 0.74[1] at pp. 707-707.1. In the leading case of *Stifel v. Hopkins*, 477 F.2d 1116 (6th Cir. 1973), the rule is stated as follows:

"The determination of a litigant's state citizenship for purposes of diversity jurisdiction is a matter of federal law, *Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir. 1968); *Taylor v. Milam*, 89 F. Supp. 880, 883 (W.D. Ark. 1950); see 1 J. Moore, Federal Practice (pt. 1) ¶ 0.74[1], at 707.1 (2d ed. 1972), although federal courts may look to state law for guidance in defining terms, formulating concepts, or delineating policies. . . . Thus, although it is settled that citizenship for purposes of 28 U.S.C. § 1332 (a) means domicile rather than residence, . . . considerations on which federal courts rely in determining domicile often derive from state choice-of-law rules that have been developed in such diverse contexts as probate jurisdiction, taxation of incomes or intangibles, or divorce law. . . . Although this importation of the law of conflicts into resolution of federal jurisdictional questions can have the unfortunate consequence of causing federal courts to lose sight of important federal interests that may be involved, conflicts law is useful in providing basic working definitions." *Id.* at 1120 (citations omitted).

For the purpose of determining the citizenship of the four plaintiffs, the citizenship of the husband and father, Harry Robinson is controlling. With regard to the wife, Kay Eloise Robinson, "[a] wife who lives with her husband has the same domicil as his unless the special circumstances of the wife make such a result unreasonable." Restatement of the Law of Conflicts 2d, Domicil § 21. "As a general rule, the domicile of a wife--and consequently, her citizenship for purpose of diversity of jurisdiction--is deemed to be that of her husband." 1 J. Moore, Federal Practice (pt. 1) ¶ 0.74[6.-1] at p. 708.51.

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his domicile is generally derived from his parents. Normally the domicile of a minor is deemed to be that of his father.

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Therefore, the Court finds that the domicile of all four plaintiffs will be determined by the domicile of Harry Robinson, and such determination will be controlling in all four Motions to Remand.

Moore's sheds further light on the problem of domicile:

"[S]tate citizenship for diversity purposes is regarded as synonymous with domicile. Domicile normally requires the concurrence of physical presence in a state and the intent to make such state a home." 1 J. Moore, Federal Practice (pt. 1) ¶ 0.74[3.-1], at p. 707.50 (emphasis added).

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Therefore, for diversity purposes, domicile (and therefore citizenship) does not change until the physical arrival in the new state of residence. This is also the general rule in conflicts of law rules. "A domicil once established continues until it is superseded by a new domicil." Restatement of the Law of Conflicts 2d, Domicil § 19. "Since a domicil once established continues until a new one is acquired and a new domicil is not acquired until there has been a concurrence of intent and physical presence, it is held that the domicil of one who is in itinere from an old to a new home continues to be the old domicil until the new one is reached." 25 AmJur 2d, Domicil § 35, at p. 26. Since the plaintiffs were in itinere at the time of filing of this suit, and were not yet physically present in Arizona, the old domicile in the State of New York continued, and therefore there is no diversity between the parties. The Court finds that the Motions to Remand filed by plaintiffs should be granted for lack of diversity.

IT IS, THEREFORE, ORDERED that the Motion to Remand filed by plaintiffs should be, and hereby is, granted and these cases are remanded to District Court, Creek County, Bristow Division.

ENTERED this 14th day of March, 1978.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

FILED

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

MAR 14 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

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vs.)

78-C-7-B

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GEORGE SAMUEL ROBINSON,)

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78-C-10-B

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WORLD-WIDE VOLKSWAGEN CORPORATION,)
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O R D E R

The Court has for consideration the Motion to Remand to State Court filed by all plaintiffs and the briefs in support thereof; and the briefs in response filed by all defendants; and, having carefully perused the entire file and being fully advised in the premises, finds:

Plaintiffs filed this action for damages for personal injury, property damage and related claims in District Court, Creek County, Bristow, Oklahoma. In their original Petitions, plaintiffs alleged that they were residents of the State of New York. Defendant Volkswagen of America, Inc., is a foreign corporation organized under the laws of the State of New Jersey; defendant World-Wide Volkswagen Corporation is a foreign corporation existing under the laws of the State of New York; and the defendant Seaway Volkswagen, Inc. is a foreign corporation existing under the laws of the State of New York. At first blush, it appeared to defendants that there was no diversity between the parties. However, on December 30, 1977, one of the plaintiffs, Harry Robinson, testified under oath in a deposition in this case, such deposition being marked as Exhibit 1 to the Petition for Removal.

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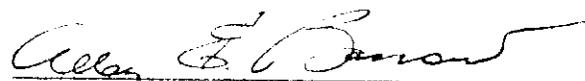
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IT IS, THEREFORE, ORDERED that the Motion to Remand filed by plaintiffs should be, and hereby is, granted and these cases are remanded to District Court, Creek County, Bristow Division.

ENTERED this 14th day of March, 1978.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

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

TERRY LEE RADCLIFF,)
)
 Petitioner,)
)
 v.)
)
 PARK ANDERSON, Warden,)
)
 Respondent.)

No. 73-C-81-D

FILED

MAR 13 1978 *jm*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

The Petition for Writ of Habeas Corpus as amended April 24, 1973, alleged that the petitioner was in custody under a subsequent conviction for Armed Robbery After Former Conviction of a Felony and that petitioner's conviction in case No. 21,197 District Court of Tulsa County, Oklahoma, was used to enhance the penalty which conviction "was void and illegal in that although only 17 years of age at the time of the commission of the offense and the commencement of prosecution, the petitioner was denied the status of a juvenile accorded to like age females under 10 O.S. 1101(a) in violation of Fourteenth, Eighth and Nineteenth Amendments to the Constitution as vindicated in Lamb v. Brown (10th Cir., 1972) 456 F.2d 18." After response and without an evidentiary hearing the court on June 6, 1973 dismissed the action on the ground that the petitioner had failed to state a claim for relief since the Court of Appeals for the Tenth Circuit in Lamb v. Brown, supra, had declared that its ruling should not apply retroactively. On appeal the Tenth Circuit held that Lamb v. Brown must be applied retroactively and this court was reversed and the case remanded for further proceedings in the light of that opinion. Radcliff v. Anderson, 509 F.2d 1093 (CA10 1975), cert. denied, 421 U.S. 939. After remand evidentiary hearings were held by this court on October 6, 1975 and June 7, 1976. Having examined the files and records herein and having considered the evidence presented by the parties, and the arguments of counsel, the court makes the following Findings of Fact and

Conclusions of Law:

I. FINDINGS OF FACT

1. The petitioner was born November 21, 1947.
2. In said case No. 21,197, District Court of Tulsa County, Oklahoma, the petitioner was charged by Information on April 2, 1965 with the offense of Unauthorized Use of a Vehicle occurring on March 22, 1965. (Defendant's Exh. 1.)
3. On June 15, 1965, when the petitioner was 17 years of age he entered a counseled plea of guilty to the charge of Unauthorized Use of a Motor Vehicle. (Defendant's Exh. 7.)
4. December 6, 1965 when the petitioner was 18 years of age the petitioner was sentenced to one year imprisonment in said case No. 21,197, which sentence was suspended and the petitioner placed on probation. (Defendant's Exh. 4.)
5. On March 11, 1966 after hearing the suspended sentence was revoked in said case No. 21,197 and the petitioner was transported to the Oklahoma State Penitentiary for immediate execution of the judgment and sentence. (Defendant's Exh. 6.)
6. The sentence in case No. 21,197 has been fully served.
7. In case No. 22,595, District Court of Tulsa County, Oklahoma, the petitioner was charged on April 28, 1967 by Information with Attempted Robbery With Firearms occurring on April 11, 1967, After Former Conviction of a Felony. (Defendant's Exh. 8.)
8. In said case No. 22,595 the petitioner entered a counseled plea of guilty and was sentenced on September 7, 1967 to five years imprisonment. (Defendant's Exh. 9.)
9. The five-year sentence imposed in said case No. 22,595 has been fully served.
10. In case No. CRF-70-2474, District Court of Tulsa County, Oklahoma, petitioner was charged on December 26, 1970, by Information with the Crime of Robbery With Firearms occurring on December 26, 1970. In the second page of the Information the State further alleged that the petitioner had been convicted in case No.

21,197 with the Crime of Unauthorized Use of a Motor Vehicle and sentenced to a term of one year and that the petitioner had been convicted in case No. 22,595 of the crime of Attempted Robbery With Firearms and sentenced to a term of five years. (Defendant's Exh. 11.)

11. In said case No. CRF-70-2474 after a plea of not guilty the petitioner was tried by a jury and convicted of the crime of Robbery With Firearms After Former Conviction of a Felony and sentenced on February 16, 1971, to a term of not less than 25 years nor more than 75 years imprisonment. (Defendant's Exh. 12 and 13.)

12. On direct appeal the judgment and sentence in said case No. CRF-70-2474 was modified by the Oklahoma Court of Criminal Appeals to a term of 10 to 30 years because of prejudicial argument of the prosecuting attorney and the giving of an improper instruction by the court. (Defendant's Exh. 14.)

13. At the time the Petition for Writ of Habeas Corpus was filed herein the petitioner was detained at the Oklahoma State Penitentiary at McAlester, Oklahoma by virtue of the judgment and sentence in said case No. CRF-70-2474.

II. CONCLUSIONS OF LAW

1. In said case No. 21,197 the petitioner should have been afforded all the benefits allowable to children under the Oklahoma Statutes and specifically, should not have been proceeded against as an adult without a certification hearing as provided by Oklahoma law. Lamb v. Brown, supra; Radcliff v. Anderson, supra.

2. A conviction in which the federal habeas petitioner was unconstitutionally denied an adult certification hearing is not absolutely void and need not be set aside, if the judge is clearly convinced that certification would have been made in the State court. Bromley v. Crisp, 561 F.2d 1351, 1357 (CA10 1977).

3. If it were necessary to dispose of the habeas petition herein to determine whether certification would have been made in the State court the proper procedure would be for this court to "withhold judgment for a reasonable time to permit the determination to be made

in the State courts. See *Kemplen v. Maryland*, supra, 428 F.2d at 178; *Booker v. Phillips*, 418 F.2d 424, 427 (10th Cir.), cert. denied, 399 U.S. 910, 90 S.Ct. 2194, 26 L.Ed.2d 564. If the State obtains in the Oklahoma courts a determination that certification would have occurred, then on a showing of such determination, the federal district court should deny the writ; if the State court finding is otherwise, the writ should issue. Further, failing a State court ruling as to whether petitioner would have been certified, then the federal district court may have a hearing and make the ruling as to whether or not the court is clearly convinced that the petitioner would have been certified for trial as an adult, and then make proper disposition." *Bromley v. Crisp*, supra at 1356, n. 6.

4. It is not necessary to the disposition of the habeas petition herein to determine whether certification would have been made in the State court in said case No. 21,197. The record clearly shows that in addition to the challenged conviction in 1965 the petitioner was also convicted in said case No. 22,595 in 1967 of Attempted Robbery With Firearms and that such conviction formed a part of the After Former Conviction of a Felony charge in said case No. CRF-70-2474. He was represented by counsel during such proceeding and there is nothing to indicate that the conviction of Attempted Robbery With Firearms was obtained in violation of petitioner's constitutional rights. Under these circumstances the petitioner's present detention is not unlawful and he is not entitled to federal habeas relief. *Snow v. State of Oklahoma*, 489 F.2d 278 (CA10 1973).

III. ORDER

Accordingly, since the petitioner's subsequent offender's sentence in case No. CRF-70-2474 is supported by a constitutionally valid former conviction, the Petition for Writ of Habeas Corpus will be denied.

IT IS SO ORDERED.

Dated this 13th day of March, 1978.


UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America,)
)
 Plaintiff,)
)
 vs.) CIVIL ACTION NO. 77-C-427-B
)
 119.90 Acres of Land, More or) Master File #398-9
 Less, Situate in Osage County,)
 State of Oklahoma, and Anita L.) Tract No. 203
 Whitlatch, et al., and Unknown)
 Owners,)
)
 Defendants.)

FILED

MAR 10 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

1.

NOW, on this 10th day of March, 1978, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on a stipulation agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for Plaintiff, finds:

2.

This judgment applies to the entire estate condemned in Tract No. 203, as such estate and tract are described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause who are interested in subject tract.

5.

The Acts of Congress set out in paragraph 2 of the Complaint herein give the United States of America the right, power and authority to condemn for public use the property described in such Complaint. Pursuant thereto, on October 17,

1977, the United States of America filed its Declaration of Taking of a certain estate in such described property, and title to the described estate in such property should be vested in the United States of America as of the date of filing the Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court, as estimated compensation for the taking of a certain estate in subject tract a certain sum of money, and all of this deposit has been disbursed, as set out below in paragraph 12.

7.

On the date of taking in this action, the owner of the estate taken in subject property was the defendant whose name is shown below in paragraph 12. Such named defendant is the only person asserting any interest in the estate taken in such property. All other persons having either disclaimed or defaulted, such named defendant is entitled to receive the just compensation awarded by this judgment.

8.

The owner of the subject property and the United States of America have executed and filed herein a Stipulation As To Just Compensation wherein they have agreed that just compensation for the estate condemned in subject property is in the amount of cash and other compensation as shown in paragraph 12 below, and such Stipulation should be approved.

9.

This judgment will create a deficiency between the amount deposited as estimated compensation for the estate taken in subject property and the amount fixed by the Stipulation As To Just Compensation, and the amount of such deficiency should be deposited for the benefit of the owner. Such deficiency is set out below in paragraph 12.

10.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power, and authority to condemn for public use the property particularly described in the Complaint filed herein; and such property, to the extent of the estate described in such Complaint, is condemned, and title to such described estate is vested in the United States of America as of October 17, 1977, and all defendants herein and all other persons interested in such estate are forever barred from asserting any claim to such property.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking the owner of the estate condemned herein in subject property was the defendant whose name appears below in paragraph 12 and the right to receive the just compensation for the estate taken herein in this property is vested in the party so named.

12.

It Is Further ORDERED, ADJUDGED and DECREED that the Stipulation As To Just Compensation, described in paragraph 8 above, hereby is confirmed; and the sum of cash and the other compensation therein fixed is adopted as the award of just compensation for the estate condemned in subject property, as follows:

TRACT NO. 203

OWNER:

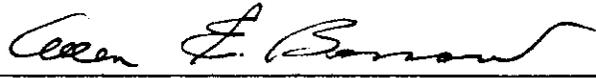
Anita L. Whitlatch

<u>Award</u> of just compensation		
pursuant to Stipulation -----	\$77,000.00	\$77,000.00
As part of just compensation		
Anita L. Whitlatch has the right		
of possession and use of the		
subject property through		
June 30, 1978.		
 <u>Deposited</u> as estimated compensation ----	\$67,200.00	
 <u>Disbursed</u> to owner -----		<u>\$67,200.00</u>
 Balance due to owner -----		<u>\$ 9,800.00</u>
 Deposit deficiency -----	\$ 9,800.00	

12.

It Is Further ORDERED, ADJUDGED and DECREED that the Plaintiff shall deposit in the Registry of this Court, in this civil action, to the credit of the subject property, the deficiency sum of \$9,800.00, and the Clerk of this Court then shall disburse such deposit as follows:

To Anita L. Whitlatch ----- \$9,800.00.


UNITED STATES DISTRICT JUDGE

APPROVED:


HUBERT A. MARLOW
Assistant U. S. Attorney

MAR 10 1978

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Jack C. Smith, Clerk
U.S. DISTRICT COURT

BEVERLEY HAUSAM, et al.,)
 Plaintiff,)
vs.) Civil Action NO. 77-C-514-B
)
INDEPENDENT SCHOOL DISTRICT)
#3, TULSA COUNTY, et al.,)
 Defendants.)

ORDER GRANTING DISMISSAL WITHOUT PREJUDICE

Defendants having failed to respond within the time ordered by the Court, it is ordered that Plaintiffs' request to dismiss without prejudice Causes of Action #1,3,4,5 and 6 is hereby granted. *Entered March 10, 1978*

Cecilia E. Barnett

JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the ____ day of March, 1978, a true and correct copy of the above and foregoing Order Granting Dismissal without Prejudice was mailed to Mr. Frederic N. Schneider, III, Boone, Ellison & Smith, 900 World Building, Tulsa, Oklahoma, 74103, and Lana Tyree, Benefield, Shelton, Lee, Wilson & Tyree, 2700 City National Bank Tower, Oklahoma City, Oklahoma, 73102, with postage prepaid thereon.

REBECCA J. PATTEN

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

WARREN LYNCH and)
RETA LYNCH,)
)
Plaintiffs,)
)
vs.)
)
UNITED ASSOCIATION OF)
JOURNEYMEN AND APPRENTICES)
OF THE PLUMBING AND PIPE-)
FITTING INDUSTRY OF THE)
UNITED STATES AND CANADA,)
PIPELINERS LOCAL UNION NO.)
798, an unincorporated)
association,)
)
Defendant.)

No. 77-C-501-C

FILED

MAR 10 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

Plaintiffs in this action allege violations by the defendant of 29 U.S.C. §§ 158(b)(4)(ii)(A), (B). Plaintiff Warren Lynch also makes a further claim against the defendant under 42 U.S.C. § 1985(3). Jurisdiction is predicated upon 29 U.S.C. § 187 and 28 U.S.C. § 1343. Plaintiffs make a fourth claim against the defendant sounding in tort, jurisdiction thereof being predicated upon the Court's pendent jurisdiction. Defendant has moved to dismiss the plaintiffs' complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) prohibits secondary boycotts by labor unions. See Nat'l Woodwork Manus. Asso. v. NLRB, 386 U.S. 612 (1967); Powell v. Internat'l. Bro. of Painters and Allied Trades, 429 F.Supp. 1 (W.D. Okla. 1976). The core concept of a secondary boycott is "union pressure directed at a neutral employer the object of which was to induce or coerce

him to cease doing business with an employer with whom the union was engaged in a labor dispute." Woodwork Manus., supra, at p. 622. See also Internat'l. Bro. Elec. Workers v. NLRB, 181 F.2d 34, 37 (2nd Cir. 1950); Big Apple Supermarkets, Inc. v. Dutto, 237 F.Supp. 774, 777-8 (E.D.N.Y. 1965).

It appears to the Court that the initial inquiry here must be whether plaintiffs' complaint has alleged a labor dispute. Clearly it does not do so. Plaintiff Warren Lynch alleges that he contracted with Green Construction Company (Green) to function as a spread superintendent for a pipeline construction job. Plaintiff Reta Lynch was also employed by Green. Plaintiffs further allege that defendant, by and through its agents and/or officers threatened and coerced Green with the object of forcing Green to enter into an agreement whereby it would refrain from doing business with the plaintiff Warren Lynch. Plaintiffs allege that as a result of these activities, Green terminated the services of both plaintiffs. At one point in the Complaint plaintiffs specifically deny that Green was engaged in any labor dispute with the defendant. Furthermore, there are no facts alleged from which a labor dispute between plaintiffs and defendant can be inferred.

Without a primary labor dispute there can be no secondary boycott in violation of Sections 8(b)(4)(ii)(A), (B) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(4)(ii)(A), (B) as this term was earlier defined. The Court therefore lacks subject matter jurisdiction over plaintiffs' claims thereunder pursuant to 29 U.S.C. § 187.

Plaintiffs' Complaint also fails to state a claim for relief under 42 U.S.C. § 1985(3). Section 1985(3) was not intended to be a general federal tort law.

"The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based,

invidiously discriminatory animus behind the conspirators' action."

Griffin v. Breckenridge, 403 U.S. 88, 101-2 (1971). See also Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973); Timo v. Assoc. Indemnity Corp., 412 F.Supp. 1056 (W.D. Okla. 1976). Plaintiff Warren Lynch states that the alleged conspiracy was directed against him because of his membership in a particular identifiable class. However, he does not name this class and there are no additional facts alleged in the complaint that would indicate that he is a member of any identifiable class. Furthermore, plaintiff only makes a conclusory statement that the object of the alleged conspiracy was discriminatory. Plaintiff nowhere alleges that another person or class of persons received more favorable treatment from the defendant under the same circumstances. Such conclusory allegations have been held not to support a cause of action under Section 1985(3). See Jacobsen v. Industrial Found. of the Permian Basin, 456 F.2d 258 (5th Cir. 1972); Joyce v. Ferrazzi, 323 F.2d 931 (1st Cir. 1963); Schoonfield v. Mayor and City Council of Baltimore, 399 F.Supp. 1068 (D. Md. 1975).

Finally, a Section 1985 action is not supported by vague and conclusionary allegations regarding the existence of a conspiracy.

"It [is] incumbent upon [the plaintiff] to allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy."

Powell v. Workmen's Comp. Bd. of the State of New York, 327 F.2d 131, 137 (2nd Cir. 1964). See also Guedry v. Ford, 431 F.2d 660 (5th Cir. 1970). Here plaintiff has not alleged any such overt acts. He simply states the conclusion that certain agents and/or officers of the defendant "conspired among themselves in a malicious and purposeful manner to deprive Plaintiff Warren Lynch of his constitutionally guaranteed rights of free speech and free association, and

property rights and coerced Green Construction Company to participate in said conspiracy. . . . In particular, . . . Defendant Union by its above named officers and/or agents maliciously, intentionally, and outrageously conspired to remove Plaintiff Warren Lynch, from his position of spread superintendent, and by such conduct did in fact cause Green Construction Company to immediately remove Plaintiff from his position."

The Court would note at this point that these agents and/or officers of the defendant have not also been named as defendants in this action. Plaintiff apparently attributes their alleged acts to the named defendant under the doctrine of respondeat superior. However, the doctrine of respondeat superior does not apply in civil rights cases unless there are allegations that the superior actually directed or participated in the alleged violation of a plaintiff's constitutional rights. See Westinghouse Broadcasting Co., Inc. v. Dukakis, 409 F.Supp. 895 (D. Mass. 1976); Conner v. Jeffes, 67 F.R.D. 86 (M.D. Pa. 1975). See also Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973), cert. denied 414 U.S. 1033 (1973); Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973); Casey v. Purser, 385 F.Supp. 621 (W.D. Okla. 1974); Barrows v. Faulkner, 327 F.Supp. 1190 (N.D. Okla. 1971). The Complaint lacks any allegations that the acts of the agents and/or officers were authorized by the defendant Union, such that the Union as an individual entity could be said to have directed or participated in the alleged conspiracy.

Because the plaintiff Warren Lynch has not stated a claim arising under 42 U.S.C. § 1985(3), the Court lacks subject matter jurisdiction pursuant to 28 U.S.C. § 1343.

Plaintiffs' fourth claim arises under state tort law. For a federal court to exercise pendent jurisdiction over a state claim, "[t]he federal claim must have substance sufficient to confer subject matter jurisdiction on the court." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Because

the Court has held that it lacks subject matter jurisdiction over plaintiffs' federal claims, it may not exercise pendent jurisdiction over the state claim. Plaintiffs' fourth claim must therefore also be dismissed.

For the foregoing reasons, it is therefore ordered that defendant's motion to dismiss is hereby sustained.

It is so Ordered this 9th day of March, 1978.


H. DALE COOK
United States District Judge

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

FILED

TULSA DIVISION

MAR 8 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

DILLARD CRAVENS, et al.,)
)
Plaintiffs,)
)
-vs-)
)
AMERICAN AIRLINES, ET AL.,)
)
Defendants.)

NO. CIV-74-C-301

ORDER DISMISSING CLAIMS OF PLAINTIFF REBECCA JORDON

The parties having filed a stipulation pursuant to Rule 41(a) (1) of the Federal Rules of Civil Procedure to dismiss with prejudice as to the defendant, American Airlines, all claims of plaintiff, Rebecca Jordon, and for good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. All claims of plaintiff, Rebecca Jordon, shall be and are hereby dismissed with prejudice as to defendant, American Airlines.

2. The Court finds there is no just reason for delay and expressly directs that final judgment be entered against each of said plaintiffs in accordance with this Order.

DATED this 8th day of March, 1978.

W. Dale Book
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 LEE M. RHODES, JVA D.)
 RHODES, and OKLAHOMA)
 TAX COMMISSION,)
)
 Defendants.)

CIVIL ACTION NO. 77-C-298-B

FILED

MAR 7 1978

JUDGMENT OF FORECLOSURE

Jack C. Silver, Clerk
U. S. DISTRICT COURT

THIS MATTER COMES on for consideration this 7th
day of March, 1978, the Plaintiff appearing by Robert P. Santee,
Assistant United States Attorney; and the Defendant, Oklahoma
Tax Commission, appearing by its attorney, Clyde Fosdyke, and
the Defendants, Lee M. Rhodes and Iva D. Rhodes, appearing not.

The Court being fully advised and having examined
the file herein finds that Defendants, Lee M. Rhodes and Iva D.
Rhodes, were served with Summons and Complaint on August 1, 1977,
and the Defendant, Oklahoma Tax Commission, was served with Summons
and Complaint on July 12, 1977, as appears on the United States
Marshal's Service herein.

It appearing that the Defendant, Oklahoma Tax Commission,
has duly filed its Answer and Cross-Petition on August 2, 1977,
and filed its Amended Answer and Cross-Petition on August 3, 1977,
and, that Defendants, Lee M. Rhodes and Iva D. Rhodes, have
failed to answer herein and that default has been entered by
the Clerk of this Court.

The Court further finds that this is a suit based
upon a mortgage note and foreclosure on a real property mortgage
securing said mortgage note upon the following described real
property located in Delaware County, Oklahoma, within the Northern
Judicial District of Oklahoma:

Lots 5 and 6 in Block A of MAPLE WOOD ADDITION according to the official plat thereof, Delaware County, Oklahoma.

THAT the Defendants, Lee M. Rhodes and Iva D. Rhodes, did, on the 4th day of August, 1975, execute and deliver to the United States of America, acting through the Farmers Home Administration, their mortgage and mortgage note in the sum of \$20,800.00 with 8 1/8 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Lee M. Rhodes and Iva D. Rhodes, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$22,369.67 as unpaid principal with interest thereon at the rate of 8 1/8 percent per annum from February 28, 1977, until paid, plus the cost of this action accrued and accruing.

The Court further finds that Defendant, Oklahoma Tax Commission, is entitled to judgment against Defendant, Lee M. Rhodes, in the amount of \$488.82 together with accruing interest thereon, filed May 5, 1976, in Delaware County, Oklahoma, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Defendant, Oklahoma Tax Commission, is entitled to judgment against Defendant, Lee M. Rhodes, in the amount of \$1,524.67, together with accruing interest thereon, filed on September 28, 1973, in Delaware County, Oklahoma, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Lee M. Rhodes and Iva D. Rhodes, in personam, for the sum of \$22,369.67 with interest thereon at the rate of 8 1/8 percent per annum from

February 28, 1977, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Oklahoma Tax Commission have and recover judgment, in personam, against the Defendant, Lee M. Rhodes, in the amount of \$488.82 together with accruing interest thereon, filed May 5, 1976, in Delaware County, Oklahoma, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Oklahoma Tax Commission have and recover judgment, in personam, against the Defendant, Lee M. Rhodes, in the amount of \$1,524.67 together with accruing interest thereon, filed September 28, 1973, in Delaware County, Oklahoma, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property

or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

s/ William L. Barrow
UNITED STATES DISTRICT JUDGE

APPROVED

Robert P. Santee
ROBERT P. SANTEE
Assistant United States Attorney

Clyde Fosdyke
CLYDE FOSDYKE
Attorney for Oklahoma Tax Commission

BEFORE THE JUDICIAL PANEL
ON
MULTIDISTRICT LITIGATION

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION
FILED

FEB 28 1978

IN RE SWINE FLU IMMUNIZATION)
PRODUCTS LIABILITY LITIGATION)

PATRICIA D. HOWARD
CLERK OF THE PANEL
DOCKET NO. 330

OPINION AND ORDER

77-C-465-B

BEFORE JOHN MINOR WISDOM*, CHAIRMAN, AND EDWARD WEINFELD*,
EDWIN A. ROBSON *, JOSEPH S. LORD, III, STANLEY A. WEIGEL,
ANDREW A. CAFFREY, AND ROY W. HARPER, JUDGES OF THE PANEL.

PER CURIAM

FILED

MAR - 1 1978

JAMES F. DUFFY
CLERK

I. Background of the Litigation

This litigation presently consists of 26 actions pending
in seventeen federal districts. The distribution of the actions
is as follows:

Northern District of Alabama	5
Northern District of California	2
Eastern District of California	2
Southern District of New York	2
District of Minnesota	2
District of Hawaii	2
Northern District of New York	1
Northern District of Oklahoma	1
Northern District of Ohio	1
Southern District of Florida	1
Western District of Michigan	1
Eastern District of Missouri	1
Eastern District of Pennsylvania	1
Middle District of Tennessee	1
District of Colorado	1
District of Arizona	1
District of Vermont	1

FILED

MAR 6 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

* Judges Wisdom, Weinfeld and Robson took no part in the decision
of this matter.

These actions involve claims for personal injuries or wrongful death resulting from administration of swine flu vaccinations under the National Swine Flu Immunization Program of 1976, 42 U.S.C. §247b(j)-(1). The legislation provided that the United States would assume exclusive liability, with certain limitations, for all personal injuries or deaths resulting from manufacture, distribution or administration of vaccine under the swine flu program. 42 U.S.C. §247b(k). The legislation further provided that, with certain modifications, the customary procedures for filing tort claims against the United States must be followed. Id. Those procedures require a claimant to file a written notice of claim with the United States and, if the claim is not resolved within six months, it is deemed to have been disallowed and the claimant is entitled to file suit in federal court on the claim. 28 U.S.C. §2675. The present actions apparently have been filed after compliance with those procedures.

The United States is the sole defendant in all except two of the actions.^{1/} Plaintiffs in the actions generally

^{1/} In one of the Alabama actions (Jarrett), four pharmaceutical manufacturers that participated in the swine flu program are also named as defendants. Plaintiff in Jarrett alleges that any interpretation of the statutory provisions of the swine flu program that would preclude actions against participants in the program other than the United States is unreasonable and unconstitutional.

Plaintiff in one of the Southern District of New York actions (Shiels) alleges that while he was hospitalized in a New York hospital with injuries resulting from administration of a swine flu vaccination to him, he was allowed to fall from an x-ray table, sustaining further injuries. The New York hospital is named as a second defendant in Shiels.

allege that the swine flu vaccine was improperly developed, researched, tested, manufactured, marketed, distributed, promoted and administered. In particular, plaintiffs allege that the risks of injuries and neurological complications that might result from administration of the vaccine were inadequately disclosed. Liability is claimed under theories of, inter alia, negligence, strict liability, fraudulent misrepresentation and breach of express and implied warranties. The injuries most frequently alleged are paralysis, a particular type of paralysis known as Guillain-Barre Syndrome, loss of sensation and death. Plaintiff in the action pending in the Southern District of Florida (Reichlin) seeks to represent a class consisting of all individuals who have contracted Guillain-Barre Syndrome as a proximate result of having been innoculated with swine flu vaccine. The other 25 actions are individual actions.

II. Proceedings Before the Panel

Pursuant to 28 U.S.C. §1407(c)(i) and Rule 8, R.P.J.P.M.L., 65 F.R.D. 253, 258-59 (1975), the Panel ordered the parties to show cause why these 26 actions should not be transferred to a single district for coordinated or consolidated pretrial proceedings.^{2/} The plaintiffs in several actions favor transfer.

^{2/} Another action, Rosaleen Fergus v. The United States of America, N.D. Illinois, Civil Action No. 77C3697, was included in the show cause order but has recently been dismissed. A motion to reconsider that dismissal is presently under consideration by the Illinois court, however. If this action is reinstated, it will be treated as a tag-along action. See Rules 1, 9 and 10, R.P.J.P.M.L., 65 F.R.D. 253, 255, 259-60 (1975).

The United States and plaintiffs in several other actions oppose transfer. A number of different transferee forums have been suggested by the parties.

We find that these actions involve common questions of fact and that their transfer under Section 1407 to the District of the District of Columbia for coordinated or consolidated pretrial proceedings will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation.

III. The Question of Transfer

Although the United States and some of the other parties opposing transfer recognize that these actions involve common questions of fact regarding pertinent scientific and medical data, the parties opposing transfer contend that individual factors predominate in each action. For example, they urge that the types and degrees of injuries vary; that causation varies significantly with individual factors such as age, medical history, and the amount of time that elapsed from receipt of the vaccine until the onset of injuries; that the substantive law applicable in each action will be that of the state wherein each action was filed; and that liability questions against the United States differ because in actuality the United States stands in the shoes of a number of participants in the swine flu program, including the five manufacturers of the swine flu vaccine and the numerous local

groups that administered the vaccine. In addition, some opponents maintain that transfer will cause undue expense to plaintiffs of limited financial means and that, because new actions will continuously be filed, pretrial proceedings in the actions in this litigation will be in many different stages and therefore coordination or consolidation of these proceedings will be difficult.^{3/}

We find these arguments unpersuasive. Although we acknowledge that the swine flu actions differ in certain respects, we are persuaded that all these actions involve substantial common questions of fact concerning the development, production, testing and administration of the swine flu vaccine. Scientific knowledge concerning the efficacy of the swine flu vaccine and the potential risks involved in administration of the vaccine is relevant to all actions. Transfer is thus necessary in order to prevent duplicative discovery concerning the same documents and witnesses and to eliminate the possibility of conflicting pretrial rulings. Any discovery unique to a particular action can be scheduled by the transferee judge to proceed concurrently with the common discovery, which will allow the litigation to proceed

^{3/} We are advised that over 1100 claims have been filed with the United States for injuries allegedly resulting from the administration of vaccinations under the swine flu program, and that over 300 of these claims involve Guillain-Barre Syndrome. We are further advised that no Guillain-Barre claims have been settled by the United States. A large number of tag-along actions are therefore anticipated and, in fact, several have already been filed. Our order of December 5, 1977, directing the United States to notify the Panel of any new actions remains in effect.

expeditiously in all areas. See In re Republic National-Realty Equities Securities Litigation, 382 F. Supp. 1402, 1405-06 (J.P.M.L. 1974).

The concern that transfer might be financially burdensome to plaintiffs of limited financial means is unwarranted. Transfer under Section 1407 will have the salutary effect of placing all swine flu actions before a single judge who will be in the best position to determine the manner and extent of coordination or consolidation of the pretrial proceedings for the optimum conduct of the litigation as a whole, including minimizing the overall expense to the parties. See In re A. H. Robins, Inc. "Dalkon Shield" IUD Products Liability Litigation, 406 F. Supp. 540, 542 (J.P.M.L. 1975). Since a Section 1407 transfer is for pretrial proceedings only, there is usually no need for the parties and witnesses to travel to the transferee district for depositions or otherwise. See, e.g., Fed.R.Civ.P. 45(d)(2). Furthermore, the judicious use of liaison counsel, lead counsel and steering committees will eliminate the need for most counsel ever to travel to the transferee district. See Manual for Complex Litigation, Part I, §§1.90-1.93 (rev. ed. 1977). And it is most logical to assume that prudent counsel will combine their forces and apportion the workload in order to streamline the efforts of the parties and witnesses,

their counsel and the judiciary, thereby effectuating an overall savings of cost and a minimum of inconvenience to all concerned. See In re Nissan Motor Corporation Antitrust Litigation, 385 F. Supp. 1253, 1255 (J.P.M.L. 1974).

Nor need the parties worry about incorporating tag-along actions into the coordinated or consolidated pretrial proceedings in this litigation. The transferee judge has procedures available through which appropriate discovery already completed in earlier actions can be made applicable to actions that are later filed. See Manual for Complex Litigation, Parts I and II, §§3.11 (rev. ed. 1977). Indeed, this will be an additional benefit of transfer under Section 1407.

IV. Selection of the Transferee District

Since this litigation is national in scope, and many actions filed in several different districts are involved, any of several districts might be an appropriate transferee forum. On balance, however, we believe that the District of the District of Columbia is the preferable transferee forum for this litigation, even though none of the actions yet filed in this litigation is pending there. Administrative control over the swine flu program was exercised by officials of the Department of Health, Education and Welfare, which is headquartered in the District of Columbia. The District of the District of

Columbia therefore has a greater nexus to the principal issues involved in this litigation than any other federal district. See In re Sundstrand Data Control, Inc. Patent Litigation, ___ F. Supp. ___, ___ (J.P.M.L., filed January 27, 1978) (slip opinion at 6-8).

Although we are particularly sensitive to the arguments of certain plaintiffs for selection of a transferee district in the central part of the country in order to best facilitate the convenience of the plaintiffs, we are satisfied that the need for a central location will be minimized by optimum use of lead counsel.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. §1407, the actions listed on the following Schedule A be, and the same hereby are, transferred to the District of the District of Columbia and, with the consent of that court, assigned to the Honorable Gerhard A. Gesell for coordinated or consolidated pretrial proceedings.

NORTHERN DISTRICT OF ALABAMA

Roland Ryan v. The United States
of America

Civil Action
No. 77M1666S

Leevotus Cooper v. The United States
of America

Civil Action
No. 77P1500S

George T. Jarrett, etc. v. The United
States of America, et al.

Civil Action
No. 77L5051NE

Bert Moss v. The United States of
America

Civil Action
No. 77H1587M

Mary A. Moss v. The United States of
America

Civil Action
No. 77H1586M

NORTHERN DISTRICT OF CALIFORNIA

Robert Ray Putman v. The United States of
America

Civil Action
No. C77-2201-RHS

Stephen Burke v. The United States of
America

Civil Action
No. C77-2234-SAW

EASTERN DISTRICT OF CALIFORNIA

Howard Edwin Blake v. The United States
of America

Civil Action
No. Civ S 77-665-TJM

Albert J. Heitz v. The United States
of America

Civil Action
No. Civ S-77-578-TJM

SOUTHERN DISTRICT OF NEW YORK

George F. Shiels v. The United States
of America

Civil Action
No. 77 Civ. 5231

Benton Fischer v. The United States
of America

Civil Action
No. 77 Civ 5495

DISTRICT OF MINNESOTA

Dorothy Burdine, etc. v. The United States of America Civil Action
No. Civ 4-77-333

Rodney J. Ganje v. The United States of America Civil Action
No. Civ 4-77-412

DISTRICT OF HAWAII

Kenneth Tatsuro Hazemoto v. The United States of America Civil Action
No. 77-0264

Mark Charles Waldvogel, et al. v. The United States of America Civil Action
No. 77-0459

NORTHERN DISTRICT OF NEW YORK

Catharine M. McDonough v. The United States of America Civil Action
No. 77 CV416 78-0356

NORTHERN DISTRICT OF OKLAHOMA

J. Don Foster v. The United States of America Civil Action
No. 77-C-465-B

NORTHERN DISTRICT OF OHIO

Mary Ellen Ivan, et al. v. The United States of America Civil Action
No. C77-229-Y

SOUTHERN DISTRICT OF FLORIDA

Celia D. Reichlin v. The United States of America Civil Action
No. 77-5892-Civ-CA

WESTERN DISTRICT OF MICHIGAN

Kathleen Herbst, etc. v. The United States of America Civil Action
No. G77-543

EASTERN DISTRICT OF MISSOURI

Weldon Edward Pretre, etc. v. The United States of America

Civil Action
No. 77-1107C(4)

EASTERN DISTRICT OF PENNSYLVANIA

Arthur S. Polk, etc. v. The United States of America

Civil Action
No. 77-4041

MIDDLE DISTRICT OF TENNESSEE

Katherine G. Wolfe, et al. v. The United States of America

Civil Action
No. 77-2083-NE-CV

DISTRICT OF COLORADO

Scott Richard Heath v. The United States of America

Civil Action
No. 77-F-1113

DISTRICT OF ARIZONA

Jerome Katz v. The United States of America

Civil Action
No. Civ 77-249-Tuc

DISTRICT OF VERMONT

Roger A. Mitiguy v. The United States of America

Civil Action
No. 77-243

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TULSA AIRPORT AUTHORITY,)
an agency of the City of Tulsa,)
Tulsa, Oklahoma, (a municipal)
corporation),)

Plaintiff,)

-vs-)

NO. 77-C-530-B

TRANSPORT WORKERS' UNION OF AMERICA,)
and its Local Union #514, ROBERT J.)
RIDGE, President of Local #514 of)
TWUA, PAUL A. GAYNOR, International)
Representatives of TWUA, and all)
other officers, members and associates)
of the Transport Workers' Union and its)
Local #514,)

Defendants.)

FILED

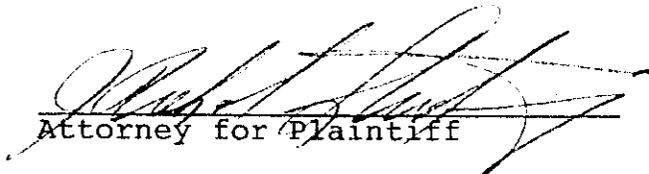
MAR 3 1978

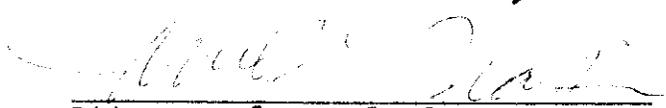
Jack C. Silver, Clerk
U. S. DISTRICT COURT

STIPULATION FOR DISMISSAL

It is hereby stipulated that the above entitled
action may be dismissed without prejudice, each party to bear his
own costs.

Dated this 3 day of March, 1978.


Attorney for Plaintiff


Attorney for Defendant

Approved

Allen E. Bonar
Chief U.S. District Judge
3/3/78

FILED

MAR 3 1978 K

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk
U. S. DISTRICT COURT

INTERNATIONAL BUSINESS MACHINES)
CORPORATION,)
)
Plaintiff,)
)
vs.)
)
THE TELEX CORPORATION and)
TELEX COMPUTER PRODUCT, INC.,)
)
Defendants.)

Civil Action No. 73-C-39 - 10 ✓

ORDER

NOW, on this 31st day of March, 1978, appears the plaintiff represented by Donald E. Greenholz and Rucker, Tabor, McBride & Hopkins, Inc. by Donald G. Hopkins, and the defendants represented by Head, Johnson & Chafin by Paul H. Johnson, to announce to the Court that the parties hereto have entered into an Agreement of Settlement and Mutual Release, and a Stipulation of Dismissal With Prejudice, wherein the plaintiff desires to dismiss its Complaint and defendants desire to dismiss their counterclaims, all with prejudice.

The Court, after hearing the announcements of counsel and examining the Agreement of Settlement and Mutual Release, and the Stipulation of Dismissal With Prejudice, finds:

1. That said Agreement of Settlement and Mutual Release entered into by the parties settles all issues pending in the above-entitled litigation in this Court between them.
2. That the pending Complaint and counterclaims are dismissed with prejudice.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that this entitled cause and the counterclaims filed herein, be and the same are dismissed with prejudice, with no costs to be paid by the parties to each other.

Celia F. Bonow
JUDGE

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

ARTHUR LEE GORDON,)
)
 Plaintiff,)
)
 vs.) No. 77-C-452-C ✓
)
 DAVID WILLIAMS,)
)
 Defendant.)

FILED

MAR - 1 1978 *ph*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

This negligence action was removed by the defendant from the District Court of Creek County, Drumright Division, State of Oklahoma. Federal jurisdiction is predicated upon diversity and amount in controversy. Plaintiff has moved to remand this action to the state court on the ground that there is no diversity of citizenship between the plaintiff and the defendant.

In his removal petition, defendant alleges that he is and was at the time of the commencement of this lawsuit, a resident and citizen of the State of Texas. He further alleges that the plaintiff was at the time of the commencement of suit and still is a resident and citizen of the State of Oklahoma. Plaintiff takes the position that the defendant has always been a citizen of the State of Oklahoma and that therefore diversity of citizenship does not exist between these parties.

An allegation of diversity of citizenship alone, when challenged, is not enough to establish federal jurisdiction. Where the evidence and the inferences and deductions fairly to be drawn from it present a conflict upon that question of fact, it is for the trial court to decide what inferences and deductions are to be drawn therefrom. Walden v. Broce Const. Co., 357 F.2d 242, 244 (10th Cir. 1966); Midcontinent

Pipe Line Co. v. Whiteley, 16 F.2d 871, 874-5 (10th Cir. 1940).

The only evidence adduced on this matter is found in the defendant's deposition dated January 13, 1978. It is clear from defendant's testimony on that occasion that he changed his residence to Dallas, Texas approximately two years ago. This change in residence resulted from a transfer by his employer, Sun Oil Company. Previous to this transfer, defendant had worked for Sun Oil for approximately four years in Oklahoma. Defendant did not want to move to Texas, but desired to stay in Oklahoma. Defendant considers Sapulpa, Oklahoma to be his home. Previous to his transfer, defendant had lived in Oklahoma his entire life. He still has family in Oklahoma and returns to Oklahoma to visit approximately once a month and on holidays. His immediate family, that is, his wife and children, reside with him in Dallas, Texas. Defendant desires to return to Oklahoma at the earliest possible date and has arranged with Sun Oil to be transferred back to Oklahoma at the first opening. Defendant is a registered voter in Creek County, Oklahoma.

For the purpose of determining diversity, citizenship is synonymous with domicile. See Russell v. New Amsterdam Cas. Co., 325 F.2d 996 (8th Cir. 1964). See also Johnston v. Cordell Nat'l Bank, 421 F.2d 1310 (10th Cir. 1970). The parties do not question the fact that the defendant's original domicile is Oklahoma. Two elements are essential to establish a new domicile: a present intent and purpose to remain and establish a residence in a particular place and some act or acts to carry such intention into effect. See Midcontinent Pipe Line, supra, at p. 874. See also Johnston, supra, at p. 1312. The only reasonable inference to be drawn from the defendant's testimony is that he lacked the present intent to remain and establish a residence in Dallas, Texas. His move to Dallas was entirely involuntary. He was transferred there by his employer, but he never really wanted to leave

Oklahoma. Since his transfer, he has made every effort to return permanently to Oklahoma. Defendant also had strong motives for not wanting to leave Oklahoma, these being the presence of close family members in Oklahoma, and the fact that he was a lifetime Oklahoman.

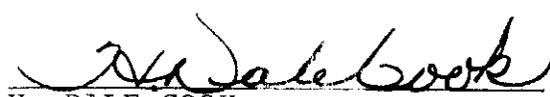
"Declarations of intention to establish or retain residence in a particular locality are of course entitled to great weight in the determination of the factum of residence, but like other declarations they should be viewed in the light of the motive which prompted them. Ofttimes an unguarded course of conduct is more significant in the ascertainment of domicile or residence."

Townsend v. Bucyrus-Erie Co., 144 F.2d 106, 109 (10th Cir. 1944). See also Johnston, supra.

The Court is satisfied that the defendant has retained his Oklahoma domicile or citizenship. Because the plaintiff is also an Oklahoma citizen, diversity jurisdiction is lacking and this action must be remanded to the state court pursuant to 28 U.S.C. § 1447(c).

For the foregoing reasons, it is therefore ordered that plaintiff's motion to remand be sustained.

It is so Ordered this 28th day of February, 1978.


H. DALE COOK
United States District Judge

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

PATRICIA W. BINGHAM,)
)
) Plaintiff,)
)
vs.)
)
RUSSELL BRIDGES, a/k/a)
LEON RUSSELL,)
)
) Defendant.)

No. 77-C-42-C

FILED

MAR - 1 1978 *pl*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

The Court has before it for consideration plaintiff's motion to amend the Findings of Fact, Conclusions of Law and Judgment entered by the Court on February 7, 1978. The Court has reviewed the file in this case in light of plaintiff's motion and is convinced that its rulings of that date were correct. However, it seems appropriate to comment briefly on some of the points raised in plaintiff's motion.

Plaintiff's primary contention is that the Court erred in refusing to recognize the competency of certain of defendant's statements offered by plaintiff to prove the fair market value, or "reasonable" value of the lake property as of May 19, 1976. Plaintiff argues that the law applicable to this case is found in H. D. Youngman Contractor v. Girdner, 262 P.2d 693 (Okla. 1953). However, that case is distinguishable from the instant one, in that the issue before that court was whether the plaintiff, who sued to recover for damage caused to his property by the defendant's blasting activities, was competent to testify as to the value of his land. No case has been cited by plaintiff, and the Court has discovered none, in which statements similar to those relied upon by plaintiff in this case were held to be competent evidence to be used against a defendant in establishing the value of the defendant's property. The Court also notes that in Minick v. Rhoades Oil Company, 533 P.2d 598 (Okla. 1975), a case

factually similar to the one relied upon by plaintiff but decided more than twenty years later, the court held that for a property owner to be competent to testify as to the value of his land, he must occupy the property and be familiar with values in the community. Neither of those conditions was present in this case. In any event, as the Court held in its Findings of Fact and Conclusions of Law, even if the defendant were competent to give an opinion as to the value of the lake property under these circumstances, the statements made were conditional and, if taken at face value, were so incredible as to be disregarded.

For the foregoing reasons, plaintiff's motion to amend the Findings of Fact, Conclusions of Law and Judgment is hereby overruled.

It is so Ordered this 28th day of February, 1978.


H. DALE COOK
United States District Judge

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

TIMOTHY WAYNE THOMAS,)
)
 Plaintiff,)
)
 vs.)
)
 DAVID YOUNG, DISTRICT ATTORNEY;)
 THE HONORABLE STREETER SPEAKMAN,)
 JR.; BRICE COLEMAN, SHERIFF OF)
 CREEK COUNTY, OKLAHOMA; AND THE)
 STATE OF OKLAHOMA,)
)
 Defendants)

✓
No. 77-C-531-C

F I L E D

MAR - 1 1978 *ph*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

This is a civil rights action brought pursuant to 42 U.S.C. §§ 1983 and 1985, in which plaintiff seeks to recover damages for alleged deprivations of his constitutional rights caused by certain actions of the defendants in processing the plaintiff as a material witness pursuant to 22 O.S. § 719. Now before the Court for consideration is the motion of defendant Streeter Speakman, Jr. (Speakman) to dismiss the complaint for failure to state a claim upon which relief can be granted.

Plaintiff alleges that he was a witness to the murder of an Oklahoma Highway Patrolman and that he was apprehended as a material witness and brought before defendant Speakman, a Creek County, Oklahoma District Court Judge. Plaintiff alleges that this defendant set an excessive and unjust surety bond, failed and refused to advise him of his Constitutional rights, including his right to the assistance of an attorney, failed to advise him of the amount of time he could expect to be incarcerated and failed to supervise his incarceration, all in violation of various provisions of the United States Constitution and of 22 O.S. § 719. Plaintiff further alleges that "[a]t all times pertinent to this complaint, . . . Defendant, Streeter Speakman, Jr., was a

District Court Judge for Creek County, State of Oklahoma, and in doing the acts and things hereinafter set forth, said Defendants were acting in their respective official capacities.

. . ." Defendant Speakman contends that the doctrine of judicial immunity renders him absolutely immune from this suit and that it should therefore be dismissed as to him.

At the outset, it is apparent that plaintiff has failed to state a claim upon which relief can be granted under 42 U.S.C. § 1985(3). To constitute a cause of action under that statute, ". . . there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). See also Lesser v. Braniff Airways, Inc., 518 F.2d 538 (7th Cir. 1975). The plaintiff must show that he was treated differently than anyone else would have been treated under the same circumstances. Joyce v. Ferrazzi, 323 F.2d 931 (1st Cir. 1963). In the instant case, the plaintiff has not alleged any discrimination -- racial, class-based or otherwise. § 1985 does not attempt to reach a conspiracy to deprive one of every constitutional right; it is directed solely to deprivations of "equal protection of the laws" or of "equal privileges and immunities under the laws." Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951). Because the plaintiff has failed to allege any discriminatory deprivation of equal protection or equal privileges and immunities, his complaint fails to state a cause of action against any of the defendants under 42 U.S.C. § 1985(3).

The common law immunity of judges from liability for damages for acts committed within their judicial jurisdiction applies in actions brought pursuant to 42 U.S.C. § 1983. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

"This immunity applies even when the judge

is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (citations omitted) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." 386 U.S. at 554.

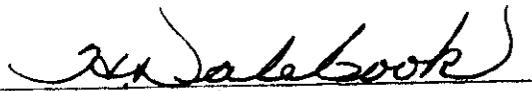
A judge is immune if he acts merely in "excess" of his jurisdiction, Duba v. McIntyre, 501 F.2d 590 (8th Cir. 1974), and

"[i]t is only in instances in which a judge acts or proceeds in the clear absence of any color of jurisdiction or proceeds officially in respect to a cause or matter over which the court is clearly without any color of jurisdiction that he may be subjected to personal liability as a trespasser for damages arising out of his unauthorized act."

Ryan v. Scoggin, 245 F.2d 54 (10th Cir. 1957). In the instant case, defendant Speakman was acting pursuant to an Oklahoma statute and clearly had jurisdiction over the subject matter and over the person of the plaintiff. See Franklin v. Meredith, 386 F.2d 958 (10th Cir. 1967); O'Bryan v. Chandler, 352 F.2d 987 (10th Cir. 1965), cert. denied 384 U.S. 926, 86 S.Ct. 1444, 16 L.Ed.2d 530 (1966). Plaintiff has alleged that defendant Speakman was at all times acting in his official capacity as a District Judge. A similar allegation has been held sufficient, in and of itself, to establish judicial immunity. Weaver v. Haworth, 410 F.Supp. 1032 (E.D. Okl. 1975). Under the circumstances of this case, defendant Speakman is immune from personal liability in damages for the acts complained of by the plaintiff.

For the foregoing reasons, the motion to dismiss of defendant Streeter Speakman, Jr. is hereby sustained.

It is so Ordered this 28th day of February, 1978.


H. DALE COOK
United States District Judge