

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

**FILED**

NOV 17 1994

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

KATHY L. RYALS,  
Plaintiff,

vs.

CITY OF TULSA, a municipal  
corporation, and ROY C.  
JOHNSON,

Defendants.

No. 91-C-693-E

JUDGMENT

This action came on for jury trial before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly tried and a jury having rendered its verdict,

IT IS THEREFORE ORDERED that Plaintiff recover the sum of \$5,000.00 from Defendant Roy C. Johnson, with interest thereon at the rate of 6.06 per cent as provided by law, together with costs.

IT IS FURTHER ORDERED that the Plaintiff recover of the Defendant City of Tulsa the sum of \$5,000.00 in damages, with interest thereon at the rate of 6.06 per cent as provided by law, together with costs.

ORDERED this 16<sup>th</sup> day of November, 1994.

  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE 11-18-94

54

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

FILED  
NOV 1 / 1994  
Richard H. Lawrence, Clerk  
U.S. DISTRICT COURT

WESLEY H. YOUNG, JR.,  
Petitioner,  
vs.  
R. MICHAEL CODY,  
Respondent.

No. 93-C-503-B

ENTERED ON DOCKET

DATE NOV 18 1994

ORDER

Petitioner's pro-se application for a writ of habeas corpus is now at issue before the Court. The Respondent has filed a Rule 5 response. As more fully set out below, the Court concludes that Petitioner's application should be denied.

**I. BACKGROUND**

In the present application for a writ of habeas corpus, Petitioner challenges his conviction in Case No. CRF-88-4053, Tulsa County District Court, for possession of a controlled substance, after former conviction of two or more felonies. He argues that certain comments made by the prosecutor during closing argument resulted in the denial of a fair trial and that the prosecutor improperly cross-examined him regarding the giving of a false name at a previous arrest. Respondent argues that the comments made by the prosecutor did not deny the Petitioner of a fundamentally fair trial and that the improper questioning by the prosecutor amounted to harmless error. The Petitioner has not filed a reply.

At trial, the State presented evidence that the Petitioner dropped the cocaine, for which he was charged, after Tulsa Police

Officer David Davis forced the bathroom door open and shined a flashlight directly into Petitioner's face. (Tr. at 30-39.) A rock of suspected cocaine was later confiscated by Officer Robert Kurowski from the bathroom floor once the lights were turned on. (Tr. at 39-40; 53-60.) The Petitioner took the stand and presented a story diametrically opposed to the prosecution. He denied blocking the door intentionally or possessing the cocaine. (Tr. at 99-100.)

## II. ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law because he raised the claims in this case on direct appeal. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318

(1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992).

Next, the Court must address Petitioner's claims of prosecutorial misconduct and the improper questioning by the prosecutor.

#### A. Prosecutorial Misconduct

In analyzing whether a petitioner is entitled to federal habeas relief for prosecutorial misconduct, a federal habeas corpus must determine whether there was a violation of the criminal defendant's federal constitutional rights which so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Coleman v. Saffle, 869 F.2d 1377, 1395 (10th Cir. 1989), cert. denied, 494 U.S. 1090 (1990). The factors considered in this due process analysis are: (1) the strength of the state's case; (2) whether the judge gave curative instructions regarding the misconduct; and, (3) the probable effect of the conduct on the jury's deliberative process. Hopkinson v. Shillinger, 866 F.2d 1185, 1210 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

In his petition, Petitioner does not point to any specific comments made by the prosecutor during closing argument. He argues, however, that his Fourteenth Amendment rights were violated by the prosecutors comments as briefed in Mahorney v. Wallman, 917 F.2d 469 (10th Cir. 1990), and by the prosecutor's improper comments regarding the credibility of the State's witnesses and the

unbelievability of Petitioner's testimony. Because Petitioner is proceeding pro se, the Court liberally construes his petition to raise the same prosecutorial comments which his counsel challenged on direct criminal appeal.

The first instance of alleged misconduct was when the prosecutor endorsed the character for truthfulness of his testifying police officers and commented on the unbelievability of Petitioner's testimony as follows:

What reason on earth would Officer Davis and Officer Kurowski come in and commit perjury just to convict this man?

MR. OLIVER: Judge, we would object.

THE COURT: Overruled.

MR. EAGLETON: That's what it comes down to. Either Officers Davis and Kurowski are telling the truth or they're not. In weighing the credibility of the defendant's statement, testimony, first he said, yeah, I've got six prior felony convictions. I pled guilty because I was guilty. And then he said Oh, but they're still on appeal because of King versus State and Cole versus State and the Judge didn't ask me about my mental state. Forthright, coming forward, being honest. You determine the credibility. . . . Officer Yelton came in and gave a story diametrically opposed to what the defendant said. What reason on earth would Officer Yelton come in and commit perjury in an attempt to convict this man?

MR. OLIVER: Judge, again, we would object, vouching for the testimony of the witness.

THE COURT: Overruled. Overruled.

MR. EAGLETON: No reason whatsoever has been shown to you.

(Tr. at 134-135.)

While it amounts to misconduct for a prosecutor to vouch for the credibility of a witness, the Court cannot conclude that the

above comments individually or in summation constitute misconduct. The "vouching" comments were made by the prosecutor merely to illustrate to the jury that the defense case was diametrically opposed to the testimony of the prosecutor's witness and that, in order to find a reasonable doubt, the jury would have to conclude that the prosecutor's witness were not credible. Similarly, the Court finds that the comments about the unbelievability of the Petitioner were proper due to the two inconsistent stories presented at trial. At any rate, in the context of the entire trial, the Court finds that the "vouching" comments and the comments about the credibility of the Petitioner do not appear to be "so prejudicial" that they render the trial "fundamentally unfair."

The second instance of alleged misconduct was when the prosecutor stated the following comment:

He walked in cloaked in the presumption of innocence. I would suggest to you that the testimony by Officer Davis alone is enough to strip the defendant of that cloak.

(Tr. at 135.) Petitioner argues that these statements were improper under Mahorney v. Wallman, 917 F.2d 469 (10th Cir. 1990), because they deprived Petitioner of a constitutional right.<sup>1</sup>

In Mahorney, the prosecutor made misstatements concerning the presumption of innocence during voir dire and closing arguments. At closing argument, the prosecutor stated as follows:

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<sup>1</sup>Although Petitioner's trial counsel did not make a contemporaneous objection at trial to this second set of statements, the State has waived any procedural bar. Nevertheless, failure to object is properly weighed in the overall evaluation of fundamental fairness.

I submit to you, under the law and the evidence, that we are in a little different position today than we were when we first started this trial and it was your duty at that time, under the law of this land, as you were being selected as jurors, to actively in your minds presume that man over there not to be guilty of the offense of rape in the first degree, but, you know, things have changed since that time. I submit to you at this time, under the law and under the evidence, that that presumption has been removed, that that presumption no longer exists, that that presumption has been removed by evidence and he is standing before you now guilty. That presumption is not there any more.

Recognizing that ordinarily claims of prosecutorial misconduct and other trial errors are reviewed on habeas under the fundamental fairness standard, the Tenth Circuit Court of Appeals in Mahorney determined that "when the impropriety complained of effectively deprived the defendant of a specific constitutional right, a habeas claim may be established without requiring proof that the entire trial was thereby rendered fundamentally unfair." Mahorney, 917 F.2d at 472. Because the presumption of innocence is constitutionally rooted, the Tenth Circuit refused to be constrained by the fundamental fairness standard under the circumstances in Mahorney. Id.

The prosecutor's remarks in the case at hand, unlike the one in Mahorney, did not prejudice Petitioner's constitutional rights to a presumption of innocence. In the instant case the prosecutor at no time stated that the presumption of innocence was no longer present. Rather the prosecutor merely commented on the evidence-- i.e., that Officer Davis's statement was sufficient to find the Petitioner guilty. This analysis is further supported by the statements which followed the one at issue:

But if Officer Davis' testimony is not enough, Officer Kurowski's testimony corroborating Officer Davis and diametrically opposed to the testimony given by the defendant is enough to establish that the defendant might not be coming completely clean with us.

(Tr. at 135.) The Court also notes that during closing argument defense counsel twice restated that Petitioner must be presumed innocent, (tr. at 140-41), and at least once restated that the State had the burden to prove the Petitioner guilty beyond a reasonable doubt. (Tr. at 140.)

Accordingly, the Court concludes that Petitioner is not entitled to habeas relief on the basis of prosecutorial misconduct as alleged in his first and second grounds for relief.

**B. Improper Questions about Giving of False Name**

In his last ground for relief, Petitioner contends that he was denied a fair and impartial trial when the prosecutor questioned him concerning the giving of a false name during a prior arrest. The Oklahoma Court of Criminal Appeals found the questioning to be improper because the giving of a false name to an official constitutes a criminal offense under Oklahoma law. Nevertheless, the Court concluded that the error was harmless.

On federal habeas corpus review, this Court is concerned only with whether federal constitutional rights were infringed. "State court rulings on the admissability of evidence may not be questioned in federal habeas proceedings unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights. Brinlee v. Crisp, 608 F.2d 839, 850 (10th

Cir. 1979), cert. denied, 444 U.S. 1047 (1980). Thus, a federal habeas court "will not disturb a state court's admission of evidence of prior crimes, wrongs or acts unless the probative value of such evidence is so greatly outweighed by the prejudice flowing from its admission that the admission denies defendant due process of law." Hopkins v. Shillinger, 866 F.2d 1185, 1197 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

After considering all of the evidence here regarding the giving of a false name at a prior arrest, the Court concludes that its introduction did not render Petitioner's trial fundamentally unfair. Petitioner's reliance on Burk v. State, 594 P.2d 771 (Okla. Crim. App. 1979), for the proposition that the State did not follow proper state procedure to introduce evidence of crimes other than those charged, is misplaced in this case. "In a habeas action, the inquiry is not whether the state court has properly applied its own rules of evidence, but whether errors of constitutional magnitude have been committed. The State court is the final arbiter of state rules, and [this Court] must uphold its ruling unless the state evidentiary rule itself denies defendants due process." Hopkinson, 866 F.2d at 1197 n.7.

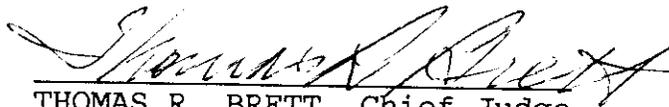
Accordingly, the Court concludes that Petitioner is not entitled to habeas corpus relief on this ground as well.

### III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in

custody in violation of the Constitution or laws of the United States. **ACCORDINGLY**, the petition for a writ of habeas corpus is hereby **denied**.

SO ORDERED THIS 17<sup>th</sup> day of Nov., 1994.



THOMAS R. BRET, Chief Judge  
UNITED STATES DISTRICT COURT

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

AMOCO CORPORATION and AMOCO )  
PRODUCTION COMPANY, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
JOHN E. NASH; ANTONY J. NASH; )  
SIDEWINDER TOOLS COMPANY, L.L.C.; )  
SANTOSE CORPORATION f/k/a )  
SIDEWINDER TOOLS CORPORATION; )  
and WORLD HIGH INVESTMENTS, INC. )  
 )  
Defendants. )  
 )

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NOV 16 1994

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

Civil Action No. 94 C 946 E

**STIPULATION OF DISMISSAL WITH PREJUDICE**

It is hereby stipulated and agreed by and among the parties that the above captioned action, and all claims and counterclaims or other causes of action asserted therein at any time, be dismissed with prejudice, with all parties to this stipulation to bear their own costs and attorneys' fees.

ENTERED ON DOCKET  
DATE 11-17-94

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

ENTERED ON DOCKET

DATE NOV 17 1994

THRIFTY RENT-A-CAR, INC., )  
an Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MCCOOL CORPORATION, a )  
Nevada Corporation; HARRY S. )  
MCCOOL, an individual; and )  
LEOTA V. MCCOOL, an )  
individual, )  
 )  
Defendants. )

Case No. 93-C-1090-B

**FILED**

NOV 17 1994

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ADMINISTRATIVE CLOSING ORDER**

Before the Court is the Application for Administrative Closing filed by the Plaintiff, Thrifty Rent-A-Car System, Inc. ("Thrifty"), pursuant to the Settlement Agreement entered into by Thrifty and the Defendants, McCool Corporation, Harry S. McCool and Leota V. McCool.

The Court hereby grants the application and orders that the case be administratively closed pending Thrifty's motion to reopen the case due to breach of the Settlement Agreement, or Thrifty's Stipulation of Dismissal requesting that the Court enter an order dismissing the lawsuit with prejudice and providing that each party shall bear its own costs and attorney's fees. If Thrifty fails to reopen the case or file a Stipulation of Dismissal by July 1, 1995, thirty days after the final settlement payment is due, the Court will dismiss the case with prejudice.

IT IS SO ORDERED, this 16<sup>th</sup> day of Nov, 1994.

**S/ THOMAS R. BRETT**  
UNITED STATES DISTRICT COURT JUDGE

ENTERED ON DOCKET

DATE NOV 16 1994

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

**FILE**

NOV 15 1994

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THERESA HANNAH aka )  
 Teresa Hannah, )  
 )  
 Defendant. )

No. 93-CR-187-C

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Now on this 15<sup>th</sup> day of November, 1994, this cause comes on to be heard in the matter of the plaintiff's motion to dismiss the Indictment without prejudice in the above styled cause. The Court finds that said motion ought to be granted and the Indictment is dismissed without prejudice.

IT IS SO ORDERED.



H. DALE COOK  
U.S. DISTRICT COURT JUDGE

28

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

**F I L E D**

NOV 14 1994

JENNIFER WILLIAMS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 BOARD OF COUNTY COMMISSIONERS )  
 OF THE COUNTY OF TULSA, *et al.*, )  
 )  
 Defendants. )

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-96-BU

**ENTERED ON DOCKET**

DATE 11-16-94

**JOURNAL ENTRY ON CONFESSION OF JUDGMENT**

This cause comes on for hearing on this 11 day of Nov, 1994.

The Plaintiff, Jennifer Williams, appearing by Counsel, Melvin C. Hall. Defendant, Board of County Commissioners of Tulsa County, Oklahoma, appearing by M. Denise Graham, Assistant District Attorney. The Court finds that these parties have entered the following stipulations:

1. On October 31, 1994, the Board of County Commissioners of Tulsa County, Oklahoma approved the recommendation of the District Attorney of Tulsa County, Oklahoma, to confess judgment in the case herein in the amount of Twenty Thousand Dollars (\$20,000.00) under the following conditions:

- a. The Defendant, Board of County Commissioners, is in no way admitting any liability or fault on the part of Sheriff Stanley Glanz, Undersheriff Bill Thompson or any other unnamed employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma;
- b. That the settlement of this case will result in a full release of any and all, past, present, or future claims against Defendant Board of County Commissioners of the County of Tulsa, Sheriff Stanley Glanz, Undersheriff Bill Thompson and any other unnamed employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma, which Plaintiff Jennifer Williams has or may have as a result of the incidents alleged to have occurred herein;

- c. That the settlement of this case will result in a full release of any and all, past, present, or future claims for attorney's fees under 42 U.S.C. § 1988, and costs associated therewith against Defendant Board of County Commissioners of the County of Tulsa, Sheriff Stanley Glanz and Undersheriff Bill Thompson, as well as against any unnamed employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma, which Plaintiff Jennifer Williams or her attorneys, Melvin C. Hall, Michael C. Turpen, Danny Williams, and Marilyn Wagner or the law firm of *Riggs, Abney, Neal, Turpen, Orbison & Lewis* may have as a result of this judgment.
2. Plaintiff specifically reserves any rights against any other named parties not deemed to be employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma.
3. Plaintiff is fully aware of the conditions upon which this confession of judgment is made and hereby fully accepts said conditions.

The Court accepts these stipulations and based upon said stipulations finds that the Plaintiff is entitled to recover the sum of Twenty Thousand Dollars (\$20,000.00) against the Board of County Commissioners of the County of Tulsa, Oklahoma.

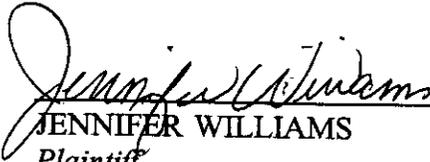
**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Plaintiff recover judgment against the Board of County Commissioners of Tulsa County, Oklahoma, in the sum of Twenty Thousand Dollars (\$20,000.00), with interest from the date hereof at 6.06% per annum.

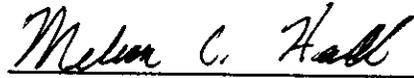
**S/ MICHAEL BURRAGE**

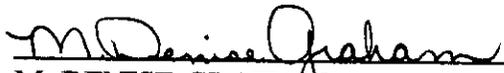
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MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

  
\_\_\_\_\_  
JENNIFER WILLIAMS  
*Plaintiff*

  
\_\_\_\_\_  
MELVIN C. HALL  
*Attorney for Plaintiff*

  
\_\_\_\_\_  
M. DENISE GRAHAM  
*Attorney for Defendants, Board of County  
Commissioners, Sheriff Stanley Glanz,  
and Bill Thompson*

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

JERRY DAIL HEAROD aka  
Jerry D. Hearod;  
JERRI ANNE HEAROD;  
CITY OF BROKEN ARROW, Oklahoma;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

FILED

NOV 16 1994

ROBERT J. HARRIS, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE 11/16/94

CIVIL ACTION NO. 94-C-543-~~7~~ B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14<sup>th</sup> day  
of Nov., 1994. The Plaintiff appears by Stephen C.  
Lewis, United States Attorney for the Northern District of  
Oklahoma, through Neal B. Kirkpatrick, Assistant United States  
Attorney; the Defendants, COUNTY TREASURER, Tulsa County,  
Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County,  
Oklahoma, appear by Dick A. Blakeley, Assistant District  
Attorney, Tulsa County, Oklahoma; the Defendant, CITY OF BROKEN  
ARROW, Oklahoma, appears by Michael R. Vanderburg, City Attorney,  
Broken Arrow, Oklahoma; and the Defendants, JERRY DAIL HEAROD and  
JERRI ANNE HEAROD, appear not, but make default.

The Court being fully advised and having examined the  
court file finds that the Defendant, CITY OF BROKEN ARROW,  
Oklahoma, was served a copy of Summons and Complaint on May 26,  
1994 by Certified Mail.

The Court further finds that the Defendants, JERRY DAIL HEAROD and JERRI ANNE HEAROD, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning August 17, 1994, and continuing through September 21, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, JERRY DAIL HEAROD and JERRI ANNE HEAROD, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendants, JERRY DAIL HEAROD and JERRI ANNE HEAROD. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the

parties served by publication with respect to their present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on June 9, 1994; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on June 3, 1994; and that the Defendants, JERRY DAIL HEAROD and JERRI ANNE HEAROD, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on August 20, 1991, Jerry Dail Hearod filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-2992-C. On December 6, 1991, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor, and on January 30, 1992 the case was subsequently closed.

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

Lot Thirty-three (33), Block Seven (7),  
LEISURE PARK II, an Addition to the City of  
Broken Arrow, Tulsa County, State of  
Oklahoma, according to the recorded Plat No.  
3793.

The Court further finds that on September 13, 1988, the Defendants, JERRY DAIL HEAROD and JERRY ANNE HEAROD, executed and delivered to Central Mortgage Corp., their mortgage note in the amount of \$48,850.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, JERRY DAIL HEAROD and JERRI ANNE HEAROD, husband and wife, executed and delivered to Central Mortgage Corp., a mortgage dated September 13, 1988, covering the above-described property. Said mortgage was recorded on September 15, 1988, in Book 5128, Page 903, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 13, 1988, Central Mortgage Corporation, assigned the above-described mortgage note and mortgage to Trust America Mortgage Inc. This Assignment of Mortgage was recorded on November 1, 1988, in Book 5128, Page 908, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 19, 1988, Trust America Mortgage Inc., assigned the above-described mortgage note and mortgage to The Florida Group, Inc. This Assignment of Mortgage was recorded on November 14, 1988, in Book 5139, Page 1516, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 26, 1988, The Florida Group, Inc., assigned the above-described mortgage note

and mortgage to Trust America Resources, Inc. This Assignment of Mortgage was recorded on December 5, 1988, in Book 5143, Page 2098, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 14, 1989, TARI, Inc., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 19, 1989, in Book 5195, Page 1934, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 1, 1989, the Defendants, JERRY DAIL HEAROD and JERRY ANNE HEAROD, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on July 1, 1990. On March 1, 1992 another forbearance agreement was entered into with the Defendant, JERRY DAIL HEAROD, and the Plaintiff.

The Court further finds that the Defendants, JERRY DAIL HEAROD and JERRI ANNE HEAROD, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, JERRY DAIL HEAROD and JERRI ANNE HEAROD, are indebted to the Plaintiff in the principal sum of \$72,517.38, plus interest at the rate of Ten percent per annum from May 1, 1994 until judgment, plus interest

thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$18.00 which became a lien on the property as of July 7, 1988; a lien in the amount of \$6.00 which became a lien on the property as of July 2, 1990; a lien in the amount of \$12.00 which became a lien on the property as of June 20, 1991; a lien in the amount of \$48.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$42.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$49.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, Oklahoma, claims no right title or interest in the subject real property, except insofar as is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendants, JERRY DAIL HEAROD and JERRI ANNE HEAROD, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all

instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, JERRY DAIL HEAROD and JERRI ANNE HEAROD, in the principal sum of \$72,517.38, plus interest at the rate of Ten percent per annum from May 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.48 percent per annum until paid, plus the costs of this action in the amount, and 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 Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$175.00 for personal property taxes for the years 1987 and 1989-1993, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, CITY OF BROKEN ARROW, Oklahoma, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County,

Oklahoma, JERRY DAIL HEAROD and JERRI ANNE HEAROD have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, JERRY DAIL HEAROD and JERRI ANNE HEAROD, to satisfy the judgment In Rem of the Plaintiff 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 according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff;

**Third:**

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$175.00, personal property taxes which are currently due and owing.

The surplus from said sale, 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 pursuant to 12 U.S.C. 1710(1) there shall be no right of

redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

**S/ THOMAS R. BRETT**

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



NEAL B. KIRKPATRICK  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



DICK A. BLAKELEY, OBA #852  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

*Michael R. Vanderburg*

**MICHAEL R. VANDERBURG, OBA #9180**

City Attorney,

CITY OF BROKEN ARROW

P. O. Box 610

Broken Arrow, OK 74012

(918) 251-5311

Attorney for Defendant,

City of Broken Arrow, Oklahoma

Judgment of Foreclosure

Civil Action No. 94-C-543-E

NBK:flv

U.S. DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

JIM K. HUSE,  
an individual, Plaintiff

) Civil Action  
) Case no. 94-C 148K

DATE NOV 16 1994

vs.

MUSTANG DEVELOPMENT CORPORATION,  
(MDC or Mustang) a corporation, et al., Defendants )  
[LISA, Inc. (as it officially goes by in OK) alias for MDC)]

**FILED**

NOV 16 1994

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

DISMISSAL

The Plaintiff respectfully gives notice to the Court that the above entitled case is being dismissed with prejudice EXCEPT for Continuing Jurisdiction of enforcement powers over the Federal Settlement Agreement. On September 7, 1994; all seven defendants signed a negotiated Federal Settlement Agreement by Adjunct Settlement Judge David Newsome. The Plaintiff signed the agreement on September 9, 1994. Some provisions of the agreement extend into the future and are expected to be honored in exchange for the non pursuance of a different outcome.

This dismissal is not to be interpreted as foreclosing the jurisdiction to the State Courts as a venue to litigate any violations of the terms of the Federal Settlement Agreement or other law, if any violations may occur in the future.

Respectfully submitted,



[Original signed by Jim K. Huse, Esq., CPA, MT]  
PRO SE, OBA #011359  
Rt. 3 Box 24  
Cleveland, OK 74020  
Phone # 918-243-7645

CERTIFICATE OF SERVICE

The undersigned certifies that on or about November 16, 1994, a copy of the foregoing Instrument and any attached Affidavit with Exhibits was hand delivered or alternatively mailed, postage prepaid, to all Defendants at the following addresses:



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

ENTERED ON DOCKET  
DATE NOV 15 1994

STANLEY PEDERSEN  
Plaintiff,

vs.

OKLAHOMA FIXTURE COMPANY,  
an Oklahoma corporation,

Defendant.

No. 94-C-110-K

**FILED**

NOV 14 1994

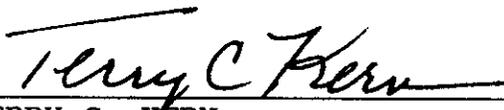
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This matter came before the Court for consideration of the defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiff.

ORDERED this 10 day of November, 1994.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

24

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

JOHN ROBERT WERNER and  
BELINDA CAROLYN WERNER,  
Husband and Wife,

Plaintiffs,

vs.

PRUDENTIAL HEALTH CARE PLAN,  
INC. ("PRUCARE"),

Defendant.

Case No. 94-C-964-B

FILED  
NOV 15 1994  
Richard M. Lortz  
U.S. DISTRICT COURT  
ENTERED ON DOCKET  
DATE NOV 15 1994

**ORDER REMANDING ACTION**

Upon Joint Motion by Plaintiffs and Defendant, and for good cause shown, the Court hereby remands this action to the District Court of Tulsa County, so that Plaintiffs may dismiss Defendant from this action and name the proper party or parties as defendants. The parties shall bear their own respective attorney's fees and costs.

IT IS SO ORDERED this 15<sup>th</sup> day of ~~October~~ <sup>November</sup>, 1994.

  
UNITED STATES DISTRICT JUDGE

**COPY**

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

ENTERED ON DOCKET

VEDA BECK,

Plaintiff,

vs.

SHOALS SUPPLY, INC., a foreign  
corporation, and STATE AND  
COUNTY MUTUAL FIRE INSURANCE  
COMPANY, a foreign corporation,

Defendants.

DATE 11-15-94

Case No. 93-C1029-B

**FILED**

NOV 14 1994

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

COMES NOW the Plaintiff, VEDA BECK (hereafter, "Plaintiff"), by and through his undersigned attorney of record, and the Defendants, SHOALS SUPPLY, INC., a foreign corporation, and STATE AND COUNTY MUTUAL FIRE INSURANCE COMPANY, a foreign corporation, identified by Plaintiff as Defendants in her original state court pleading (hereafter, "Defendants"), by and through its undersigned attorney of record and hereby enter into the following Joint Stipulation of Dismissal With Prejudice, pursuant to Rule 41(a) (1) of the Fed. R. Civ. P.

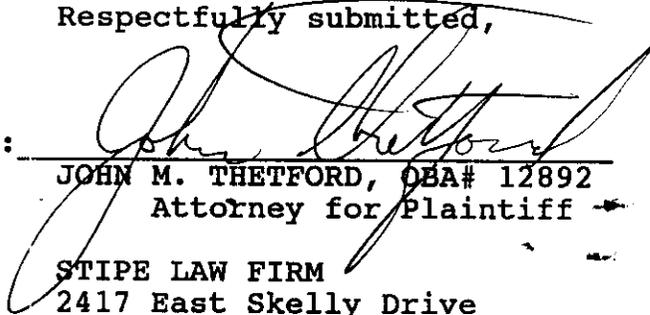
1. Plaintiff and Defendants hereby stipulate that Plaintiff dismisses the above-styled case with prejudice.

2. Plaintiff and Defendants enter into this Joint Stipulation of Dismissal With Prejudice voluntarily and without reservation.

3. Plaintiff and Defendants shall each bear their own costs and attorney's fees incurred in this action.

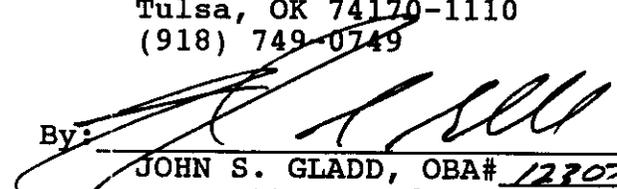
4. A proposed order dismissing the above-styled action with prejudice is submitted for the Court's signature contemporaneously with the Joint Stipulation of Dismissal With Prejudice.

Respectfully submitted,

By: 

JOHN M. THETFORD, OBA# 12892  
Attorney for Plaintiff

STIPE LAW FIRM  
2417 East Skelly Drive  
P.O. Box 701110  
Tulsa, OK 74170-1110  
(918) 749-0749

By: 

JOHN S. GLADD, OBA# 12307  
Attorney for Defendants

ATKINSON, HASKINS, NELLIS, BOUDREAUX,  
HOLEMAN, PHIPPS & BRITTINGHAM  
1500 ParkCentre  
525 South Main  
Tulsa, OK 74103-4524  
(918) 582-8877

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

**FILED**  
IN OPEN COURT

NOV 15 1994

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

NOISE REDUCTION, INC., and SOUND )  
SOLUTION, L.P. a Delaware limited )  
partnership, )

Plaintiffs, )

vs. )

NORDAM CORPORATION, a corporation, )  
SIEGFRIED, INC., a corporation, )  
NORDAM, a general partnership, )  
UNITED TECHNOLOGIES CORPORATION, )  
PRATT & WHITNEY GROUP; COMMERCIAL )  
ENGINE BUSINESS, a corporation, and )  
THE BOEING COMPANY, BOEING )  
COMMERCIAL AIRPLANE CO., a )  
corporation, )

Defendants. )

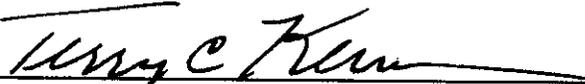
Case No. 94-C-581-K

**ADMINISTRATIVE CLOSING ORDER**

The Court has been advised by counsel that all matters previously pending before this Court have been resolved. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 30 days that further litigation in this Court is necessary.

ORDERED this 15 day of November, 1994.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

**FILED**

OCT 11 1994

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

SUNBELT FREIGHT, INC., )  
Debtor-In-Possession, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
THE BOVAIRD SUPPLY COMPANY, )  
 )  
Defendant. )

Case No. 93-CV-671-K

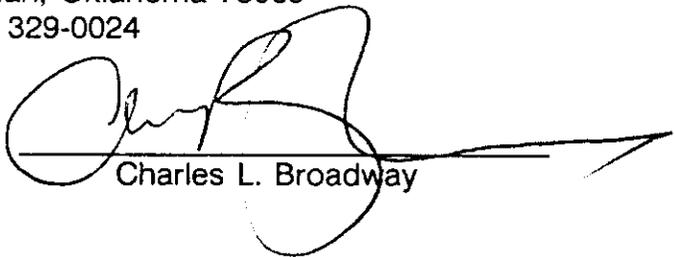
**STIPULATION OF  
DISMISSAL WITH PREJUDICE**

COME NOW on this 5th day of October, 1994, the parties in this cause pursuant to Fed. Rule Civ. Pro. 41(a) (1) (ii) and stipulate through the signatures of their respective counsel below, that Plaintiff SUNBELT FREIGHT, INC., Debtor-In-Possession, hereby dismisses with prejudice to refiling or the bringing of any other action on the facts alleged herein, its claims in this action, and this action.

SUNBELT FREIGHT, INC.  
Debtor-In-Possession

CHARLES L. BROADWAY, its attorney  
629 24th Avenue Southwest  
Norman, Oklahoma 73069  
(405) 329-0024

By:



Charles L. Broadway

THE BOVAIRD SUPPLY COMPANY

R. Casey Cooper, OBA #1197

Byron E. Brown, OBA #15535

BOESCHE, MCDERMOTT & ESKRIDGE, its Attorneys

100 West Fifth Street, Suite 800

Tulsa, OK 74103-4216

(918) 583-1777

By:





Moller at any time without cause upon one month's written notice. Donaldson worked for Rederiet A.P. Moller in different locations, principally overseas, but never in Oklahoma. However, the contract stated that Donaldson's "Point of Origin" was "Oklahoma, U.S.A". Therefore, Oklahoma was "the Country from and to which travel and other relevant expenses will be reimbursable at the discretion of the Company." (Plaintiff's Response Brief to Defendant's Motion to Dismiss, p. 2.). During his employment, Defendant mailed documents and telephoned Plaintiff numerous times regarding business matters, and Plaintiff travelled around the world for work purposes using Oklahoma as a base. Donaldson received monthly payments from Moller to his bank account in Oklahoma from 1985 to the date of his termination. Beginning with his first job assignment in 1985 and on numerous occasions afterwards, Defendant would instruct the Plaintiff to go to Tulsa International Airport where Defendant had sent airline tickets for Plaintiff to use to commence trips for Defendant.

In the latter part of 1991, Plaintiff allegedly injured his back while working for Rederiet A.P. Moller and advised the company that he was unable to perform his duties as a tool pusher. The company paid medical expenses and continued paying Plaintiff's salary until January 31, 1993 although he had failed to report to work after October 17, 1993. Defendant paid all Plaintiff's medical bills, including hospital bills at St. Francis Hospital in Tulsa, Oklahoma in 1991. On December 28, 1992, Defendant sent a letter to Plaintiff in Oklahoma, advising him that his employment

would cease on January 31, 1993.

In November of 1993, Plaintiff filed the instant Complaint against Defendant in the Northern District of Oklahoma, alleging wrongful discharge due to his age and handicap and breach of employment contract. Plaintiff mailed the Summons and Complaint by registered mail in January of 1994, and addressed the envelope as follows: "To: Postmaster: Deliver to an officer of A.P. Moller" in Copenhagen, Denmark.

### Legal Analysis

Defendant moves to dismiss the Complaint for lack of jurisdiction and *forum non conveniens*. Defendant also argues that the action should be dismissed because the above-mentioned method of service is improper.

#### A. Personal Jurisdiction

The first issue to be considered is whether this Court has personal jurisdiction over the Defendant. Whether a federal court has personal jurisdiction over a nonresident defendant in a diversity action is determined by the law of the forum state. Rambo 839 F.2d 1415, 1416 (10th Cir. 1988) quoting Yarbrough v. Elmer Bunker & Assocs., 669 F.2d 614, 616 (10th Cir. 1982). The test for determining long-arm jurisdiction in Oklahoma is to determine whether the exercise of jurisdiction is permitted by the state and, if so, whether such exercise is consistent with the exercise of due process. In Oklahoma, this two-part inquiry

collapses into one analysis since the current Oklahoma long-arm statute provides that "A court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States." 12 O.S. §2004(F).

The general test for personal jurisdiction has been outlined under the federal constitution many times.

A federal court sitting in diversity may exercise personal jurisdiction over a nonresident defendant only so long as there are minimum contacts between the defendant and the forum state. The defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. The sufficiency of a defendant's contacts must be evaluated by examining the defendant's conduct and connections with the forum state to assess whether the defendant has purposely avail[ed] itself of the privilege of conducting activities within the forum state.

Rambo at 1417, quoting First City Bank N.A. v. Air Capitol Aircraft Sales, Inc., 820 F.2d 1127, at 1130-31.

Jurisdiction over a corporation may be either general or specific. Burger King v. Rudzewicz, 471 U.S. 462, 473 n.15 (1985). The Tenth Circuit stated in Rambo that "Jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum state is "specific jurisdiction." In contrast, when the suit does not arise from or relate to the defendant's contacts with the forum and jurisdiction is based on the defendant's presence or accumulated contacts with the forum, the court exercises general jurisdiction. Rambo at 1418.

In this case, there were several types of contacts upon which the parties base their dispute over personal jurisdiction. They include: letters; bills paid; contract language; and phone calls.

Under the proper circumstances any one of these may provide sufficient contacts for the court to exercise jurisdiction. As the Court stated in Burger King, "So long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction." 471 U.S. at 475, n.18. At the same time, numerous contacts are not sufficient if they are merely random and insubstantial.

The important question to be determined is whether the contacts made by Defendant represent an effort by the Defendant to "purposefully avail[] itself of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). The key contact with reference to the purposeful availment question in this case involves the employment contract made between Donaldson and Defendant. Typically, a simple contract with an out-of-state party is not, in and of itself, sufficient to establish personal jurisdiction. Burger King, 471 U.S. at 478.

However, the employment contract here explicitly states that Oklahoma was to serve as the point of origin for all of Donaldson's services. In the Agreement of Employment, the parties incorporated the following term:

5. POINT OF ORIGIN

For the purposes of the Agreement, your Point of Origin is Oklahoma, U.S.A. This is the Country from and to which travel and other relevant expenses provided by the Company Policy will be reimbursable at the discretion of the Company.

Exhibit A, Appendix to Plaintiff's Response Brief to Defendant's Motion to Dismiss and Brief in Support. Beginning with the first

job assignment in 1985 and on numerous occasions thereafter, Defendant instructed the Plaintiff to go to Tulsa International Airport where Defendant had sent airline tickets for Plaintiff to commence trips at Defendant's behest. Exhibit C, Affidavit of Jackie Joe Donaldson, Plaintiff's Response.

At the heart of "purposeful availment" analysis is whether the Defendant took positive action to allow or promote the transaction of business in the state. Rambo at 1420; Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 840 (9th Cir. 1986). The requirement ensures that the Defendant will not be haled into a jurisdiction solely as a result of "random" or "fortuitous" or "attenuated" contacts. Burger King, 471 U.S. at 474-75. Given the point of origin agreement entered into by the parties, it is clear that the Defendant's contacts with Oklahoma were not fortuitous. Instead, the contact with Oklahoma was specifically designed to facilitate Donaldson's employment and his travels on behalf of the company. In addition to using the airport facilities in Tulsa, Rederiet A.P. Moller sent Donaldson monthly payments directly to his Oklahoma bank and contacted him by mail and by phone to discuss business matters. While these more attenuated contacts by themselves might not be sufficient, the specific use of Oklahoma as a designated point of origin demonstrates that the Defendant purposefully availed itself of conducting activities within Oklahoma and had fair warning that it might be subjected to the forum's laws.

## B. *Forum Non Conveniens*

The determination of *forum non conveniens* is traditionally a matter that has been the province of the trial court's discretion. American Dredging Company v. Miller, 114 S. Ct. 981, 989 (1994). Moreover, the court may legitimately distinguish between resident and foreign plaintiffs in deciding whether the case should be dismissed based on a *forum non conveniens* determination. Piper Aircraft 454 U.S. 235, 266 (1981). A plaintiff's choice of forum is given greater deference where the plaintiff has chosen the home forum. "When the plaintiff is foreign, however, this assumption is much less reasonable." Id. In Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524, the Court stated, "[i]n any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." Id. Clearly, it is much more convenient for Plaintiff to bring his action here than in Denmark.

In traditional *forum non conveniens* analysis, the first step in resolving a forum dispute is determining whether an alternative forum exists. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-507 (1946). Clearly, an alternative forum could be Denmark.

The second step is to balance private and public interests as set out in Gulf Oil v. Gilbert. The private interests in this case do not weigh heavily in favor of either party. Plaintiff charges in his Complaint wrongful discharge and breach of contract. Neither of these issues should involve numerous witnesses from Denmark. Along with testimony from Plaintiff and from a limited

number of company officials, the evidence will consist largely of the written contract and the termination letter sent by Rederiet A.P. Moller to Donaldson. Copies of these documents are already in the United States, are in the Record, and are available in English. In the Case Management Scheduling Order, both parties state that they will need only three fact witnesses. Moreover, the parties estimated in October 1994 that the trial would only take two days. Since neither party is significantly more burdened than the other by the choice of forum, the private interest factor of the analysis does not imply that the forum should be changed.

Lastly, it is important to weigh the public interest factors involved in the instant litigation. This case is not like Postol v. El-Al Israel Airlines, Ltd., 690 F. Supp. 1361 (S.D.N.Y. 1988) where the court decided that the case should be heard in Israel because of the Israeli security issues raised by the dispute. Instead, this case involves an Oklahoma worker who alleges wrongful termination in violation of Oklahoma public policy. The Danish government has very little public policy interest in this matter whereas the courts of the United States and of Oklahoma have a strong interest in protecting its citizens from discrimination. In light of the public policy factors that weigh more heavily in favor of maintaining the action in this forum, the Court will not dismiss the case based on *forum non conveniens*.

#### C. Service of Process

Defendant argues that the Complaint should be dismissed on the

grounds of insufficiency of service of process of the Summons and Complaint upon Rederiet A.P. Moller. Plaintiff attempted service of process upon Rederiet A.P. Moller by sending the Complaint registered mail to "Postmaster: Deliver to an Officer of A.P. Moller". Exhibit D, Appendix to Defendant's Memorandum of Law in Support of its Motion to Dismiss. Since the United States and Denmark have both entered into the multilateral Hague Convention, service upon a Danish defendant must be made pursuant to the Convention. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Under the Hague Convention, parties seeking to serve a defendant must send their request for service to a "Central Authority" in that country. Article 5, Hague Convention on Service of Process. Denmark has designated the Ministry of Justice as its central authority. See Defendant's Memorandum of Law in Support of its motion to Dismiss, p. 13.

Article 10 of the Hague Convention, however, allows for an alternative procedure for service. It states that:

Provided the State of destination does not object, the present Convention shall not interfere with

- (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
- (b) the freedom of judicial officers, officials, or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials, or other competent persons of the State of destination, [or]
- (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials, or other competent persons of the State of destination.

Hague Convention, Art. 10. When Denmark signed the Convention, it objected to Article 10(c), requiring proper service to be made through the Central Authority or pursuant to the terms of Article 10.

In its Response, Plaintiff argues that it provided service pursuant to 10(a). Plaintiff's Response Brief to Defendant's Motion to Dismiss, p. 13. In recent years, two distinct lines of Article 10(a) interpretation have arisen in two federal circuits. The Second Circuit has reasoned that since the purported objective of the Hague Convention is to facilitate service abroad, the reference to "the freedom to send judicial documents by postal channels, directly to persons abroad" would be superfluous unless it related to sending documents pertaining to service. Ackermann v. Levine, 788 F.2d 830, 839 (2d Cir. 1986). Therefore, the Second Circuit holds that service can be effected though Article 10(a).

However, many courts have interpreted Article 10(a) to permit plaintiffs to "send" legal documents by mail but not "effect service of process" by mail. In Mateo v. M/S Kiso, the court held that Article 10(a) does not allow service by mail because the language used fails to mention the word, "service". 805 F. Supp. 792, 797 (N.D. Cal. 1992). The court stated, "As the language used in international treaties is usually chosen with great care, the Court strictly construes Article 10(a) only to allow the sending of legal documents other than summons. Id. The Eighth Circuit has reasoned that "Had the drafters intended for Article 10(a) to serve as a means for service, the word 'service' presumptively would have

been employed." Bankston v. Toyota Motor Corp., 889 F.2d 172, 174 (8th Cir. 1989).

This Court adheres to the view that the drafters would have used the term "service" in Article 10(a) had they meant it to be available for that purpose. It is a "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." Bankston, quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc. 447 U.S. 102, 108 (1980). It would seem nonsensical for Denmark to object to the more rigorous method of service reflected in Article 10(c) but consent to the more liberal service regime of Article 10(a). Furthermore, the drafters used the word "service of process" in two of the three sections in Article 10. It is therefore reasonable to conclude that its absence in the third section should be recognized as a significant indication of the parties' intent.

Plaintiff makes no argument that it properly served Defendant under Article 10(b). Although Article 10(b) allows for service through "the judicial officers, officials, or other competent persons of the State of destination," Plaintiff failed to do this. Neither a post office or an officer of Rederiet A.P. Moller constitutes a "judicial officer, official, or competent person of Denmark" to receive service of process pursuant to the Convention.

In light of Plaintiff's failure to effectuate service properly under the Hague Convention, this action should be dismissed unless Plaintiff effectuates service in an appropriate manner within thirty days.

D. Conclusion

For the reasons set forth above, this Court denies the Motion to Dismiss by Defendant Rederiet A.P. Moller to the extent it is based on lack of personal jurisdiction and *forum non conveniens*. However, this Court finds that Plaintiff improperly effected service of process on Defendant Rederiet A.P. Moller. Therefore, Plaintiff is given thirty days to rectify this error. Otherwise, the action will be dismissed.

ORDERED this 10 day of November, 1994.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 14 1994

Richard M. Lawrence, Clerk:  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

PATRICIA LESTER,

Plaintiff,

vs.

JIM L. ROBERTS, and  
TERRI ROBERTS,

Defendants.

Case No. 94 CV-00353-B

ENTERED ON DOCKET  
DATE NOV 14 1994

STIPULATION OF DISMISSAL AS TO JIM L. ROBERTS

COME NOW the Plaintiff, Patricia Lester, and the Defendants, Jim L. Roberts and Terri Roberts, through their counsel, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, and stipulate that Plaintiff's cause of action against the Defendant, Jim L. Roberts only may be and it is hereby dismissed without prejudice, with each party to bear their respective costs and attorney fees.

DATED this 14<sup>th</sup> day of November, 1994.



Patrick D. O'Connor, OBA #6743  
MOYERS, MARTIN, SANTEE,  
IMEL & TETRICK  
320 South Boston Building  
Suite 920  
Tulsa, Oklahoma 74103

ATTORNEYS FOR PLAINTIFF  
PATRICIA LESTER

*Stephen C. Wilkerson*  
Stephen C. Wilkerson  
KNIGHT, WILKERSON & PARRISH  
233 West 11th Street  
Tulsa, OK 74101-1560

ATTORNEYS FOR DEFENDANTS  
JIM L. ROBERTS AND  
TERRI ROBERTS

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 14 1994

SUN COMPANY, INC., (R & M), a Delaware corporation, )  
and TEXACO INC., a Delaware corporation, )

Plaintiffs, )

vs. )

BROWNING-FERRIS, INC., a Delaware corporation, et al., )

Defendants. )

Richard M. Lawrence, Clerk U.S. District Court

Case No. 94-C-820-B

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Plaintiffs, Sun Company, Inc. (R & M) and Texaco, Inc. hereby dismiss Defendant,  
LOUISE SMITH, an individual, ONLY without prejudice.

Dated this 10th day of November, 1994.

RHODES, HIERONYMUS, JONES  
TUCKER & GABLE

By   
JOHN H. TUCKER, OBA #9110  
BENTON T. WHEATLEY, OBA # 14836  
15 W. 6th St., Suite 2800  
Tulsa, Oklahoma 74119-5430  
(918) 582-1173

ATTORNEYS FOR PLAINTIFFS,  
SUN COMPANY, INC. (R & M) and  
TEXACO INC.

DATE NOV 14 1994

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

SUN COMPANY, INC., (R & M), a Delaware corporation, )  
and TEXACO INC., a Delaware corporation, )

NOV 18 1994

Plaintiffs, )

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

vs. )

Case No. 94-C-820-B

BROWNING-FERRIS, INC., a Delaware corporation, et al., )

Defendants. )

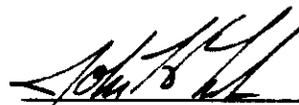
NOTICE OF DISMISSAL WITHOUT PREJUDICE

Plaintiffs, Sun Company, Inc. (R & M) and Texaco, Inc. hereby dismiss Defendant, L.G.C., INC., an Oklahoma corporation, successor in interest to Liberty Glass Co., ONLY without prejudice.

Dated this 10th day of November, 1994.

RHODES, HIERONYMUS, JONES  
TUCKER & GABLE

By



JOHN H. TUCKER, OBA #9110  
BENTON T. WHEATLEY, OBA # 14836  
15 W. 6th St., Suite 2800  
Tulsa, Oklahoma 74119-5430  
(918) 582-1173

ATTORNEYS FOR PLAINTIFFS,  
SUN COMPANY, INC. (R & M) and  
TEXACO INC.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
Plaintiff, )  
vs. )  
EDDIE G. TAYLOR, SR. aka EDDIE )  
TAYLOR aka EDDIE G. TAYLOR; )  
ANITA D. TAYLOR aka ANITA )  
TAYLOR; STATE OF OKLAHOMA ex )  
rel OKLAHOMA TAX COMMISSION; )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma; BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
Oklahoma, )  
Defendants. )

ENTERED ON DOCKET  
DATE NOV 14 1994

**FILED**

NOV 14 1994

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 94-C 937K

**ORDER**

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 10 day of Nov., 1994.

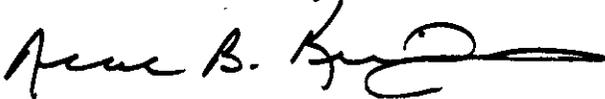
**s/ TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS

United States Attorney



**NEAL B. KIRKPATRICK**

Assistant United States Attorney

3900 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

NBK:lg

NOTE: THIS DOCUMENT TO BE MAILED  
TO THE CLERK OF COURT IMMEDIATELY  
AND  
RETURNED TO THE CLERK IMMEDIATELY

ENTERED ON DOCKET  
NOV 14 1994

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

NOV 14 1994

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

HENRY W. BLOOMFIELD and  
RANDA SUE BLOOMFIELD,

Defendants.

CIVIL ACTION NO. 94-C-776-K

DEFAULT JUDGMENT

This matter comes on for consideration this 10 day  
of November, 1994. The Plaintiff appears by Stephen C.  
Lewis, United States Attorney for the Northern District of  
Oklahoma, through Peter Bernhardt, Assistant United States  
Attorney; the Defendants, **Henry W. Bloomfield and Randa Sue  
Bloomfield**, appear not, but make default.

The Court being fully advised and having examined the  
court file finds that the Defendant, **Henry W. Bloomfield**,  
executed a waiver of service of summons on August 22, 1994; and  
that Defendant, **Randa Sue Bloomfield**, executed a waiver of  
service of summons on August 21, 1994. The time within which the  
Defendants could have answered or otherwise moved as to the  
Complaint has expired and has not been extended. The Defendants  
have not answered or otherwise moved, and default has been  
entered by the Clerk of this Court. Plaintiff is entitled to  
judgment as a matter of law.

The Court further finds that this is an action for a money judgment and collection of certain promissory notes.

The Court further finds that the Defendants, **Henry W. Bloomfield and Randa Sue Bloomfield**, executed and delivered to the United States of America, acting through the Farmers Home Administration, the following promissory notes:

<u>Loan Number</u>	<u>Original Amount</u>	<u>Date</u>	<u>Interest Rate</u>
41-01	\$ 24,660.00	01/11/77	5.00%
29-02	64,510.00	07/25/80	11.00%
29-03	166,120.00	07/25/80	11.50%
43-04	12,250.00	12/18/81	5.00%
43-05	91,550.00	12/18/81	15.00%
44-06	10,000.00	04/06/83	10.25%

The Court further finds that the Defendants, **Henry W. Bloomfield and Randa Sue Bloomfield**, made default under the terms of the aforesaid notes by reason of their failure to make the yearly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Henry W. Bloomfield and Randa Sue Bloomfield**, are indebted to the Plaintiff in the principal sum of \$226,767.37, plus accrued interest in the amount of \$289,426.27 as of December 22, 1993, plus interest accruing thereafter at the rate of \$75.89 per day until judgment, plus interest thereafter at the legal rate until fully paid.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment against the Defendants, **Henry W. Bloomfield and Randa Sue Bloomfield**, in the principal sum of \$226,767.37, plus accrued interest in the

amount of \$289,426.27 as of December 22, 1993, plus interest accruing thereafter at the rate of \$75.89 per day until judgment, plus interest thereafter at the current legal rate of 6.06 percent per annum until paid.

**s/ TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

APPROVED:

~~STEPHEN C. LEWIS  
United States Attorney~~

PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

Default Judgment  
Civil Action No. 94-C-776-K

PB:css

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

**FILED**  
NOV 14 1994

VICTOR JOEL COOPER, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 R. MICHAEL CODY, )  
 )  
 Respondent. )

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

No. 94-C-570-E ✓

ENTERED ON DOCKET

DATE 11-14-94

**ORDER**

At issue before the Court in this habeas corpus action pursuant to 28 U.S.C. § 2254, is Respondent's motion to dismiss the petition as successive under Rule 9(b) of the Rules Governing Section 2254 cases. The Petitioner has not objected.

Rule 9(b) states as follows:

**Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In the instant case, it is clear that Petitioner previously filed a habeas corpus action in this court and that the petition was denied on the basis of a procedural bar. Therefore, Petitioner's new allegations must be analyzed under the abuse of the writ standard.

In McCleskey v. Zant, \_\_\_ U.S. \_\_\_, 111 S. Ct. 1454 (1991), the Supreme Court held that when a prisoner files a second or subsequent petition for writ of habeas corpus and the government meets its burden of pleading abuse of the writ, then the claims

contained in the subsequent petition will be barred from review unless the prisoner is able to show cause--e.g., that he was impeded from bringing the claims in the first petition by some objective factor external to the defense--as well as actual prejudice resulting from the errors of which he complains.

Here, Petitioner has not shown adequate cause or prejudice under the strict McCleskey standard. In addition, he does not meet the narrow miscarriage of justice exception to the cause requirement, as he has not demonstrated that the alleged constitutional violation caused the conviction of an innocent man. Id. at 1475. Therefore, Petitioner's application for a writ of habeas corpus must be dismissed as a successive petition under Rule 9(b).

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

- (1) Respondent's motion to dismiss (doc. #6) is **granted**; and
- (2) Petitioner's application for a writ of habeas corpus is **dismissed** as a successive petition.

SO ORDERED THIS 10<sup>th</sup> day of November, 1994.

  
\_\_\_\_\_  
JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT

FILED

NOV 10 1994

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

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

MICHAEL BASCOM SELSOR,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 91-C-826-E
	)	
STEPHEN KAISER,	)	
	)	
Respondent.	)	

ORDER

Reconsideration of the issue of ineffective assistance of counsel is before the Court, on remand from the Tenth Circuit Court of Appeals. Selsor v. Kaiser, 22 F.3d 1029 (10th Cir. 1994). Trial was held in January, 1976, and Petitioner Selsor was found guilty of murder in the first degree, armed robbery, and shooting with intent to kill. Petitioner Selsor was represented by a public defender. Selsor's Co-defendant, Richard Dodson, was represented by the same public defender. Selsor and Dodson were tried together. Petitioner Selsor unsuccessfully moved for severance. On the day the case came up for trial, Co-defendant Dodson amended his plea to not guilty by reason of insanity. Petitioner Selsor moved for separate trials, or separate counsel. The motion was denied. The Tenth Circuit instructed this Court to determine the following: "(1) [Whether] Petitioner's objection at trial to joint representation was timely, and, if so, (2) whether the trial court took 'adequate steps to ascertain whether the risk [of a conflict of interest] was too remote to warrant separate counsel.'" Mandate at 11, 22 F.3d at 1033-1034, quoting Holloway v. Arkansas, 435 U.S.

ENTERED ON DOCKET

DATE 11-14-94

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475, 484 (1978).

The Court finds that Petitioner's objection to joint representation at trial was timely. In Holloway, defense counsel objected to joint representation at trial, and this was considered timely. At Petitioner Selsor's trial, the objection was made on the day the case came for trial, on the same day that Selsor's Co-defendant announced his intention to use an insanity defense.

Because Selsor's objection was timely, the Court must consider the second issue. The Tenth Circuit recently stated the test to be applied in this circumstance: "[u]nder the Holloway standard, the trial court's failure to appoint separate counsel, or adequately inquire into the possibility of conflict, in the face of a timely objection by defense counsel, demonstrates ineffective assistance of counsel without a showing of actual conflict of interest." Mandate at 9, 22 F.3d at 1033.

The trial court did not appoint separate counsel. There was a timely objection by defense counsel. On the day of trial, but before the trial began, Selsor's lawyer raised the issue of separate counsel. The trial court considered and denied the request. The trial court engaged in an extensive discussion of the possibility of a conflict of interest regarding Petitioner's representation with counsel for both the prosecution and the defense. Petitioner's Exhibit #5 (trial transcript of September 3, 1976). This is unlike the situation encountered in Hamilton v. Ford, 969 F.2d 1006 (11th Cir. 1992). In Hamilton, the Eleventh Circuit found that the trial court failed to discharge its duty

under Holloway to inquire adequately into the basis of the objection to joint representation. Hamilton at 1011. In reviewing the trial court, the Hamilton circuit court found that "the reading of file for an unrelated purpose is inadequate exploration of the possibility of conflict." Id. at 1012.

The Court finds that the trial court made adequate inquiry into the possibility of conflict. The Court does not explore the soundness of result reached in the trial court's "adequate inquiry" under Holloway, but only the adequacy of the inquiry. The trial court's adequate inquiry negated the presumption of ineffective assistance of counsel that would otherwise exist in the face of Petitioner's timely objection to joint representation.

IT IS THEREFORE ORDERED that Petitioner Selsor's petition for writ of habeas corpus, 28 U.S.C. § 2254 (Docket #1), is DENIED.

ORDERED this 10<sup>th</sup> day of November, 1994.

  
\_\_\_\_\_  
JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT COURT