

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

APR 29 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

LISA L. HASTINGS,

Defendant.

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)  
)  
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)  
)  
)  
)

Civil Action No. 98CV0016E /

ENTERED ON DOCKET  
DATE **APR 30 1998**

DEFAULT JUDGMENT

This matter comes on for consideration this 28<sup>th</sup> day of April, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Lisa L. Hastings, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Lisa L. Hastings, was served with Summons and Complaint on March 25, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has 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.

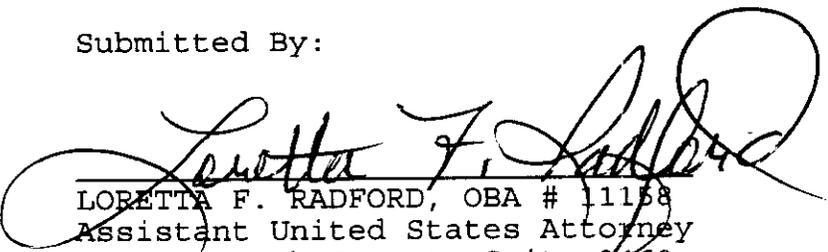
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Lisa L. Hastings, for the principal amount of \$5,224.50, plus accrued interest of \$2,834.66, plus administrative charges in the amount of \$5.65, plus interest thereafter at the rate of 8 percent per annum

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until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.407 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

  
LORETTA F. RADFORD, OBA # 11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/jmo

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

**F I L E D**

APR 29 1998 *mw*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FIRST BANK OF TURLEY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FIDELITY AND DEPOSIT INSURANCE )  
COMPANY OF MARYLAND, )  
 )  
Defendant. )

Case No. 93-C-284-E ✓

ENTERED ON DOCKET  
DATE APR 30 1998

A M E N D E D J U D G M E N T

This action came on for jury trial before the Court, Honorable James O. Ellison, Senior Judge, presiding. The issues were duly tried and the jury rendered its verdict in favor of plaintiff. The Court has further considered and ruled on the legal issues presented by Plaintiff's Motion for Judgment Notwithstanding the Verdict, Motion for New Trial, and Motion to Alter or Amend Judgment, and Motion to Vacate Judgment, The Applications For Attorneys' Fees, The Application for Prejudgment Interest, and the Motion to Amend Judgment.

IT IS THEREFORE ORDERED that the Plaintiff, First Bank of Turley, recover of the Defendant, Fidelity and Deposit Insurance Company of Maryland, the sum of \$20,000. Neither prejudgment interest nor costs are awarded.

IT IS SO ORDERED THIS 28<sup>th</sup> DAY OF APRIL, 1998.

*James O. Ellison*  
\_\_\_\_\_  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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ENTERED ON DOCKET  
DATE 4-30-98

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

THRESSA G. BOMBA, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
PHOENIX HOME LIFE MUTUAL )  
INSURANCE COMPANY, )  
 )  
Defendant/Third )  
Party Plaintiff, )  
 )  
v. )  
 )  
JAMES BOMBA, JR., PATRICK )  
BOMBA, DEBRA BOMBA, )  
THE ESTATE OF JAMES )  
BOMBA, SR., AND )  
NATIONSBANK, N.A., )  
 )  
Third Party Defendants. )

Case No. 97-CV-1121-K(J)

FILED

APR 29 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTRY OF DEFAULT BY CLERK

Upon receipt of the Request for Entry of Default by Clerk and Affidavit in Support, filed herein by Third-Party Plaintiff, Phoenix Home Life Mutual Insurance Company, the Clerk of this Court has made an independent determination that service has been effected on Third-Party Defendant, James Bomba, Jr., and that the time for responding to the Third-Party Complaint by James Bomba, Jr., has expired and no appearance or answer has been filed. The Clerk of the Court therefore enters default against James Bomba, Jr., on the Third-Party Complaint of Phoenix Home Life Mutual Insurance Company, pursuant to Fed. R. Civ. P. 55(a) and N.D. L.R. 55.1(A).

Done this 30 day of April, 1998.

A. Schwebke, Deputy Clerk  
CLERK, UNITED STATES DISTRICT COURT

4-24-98

ENTERED ON DOCKET

DATE 4-30-98

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

THE UNKNOWN HEIRS, EXECUTORS,  
ADMINISTRATORS, DEVISEES,  
TRUSTEES, SUCCESSORS AND  
ASSIGNS OF GLENN T. MATTOX  
aka Glenn Thompson Mattox, Deceased;  
JOHN H. MATTOX;  
SARAH CHAPPEL;  
STATE OF OKLAHOMA *ex rel.*  
Oklahoma Tax Commission;  
COUNTY TREASURER, Washington County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Washington County, Oklahoma,

Defendants.

**FILED**

APR 29 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CIVIL ACTION NO. 96-CV-1150-K ✓

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 28 day of April,

1998. 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, County Treasurer, Washington County, Oklahoma, and Board of County Commissioners, Washington County, Oklahoma, appear by Thomas Janer, Assistant District Attorney, Washington County, Oklahoma; that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, appears not, having previously filed its Disclaimer; and the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors

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and Assigns of Glenn T. Mattox aka Glenn Thompson Mattox, Deceased; John H. Mattox; and Sarah Chappel, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, John H. Mattox, executed a Waiver of Service of Summons on December 27, 1996; that the Defendant, Sarah Chappel, executed a Waiver of Service of Summons on December 17, 1996.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Glenn T. Mattox aka Glenn Thompson Mattox, Deceased, were served by publishing notice of this action in the Examiner-Enterprise, a newspaper of general circulation in Washington County, Oklahoma, once a week for six (6) consecutive weeks beginning March 27, 1997, and continuing through May 1, 1997, 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, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Glenn T. Mattox aka Glenn Thompson Mattox, Deceased, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Glenn T. Mattox aka Glenn Thompson Mattox, Deceased. 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, on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, 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 places of residence and/or mailing addresses. 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, Washington County, Oklahoma, and Board of County Commissioners, Washington County, Oklahoma, filed their Answer on January 9, 1997; that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, filed its Disclaimer on January 29, 1997; and that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Glenn T. Mattox aka Glenn Thompson Mattox, Deceased; John H. Mattox; and Sarah Chappel, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

The East 119.4 feet of Lot Six (6) and the East 104.6 feet of Lot Seven (7) and the West 14.8 feet of the East 119.4 feet of the North 38.5 feet of Lot Seven (7), Block Six (6), Oak Ridge Heights, Bartlesville, Washington County, Oklahoma.

The Court further finds that this a suit brought for the further purpose of judicially determining the death of Glenn T. Mattox aka Glenn Thompson Mattox and judicially determining the heirs of Glenn T. Mattox aka Glenn Thompson Mattox.

The Court further finds that Glenn T. Mattox aka Glenn Thompson Mattox (hereinafter referred to by either name) became the record owner of the real property involved in this action by virtue of that certain Warranty Deed dated July 6, 1995, from the Secretary of Veterans Affairs to Glenn T. Mattox, a single person, which Warranty Deed was filed of record on July 7, 1995, in Book 0887, Page 1775, in the records of the County Clerk of Washington County, Oklahoma.

The Court further finds that on July 7, 1995, Glenn T. Mattox executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, his mortgage note in the amount of \$35,620.00, payable in monthly installments, with interest thereon at the rate of 7.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Glenn T. Mattox, a single person, executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, a real estate mortgage dated July 7, 1995, covering the above described property, situated in the State of Oklahoma, Washington County. This mortgage was recorded on July 7, 1995, in Book 0887, Page 1776, in the records of Washington County, Oklahoma.

The Court further finds that Glenn Thompson Mattox died on July 23, 1995. Upon the death of Glenn Thompson Mattox, the subject property vested in his surviving heirs

by operation of law. Certificate of Death No. 018289 issued by the Oklahoma State Department of Health certified Glenn Thompson Mattox's death.

The Court further finds that Glenn T. Mattox aka Glenn Thompson Mattox, now deceased, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$35,620.00, plus administrative charges in the amount of \$415.00, plus penalty charges in the amount of \$51.32, plus accrued interest in the amount of \$1,184.68 as of January 10, 1996, plus interest accruing thereafter at the rate of 7.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that Plaintiff, United States of America, is entitled to a judicial determination of the death of Glenn T. Mattox aka Glenn Thompson Mattox and to a judicial determination of the heirs of Glenn T. Mattox aka Glenn Thompson Mattox.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Glenn T. Mattox aka Glenn Thompson Mattox, Deceased; John H. Mattox; and Sarah Chappel, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, disclaims all right, title or interest in the subject real property.

The Court further finds that the Defendants, County Treasurer, Washington County, Oklahoma, and Board of County Commissioners, Washington County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of a weed tax in the amount of \$110.20 plus interest and penalties. Said lien is inferior to the interest of the Plaintiff, United States of America.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the death of Glenn T. Mattox aka Glenn Thompson Mattox be and the same hereby is judicially determined to have occurred on July 23, 1995 in the City of Bartlesville, Washington County, Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the only known heirs of Glenn T. Mattox aka Glenn Thompson Mattox, Deceased, are John H. Mattox and Sarah Chappel, and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of Glenn T. Mattox aka Glenn Thompson Mattox, Deceased, have been discovered and it is hereby judicially determined that John H. Mattox and Sarah Chappel are the only known heirs of Glenn T. Mattox aka Glenn Thompson Mattox, Deceased, and that Glenn T. Mattox aka Glenn Thompson Mattox, Deceased, has no other known heirs, executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Certificate of Publication and Mailing filed on May 12, 1997 regarding said heirs.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, on behalf of the Secretary of Veterans Affairs, have and recover judgment **in rem** against all named and unnamed Defendants in the principal amount of \$35,620.00, plus administrative charges in the amount of \$415.00, plus penalty

charges in the amount of \$51.32, plus accrued interest in the amount of \$1,184.68 as of January 10, 1996, plus interest accruing thereafter at the rate of 7.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.41 percent per annum until fully paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), 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, plus any other advances.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, County Treasurer and Board of County Commissioners, Washington County, Oklahoma, have and recover judgment in the amount of \$110.20 plus interest and penalties, by virtue of a weed tax on the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Glenn T. Mattox aka Glenn Thompson Mattox, Deceased; John H. Mattox; Sarah Chappel; and State of Oklahoma *ex rel.* Oklahoma Tax Commission, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that 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 appraisal 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:**

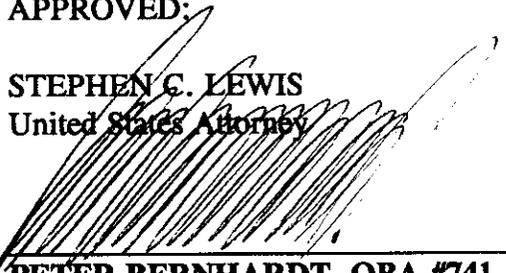
In payment of the judgment rendered herein in favor of the Defendants, County Treasurer and Board of County Commissioners, Washington County, Oklahoma.

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 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.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
STEPHEN C. LEWIS  
United States Attorney

**PETER BERNHARDT, OBA #741**  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463



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**THOMAS JANER, OBA #11110**  
Assistant District Attorney  
Washington County Courthouse  
Fifth Street and Johnstone  
Bartlesville, Oklahoma 74003  
(918) 337-2860  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Washington County, Oklahoma

Judgment of Foreclosure  
Case No. 96-CV-1150-K (Mattox)

PB:css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE 4-30-98

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
NIGEL E. CRAWLEY,  
Defendant.

Civil Action No. 98CV0080K(M) ✓

FILED

APR 23 1998 P

DEFAULT JUDGMENT

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

This matter comes on for consideration this 28 day of April, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Nigel E. Crawley, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Nigel E. Crawley, was served with Summons and Complaint on March 12, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has 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.

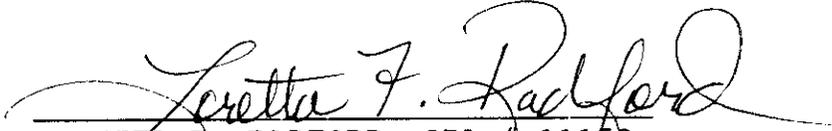
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Nigel E. Crawley, for the principal amount of \$3,130.56, plus accrued interest of \$1,615.36, plus administrative charges in the amount of \$5.00, plus interest thereafter at the rate of 7.51 percent per

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annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.

  
United States District Judge

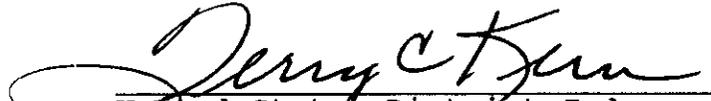
Submitted By:

  
LORETTA F. RADFORD, OBA # 11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

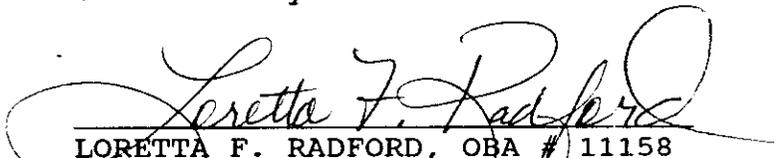
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until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

  
LORETTA F. RADFORD, OBA # 11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/llf

UNITED STATES DISTRICT COURT FOR THE **F T H E L E D**  
NORTHERN DISTRICT OF OKLAHOMA

APR 29 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ALLEN RAY LIVINGSTON )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 RON WARD )  
 )  
 Respondent. )

Case No. 96-C-459-BU(J)

ENTERED ON DOCKET

DATE APR 30 1998

**REPORT & RECOMMENDATION**

Petitioner filed a Petition for a Writ of Habeas Corpus on May 22, 1996. Petitioner challenges his sentence of 100 years for armed robbery. Petitioner pled not guilty. Following a trial to a jury, Petitioner was found guilty with the jury recommending a sentence of 100 years.

**I. ISSUES RAISED ON APPEAL**

Petitioner asserts that he was (1) deprived of effective assistance of counsel during trial, (2) sentenced to an excessive sentence, (3) denied a copy of his appellate brief, and (4) was prejudiced due to the misconduct of the prosecutor.<sup>1/</sup>

**II. PROCEDURAL HISTORY**

Petitioner was sentenced on February 15, 1973 to 100 years following his conviction for robbery with a firearm. Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals. Petitioner asserted that his trial counsel was

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<sup>1/</sup> Petitioner lists as separate errors on appeal that he had "ineffective assistance of trial counsel," and that a "sentence of 100 years is excessive." These "additional" errors are repeats of previously raised errors.

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ineffective and that he received an excessive sentence. On February 4, 1974, the state trial court affirmed the conviction and sentence of Petitioner.

Petitioner filed his Petition for a Writ of Habeas Corpus on May 22, 1996. [Docket No. 1-1]. Petitioner alleged the same issues he raised below and additionally argued that he had not appropriately received an appellate brief and that he was prejudiced due to the misconduct of the prosecutor.

Respondent filed a motion to dismiss alleging that Petitioner had failed to exhaust all of the issues which he asserted in his current habeas. The District Court denied the motion on December 5, 1996, finding that each of Petitioner's issues had either been exhausted or that exhaustion was futile and the issues would be "deemed exhausted." [Docket No. 9-1]. With respect to the issues raised by Petitioner that he was not provided with an appellate brief and the misconduct of the prosecutor denied him a fair trial, the District Court concluded that these two issues were "procedurally barred." Therefore, to overcome the procedural bar, Petitioner must establish cause and prejudice. The District Court, in the December 5, 1996 Order, directed Petitioner to file, within twenty days of the date of the order, a brief showing cause and prejudice for Petitioner's failure to raise these issues in state court.

Petitioner filed a brief on December 16, 1996. Petitioner's brief did not address cause and prejudice. Respondent filed a response to Petitioner's petition on December 26, 1996. Respondent addressed only Petitioner's claims of ineffective assistance of counsel and excessive sentencing. Respondent noted that Petitioner had not addressed

the cause and prejudice standards as previously outlined by the Court, and asserted that Petitioner must be abandoning such arguments in his direct appeal.

Petitioner was given permission to file a Reply Brief out-of-time, and on April 20, 1998, Petitioner filed his Reply to Respondent's Response to Petitioner's Petition for a Writ of Habeas Corpus.

### **III. DISCUSSION OF THE ISSUES**

#### **A. INEFFECTIVE ASSISTANCE OF COUNSEL**

Petitioner notes that his attorney, during the cross-examination of the Tulsa County District Attorney, questioned the District Attorney about Petitioner's previous convictions, and questioned about the convictions of Petitioner's two co-defendants. Petitioner contends that such testimony was extremely prejudicial. Petitioner additionally contends that the closing statement of his attorney was highly prejudicial and revealed his counsel's incompetency.

To establish ineffective assistance of counsel, Petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984) ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993).

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant

must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88.<sup>2/</sup> To establish the second prong, Petitioner must show that this deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 842-44 (1993) (counsel's unprofessional errors must cause a trial to be "fundamentally unfair or unreliable").

The Court has reviewed the trial transcript submitted by Respondent. Three individuals testified for the prosecution. The transcript reveals that Robert L. Ashworth testified. Mr. Ashworth stated that he and three other individuals were

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<sup>2/</sup> "The proper standard for measuring attorney performance is reasonably effective assistance." Gillette v. Tansy, 17 F.3d 308, 310-311 (10th Cir. 1994) (quoting Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989)). In doing so, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, at 690. There is a "strong presumption [however,] that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 695. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

robbed at gunpoint by Petitioner. [Tr. at 6, 8, 10-13]. Mr. Ashworth identified Petitioner as the individual who robbed him. [Tr. at 13].

Officer Dan Allen testified. [Tr. at 39]. Officer Allen stated that he advised Petitioner of his rights. [Tr. at 40]. According to Officer Allen, when he transported Petitioner to the county jail after Petitioner appeared in a line-up, Petitioner asked if he could see the District Attorney. [Tr. at 41]. Officer Allen informed the District Attorney that Petitioner wanted to speak to him. [Tr. at 41]. Officer Allen was present when Petitioner met with the District Attorney. [Tr. at 42]. Officer Allen testified that Petitioner informed the District Attorney that Petitioner, and two other individuals committed the armed robbery. [Tr. at 42].

The District Attorney, Mr. S.M. Fallis, Jr. testified. [Tr. at 61]. He stated that he recalled meeting Petitioner on a Saturday and that Petitioner wanted to "make a deal." Mr. Fallis recalled telling Petitioner that he would not make a deal. [Tr. at 65]. According to Mr. Fallis, Petitioner told him that Petitioner and two other individuals committed the armed robbery. [Tr. at 65].

Petitioner called no witnesses. Petitioner's attorney cross-examined each of the prosecution's witnesses, but offered no additional testimony or evidence.

Petitioner's initial argument is that his counsel was ineffective and unduly prejudiced Petitioner by eliciting testimony regarding the prison sentences given to Petitioner's accomplices. This argument was also presented by Petitioner to the Oklahoma Court of Criminal Appeals. The Oklahoma Court theorized that Petitioner's

counsel as "a trial tactic to impress upon the jury that the defendant had received harsher sentences than the accomplices. The tactic was used in hopes of swaying the jury, if it should find the defendant guilty, to bring back a verdict of a lesser than the one hundred years to three hundred years recommended by the office of the District Attorney. The jury returned a verdict of guilty and fixed the punishment at a term of one hundred years. It, therefore, cannot be said that the tactic was wholly unsuccessful as the evidence of guilt was overwhelming." [Doc. No. 1-1, Exhibit A, at 3].

Petitioner has a substantial burden in establishing ineffective assistance of counsel. First, Petitioner must show that his counsel was ineffective. Second, Petitioner must show that the ineffectiveness of his counsel deprived him of a fair trial. Upon reviewing the transcript in this case, the Court notes that Petitioner's counsel was, in some instances, unorthodox. However, even if the Court were to assume that Petitioner's counsel did not perform to the level required of a reasonably competent attorney, the Court concludes that Petitioner cannot satisfy the "second prong" of the test. Petitioner cannot show that counsel's alleged ineffectiveness deprived Petitioner of a fair trial. In this case, the only evidence offered at trial was that of an eyewitness, who identified Petitioner, and two individuals who testified that Petitioner confessed. Petitioner presented no evidence at trial and offers nothing to this Court to suggest that the result reached by the jury was not just. Based on the transcript and the facts as presented, the Court concludes that Petitioner was not denied effective assistance of counsel.

## B. EXCESSIVE SENTENCE

Petitioner asserts that the punishment he received was excessive and requests that this Court reduce the sentence imposed by the jury. Respondent's sole assertion is that this is an issue of state law and does not involve federal constitutional issues. Respondent therefore argues that the Court should not consider this issue because it does not raise a federal constitutional issue.

In Solem v. Helm, 463 U.S. 277, 284 (1983), in considering the constitutionality of a mandatory life sentence imposed pursuant to a South Dakota recidivist statute,<sup>3/</sup> the Supreme Court recognized that the Eighth Amendment requires that a sentence not be disproportionate to the severity of the crime or involve unnecessary infliction of pain. The Court listed three factors for consideration in conducting a proportionality review: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions. Id. at 292. The Court noted, however, that in reviewing the proportionality of a sentence, a court should "grant substantial deference" to the discretion of legislatures and the trial courts in determining the limits and punishments for crimes. Solem, 463 U.S. at 290. Furthermore, "outside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare."

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<sup>3/</sup> In Solem, the petitioner was convicted of seven non-violent felonies. Petitioner's seventh conviction was for "uttering a no account check for \$100." Solem at 280. A recidivist statute provided that prior conviction of at least three offenses, in addition to the current offense required sentencing based on a "class A" felony. The sentence for a class A felony was life imprisonment with no possibility of parole, which was the sentence which Solem received.

Id. at 289-90 (citations omitted). Under the Solem three-factor test, the Solem Court found that the mandatory life sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment.

The Supreme Court considered the constitutionality of a mandatory life sentence in Harmelin v. Michigan, 501 U.S. 957 (1991). In Harmelin, the petitioner was convicted under a Michigan statute for possessing more than 650 grams of cocaine and was sentenced to a mandatory term of life in prison without the possibility of parole. 501 U.S. at 961. The petitioner's main contention was that the life sentence was "significantly disproportionate" to the crime committed.

The Harmelin Court upheld the sentence by a 5-4 vote. However, the majority split on the appropriateness of the "proportionality" principle in non-capital cases. Justice Scalia, joined by Chief Justice Rehnquist, argued that "Solem was simply wrong; the Eighth Amendment contains no proportionality guarantee." Harmelin, 111 S. Ct. at 2686. In support of this conclusion, Justice Scalia conducted an extensive historical survey of the Cruel and Unusual Punishment Clause, and found, "The Eighth Amendment is not a ratchet, whereby a temporary consent on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered conditions." Id. at 990. Justice Scalia found, therefore, that although proportionality review would still remain important for death penalty cases, "we will not extend it further" except in very rare instances." Id. at 994. Justice Kennedy, joined by Justices O'Connor and Souter, noted that the Eighth Amendment proportionality analysis applies to noncapital sentence, but concluded that "our

proportionality decisions . . . require us to uphold petitioner's sentence." Id. at 997. Justice Kennedy wrote that "though our decisions recognize a proportionality principle, its precise contours are unclear." Id. at 998. Justice Kennedy concluded that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. at 1001. Three justices, Justices White, Blackmun and Stevens, concluded that the standards of Solem should continue to apply. Their conclusion was that "the statutorily mandated punishment at issue here . . . fails muster under Solem and, consequently, under the Eighth Amendment to the Constitution." Id. at 2716. Justice Marshall wrote that he agreed with Justice White's opinion with the exception that, in Justice Marshall's opinion, "capital punishment is in all instances unconstitutional." Id. at 1027. Justice Marshall agreed, however, "that the Eighth Amendment also imposes a general proportionality requirement." Id. at 1028.

Solem was clear--the right to proportionality review exists in non-capital cases. By a 5-4 vote in Harmelin, the Justices agreed to modify or overrule Solem. Two Justices wrote that no right to a proportionality review exists in a non-capital case. The remaining seven Justices agree that the right to a proportionality review exists. The confusion caused by Harmelin concerns the applicable standard that a court should apply when conducting the review. Four Justices (White, Blackmun, Stevens, and Marshall) would continue to apply the factors outlined by Solem. Justices Kennedy, O'Connor, and Souter suggest that a more stringent standard than Solem is required.

Noting and discussing the Solem and Harmelin differences, both the Fifth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals have concluded that only if a sentence is grossly disproportionate (after a comparison of the sentence to the offense is made) should a sentence be analyzed under the remaining factors in Solem. See McCullough v. Singletary, 967 F.2d 530 (11th Cir. 1992); McGruder v. Puckett, 954 F.2d 313 (5th Cir. 1992). See also Neal v. Grammar, 975 F.2d 463 (8th Cir. 1992). Some Circuits have continued to apply the factors in Solem, noting that a majority of the Harmelin court declined to expressly overrule Solem. United States v. Kratsas, 45 F.3d 63 (4th Cir. 1995). The Tenth Circuit Court of Appeals has thus far declined to decide whether or not Harmelin overruled Solem. In at least one case the Tenth Circuit has analyzed the challenged sentence under the factors outlined in Solem, and if the sentence was not so disproportionate as to violate the Eighth Amendment in accordance with Solem, the Court has concluded that further analysis was not necessary. See, e.g., United States v. Angulo-Lopez, 7 F.3d 1506 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1563 (1994). See also United States v. Montoya, 85 F.3d 641, 1996 WL 229188 (10th Cir. May 7, 1996). This Court chooses to proceed in that manner.

Petitioner bears the burden of proof to establish by a preponderance of the evidence that he or she is entitled to relief. See, e.g., Beeler v. Crouse, 332 F.2d 783 (10th Cir. 1964). Petitioner offers no evidence or argument to support his position that the one hundred year sentence for armed robbery is unconstitutional.

At the trial, Mr. Ashworth testified that Petitioner told one of the victims to "open the safe [or] he would blow her brains out." [Tr. at 16]. According to Mr. Ashworth, the victim told Petitioner that she did not know the combination to the safe and the victim was told to open the safe or she would be killed. [Tr. at 16-17].

The Supreme Court has acknowledged that sentences that are imposed within the sentencing guidelines of the sentencing state are generally not considered disproportionate and that sentences that are "less" than death are generally not considered disproportionate. Solem v. Helm, 463 U.S. 277, 290 (1983) (a court should "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals."). See also United States v. Youngpeter, 986 F.2d 349, 355-56 (10th Cir. 1993) (when sentence falls within statutory limits, as was defendant's in this case, the appellate court "generally will not regard it as cruel and unusual"). In Oklahoma, an individual convicted for robbery with a dangerous weapon can be sentenced in the range of five years to life. 28 Okla. Stat. 1991, § 801. Petitioner's sentence is within the statutory guidelines and therefore presumed constitutional.

Upon reviewing the record, the case law, and the arguments submitted by Petitioner, the Court concludes that the sentence imposed on Petitioner was not in violation of the Eighth Amendment to the United States Constitution.

### C. DENIAL OF APPELLATE BRIEF

Petitioner argues that appellate counsel failed to provide to Petitioner a copy of Petitioner's appellate brief. Petitioner asserts that he has a right to a copy of the appellate brief. Petitioner did not present this argument to the Oklahoma courts. Respondent, noting that Petitioner had failed to previously raise this argument, filed a motion to dismiss Petitioner's petition based on a failure to exhaust. By Order dated December 5, 1996, the District Court denied Respondent's motion to dismiss. The District court noted, however, that Petitioner had not presented this argument to the Oklahoma courts, and Petitioner's argument was therefore "procedurally barred." [Docket No. 9-1, at 5]. Petitioner must therefore establish cause and prejudice or show a fundamental miscarriage of justice before the Court will address this argument on the merits. Petitioner was instructed to file a supplemental brief addressing how this argument met the cause and prejudice standard. Petitioner filed a supplemental brief but did not explain how Petitioner met the cause and prejudice standard.

The doctrine of procedural bar prohibits a federal court from considering a specific habeas claim where the highest court of the state declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or [can] demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991); see also Maes v. Thomas, 46 F.3d 979,

985 (10th Cir.), cert. denied, 115 S. Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991).

"A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. Additionally, a finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. at 986 (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)). In this case, the District Court has already made a finding of procedural default, and Petitioner must therefore overcome the cause and prejudice hurdle. The Court concludes that Petitioner has not overcome this hurdle.

#### **D. PROSECUTORIAL MISCONDUCT**

Petitioner additionally argues that his Petition for a Writ of Habeas Corpus should be granted due to the misconduct of the prosecution's counsel. Petitioner generally argues that the prosecutor improperly requested that Petitioner be required to serve his sentences consecutively rather than concurrently.

Petitioner did not present this argument to the Oklahoma courts. Respondent's motion to dismiss for failure to exhaust referred to Petitioner's assertion of prosecutorial misconduct and failure to supply an appellate brief. By Order dated December 5, 1996, the District Court denied Respondent's motion to dismiss. The District court additionally noted that Petitioner had not presented this argument to the Oklahoma courts, and Petitioner's argument was therefore "procedurally barred." [Docket No. 9-1, at 5]. Petitioner must therefore establish cause and prejudice or show

a fundamental miscarriage of justice before the Court will address this argument on the merits. Petitioner was instructed by the District Court to file a supplemental brief addressing how this argument met the cause and prejudice standard. Petitioner filed a supplemental brief but did not explain how Petitioner met the cause and prejudice standard.

The District Court has already made a finding of procedural default, and Petitioner must therefore overcome the cause and prejudice hurdle or establish that a fundamental miscarriage of justice occurred. The Court concludes that Petitioner has not overcome this hurdle.

#### **CONCLUSION**

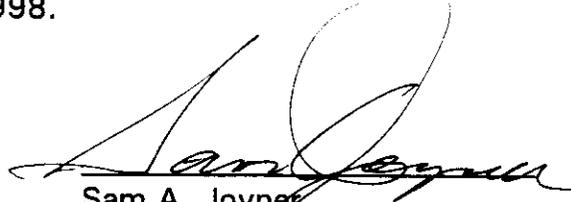
The United States Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED**.

#### **OBJECTIONS**

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b).  
**THE FAILURE TO FILE WRITTEN OBJECTIONS TO THIS REPORT AND RECOMMENDATION MAY BAR THE PARTY FAILING TO OBJECT FROM APPEALING**

ANY OF THE FACTUAL OR LEGAL FINDINGS IN THIS REPORT AND RECOMMENDATION THAT ARE ULTIMATELY ACCEPTED OR ADOPTED BY THE DISTRICT COURT. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 29 day of April 1998.

  
Sam A. Joyner  
United States Magistrate Judge

APR 29 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

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

ANGELA D. YEBESI, )  
)  
Plaintiff, )  
)  
v. )  
)  
KENNETH S. APFEL, )  
Commissioner of the Social Security )  
Administration, )  
)  
Defendant. )

CASE NO. 97-CV-251-M ✓

ENTERED ON DOCKET  
DATE APR 30 1998

**JUDGMENT**

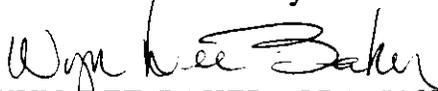
Judgment is hereby entered for Plaintiff and against Defendant. Dated  
this 29<sup>th</sup> day of APRIL, 1998.

*Frank H. McCarthy*  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE



SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney

  
WYN DEE BAKER, OBA #465  
Assistant United States Attorney  
333 W. Fourth St., Suite 3460  
Tulsa, OK 74103-3809

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

APR 29 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SCOTT M. PULEO, )  
SSN: 191-44-5588, )

Plaintiff, )

v. )

KENNETH S. APFEL, )  
Commissioner of Social Security,<sup>1</sup> )

Defendant. )

Case No. 96-CV-1138-EA

ENTERED ON DOCKET

DATE APR 30 1998

**JUDGMENT**

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 29<sup>th</sup> day of April 1998.

*Claire V Eagan*  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

<sup>1</sup> Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

APR 29 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SCOTT M. PULEO, )  
SSN: 191-44-5588, )

Plaintiff, )

v. )

KENNETH S. APFEL, )  
Commissioner of Social Security,<sup>1</sup> )

Defendant. )

Case No. 96-CV-1138-EA

ENTERED ON DOCKET  
DATE APR 30 1998

**ORDER**

Claimant, Scott M. Puleo, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.<sup>2</sup> In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Circuit Court of Appeals.

Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Commissioner's decision is **AFFIRMED**.

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<sup>1</sup> Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

<sup>2</sup> On September 31, 1994, claimant applied for Supplemental Security Income under Title XVI (42 U.S.C. § 1381 *et seq.*). Claimant's application for benefits was denied in its entirety initially (January 5, 1995), and on reconsideration (February 14, 1995). A hearing before Administrative Law Judge R.J. Payne ("ALJ") was held December 14, 1995, in Tulsa, Oklahoma. By decision dated January 25, 1996, the ALJ found that claimant was not disabled on or before the date of the decision. On October 21, 1996, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

## **I. CLAIMANT'S BACKGROUND**

Claimant was born August 5, 1955. At the time of the hearing before the ALJ, claimant lived in Nowata, Oklahoma. Claimant finished the eleventh grade and has obtained a GED high school equivalency certificate. In the past 15 years, claimant has worked as an auto body repairer, an auto body painter, a plastics injection molder, a packer on an assembly line, a mechanic, a label coder, and a lawn service worker.

## **II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW**

Disability under the Social Security Act is defined as the "...inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment...." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act 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 other kind of substantial gainful work in the national economy...." *Id.*, § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.<sup>3</sup>

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<sup>3</sup> Step One requires the claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510. Step Two requires that the claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with certain impairments listed in Appendix 1 of Subpart P, Part 404, 20 C.F.R. Claimants suffering from a listed impairment or impairments "medically equivalent" to a listed impairment are determined to be disabled without further inquiry. If not, the evaluation proceeds to Step Four, where the claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If the claimant's Step Four burden is met, the burden shifts to the Commissioner to establish at Step Five that work exists in significant numbers in the national economy which the claimant--taking into account his age, education, work experience, and RFC--can perform. See *Diaz v. Secretary of Health & Human Servs.*, 898 F.2d 774 (10th Cir. 1990). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1482 (10th Cir. 1991).

The only issue now before the Court is whether there is substantial evidence in the record to support the final decision of the Commissioner that claimant was not disabled within the meaning of the Social Security Act. The term substantial evidence has been interpreted by the U.S. Supreme Court to require "...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 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The search for adequate evidence does not allow the court to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). Nevertheless, the court must review the record as a whole, and "the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

### **III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

The ALJ made his decision at the fourth step of the sequential evaluation process. The ALJ found that although claimant had a severe impairment of degenerative joint disease, claimant retained the residual functional capacity (RFC) to perform light work. Thus, the ALJ found that claimant could perform his past relevant work as a packer and label coder, both of which are classified as work of light exertion. (R. 20) Having determined that claimant could perform his past relevant work, the ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision.

#### IV. MEDICAL HISTORY OF CLAIMANT

A previous application by claimant for Social Security disability benefits was filed August 13, 1992 and denied on October 6, 1993, pursuant to an ALJ decision which was affirmed by the Appeals Council. That decision was not appealed beyond the administrative level. Thus, administrative *res judicata* makes October 7, 1993 the beginning date of any period of disability proven by claimant.

On February 12, 1983, claimant was seen by Dr. David F. Cox, a chiropractor. Claimant complained of spasms in his lower back and blood in his bowel movements. Dr. Cox noted that claimant had an open illeocecal valve, proctitis, and colitis. (R. 189-191) Claimant was treated by Dr. Cox from February 1983 to January 1992. (R. 172-191) At the end of that period, Dr. Cox wrote that claimant had ulcerative proctitis with severe chronic colitis of a nine-year duration. (R. 172)

On November 10, 1992, a consultative examination of claimant was performed by Dr. James S. Stauffer. (R. 142) Dr. Stauffer noted that claimant's chief complaint was back pain, which claimant said had progressively increased since a 1974 injury while he was in the Air Force. (R. 142) Dr. Stauffer stated his clinical impressions to be (1) degenerative joint disease of the lumbosacral spine, (2) colitis and proctitis, and (3) scoliosis. (R. 143) A range of motion evaluation performed by Dr. Stauffer recorded that claimant had a range of back extension of only five degrees. (145) Dr. Stauffer found that claimant had a diminished straight leg rising ability while lying down and was positive for scoliosis and pain. (R. 146)

On January 5, 1993, a consultative examination of claimant's mental status was performed by Dr. John W. Hickman. (R. 153-154) Dr. Hickman found no significant mental impairments, beyond a general statement that claimant may benefit from psychological treatment. (R. 154) Another consultative examination of claimant's mental status was performed by Dr. Thomas A. Goodman on

February 19, 1993. (R. 156-158) Dr. Goodman diagnosed claimant as having "anxiety disorder, NOS, generalized, exact nature and cause unclear, provisional." (R. 158) Dr. Goodman deferred diagnosis as to Axis II. Id.

On November 29, 1994, a consultative examination of claimant was performed by Dr. Jerry Patton. (R. 275-277) Dr. Patton noted that claimant had a history of ulcerative colitis, but found no physical abnormalities in his examination. (R. 276) After administering a range of motion evaluation of claimant, Dr. Patton concluded:

[Claimant] was placed through a complete range of motion exercises, and overall did very well. His only slight limitation was that he had a slight diminished straight leg raising for lying on his right leg. The rest of the examination was virtually normal. There was no inflammatory disease of any joints, heat, swelling or tenderness. . . . It was felt by me that [claimant] did not show any signs of disability in my office today.

Id.

On December 1, 1994, a consultative examination of claimant's mental status was performed by Dr. Kyle Stewart. (R. 282-283) In listing his impressions, Dr. Stewart recorded "anxiety disorder, NOS, generalized, attributed probably to some extent by inactivity." (R. 283)

Claimant was treated at the VanWey Chiropractic Clinic in Bartlesville, Oklahoma from January 1992 through the date of the ALJ decision. (R. 301) A case history record for claimant notes that claimant's major complaints were low back pain and a "colon inflamed and swollen with the passing of blood." (R. 151) A December 1992 laboratory report ordered by Dr. William VanWey, chiropractor, indicated that claimant has anemia. (R. 149) In a letter dated November 14, 1995, Dr. James Riden of the VanWey Clinic stated that the clinic's treatment of claimant has been for lumber myalgia. (R. 301) Dr. Riden wrote:

It has also been noted that [claimant] experiences blood in his stools, which seem to vary in the amount of blood, depending on his activity levels. History of [claimant] reveals that the greater the activity, the greater the amount of blood released from the rectum, as well as, the amount in his stools.

Id. Visitation notes from the clinic document repeated statements by claimant of such bleeding, as well as back pain. (R. 288-291)

## V. REVIEW

Claimant asserts that the ALJ incorrectly determined at Step Four that claimant retained the RFC to perform his past relevant work as a packer and a label coder. Specifically, claimant asserts that the ALJ did not properly consider the effects of claimant's mental impairment or his rectal bleeding on his RFC. This Court finds that substantial evidence supports the ALJ's determination that claimant failed to meet the burden required of him at Step Four to show that he did not retain the RFC to perform his past relevant work.

### A. Claimant's Mental Status

Claimant asserts that the ALJ erred where he failed to properly evaluate claimant's mental status. The ALJ determined that claimant's ability to perform work-related activities was not diminished by his mental status. Dr. Stewart, upon his December 1994 examination of claimant, found that claimant showed no symptoms of thought disorder, delusional or hallucinatory experience, homicidal or suicidal ideations, or affective depression. (R. 283) Dr. Stewart did find that claimant suffered from a generalized anxiety disorder, but linked claimant's anxiety to his inactivity. Id. Substantial evidence supports the decision of the ALJ in regard to the effect of claimant's mental status.

***B. Claimant's Passing of Blood***

Claimant asserts that rectal bleeding, allegedly caused by colitis or some other source of irritation of the colon, requires claimant to stop working as many as five to ten times a day so that he may go to the restroom. The ALJ determined that claimant's alleged intestinal problems did not detract from claimant's ability to perform work-related activities. (R. 18)

The burden of proof is determinative in this case. A claimant bears the burden of proving disability. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984). That burden includes the Step Four burden of establishing that claimant does not retain the RFC to return to his past relevant work. Potter v. Secretary of Health & Human Servs., 905 F.2d 1346, 1349 (10th Cir. 1990); Ray v. Bowen, 865 F.2d 222, 224 (10th Cir. 1989). In the instant case, claimant simply failed to present sufficient evidence of rectal bleeding or intestinal impairment such that it was established that claimant could not return to his past relevant work.

The most credible evidence of claimant's rectal bleeding is the twelve years of office notes made by the various chiropractors who have treated claimant documenting claimant's complaints of rectal bleeding. (R. 172-191, 288-291) But these notes are not medical evidence of claimant's condition; they are only logs of the subjective complaints made by claimant. Internal medicine is generally not within the expertise of chiropractic doctors. The office notes show no objective observations, tests, or findings regarding claimant's rectal bleeding made by any of the chiropractors who treated claimant. Nor were any medical tests as to the existence or cause of the claimed rectal bleeding ordered by any of the chiropractors. The office notes presented by claimant establish no more than a twelve-year history of subjective complaints by claimant.

Similarly, although Dr. Stauffer in a November 1992 consultative examination of claimant diagnosed claimant as having colitis and proctitis, no medical tests pertaining to claimant's alleged intestinal problems were run by Dr. Stauffer and no medical records pertaining to claimant's alleged intestinal problems were reviewed. (R. 142-143) It is clear from Dr. Stauffer's report that Dr. Stauffer primarily examined claimant's range of motion and that the diagnosis of colitis was based only on claimant's subjective complaints and description of his medical history. (R. 142-146)

This Court does not completely discount the possibility that claimant has an intestinal malady of some sort and that rectal bleeding results from that malady. Rather, this Court finds that claimant has not sustained his burden of proving such a malady. Upon careful review of the record, this Court finds that claimant has not presented any evidence of an intestinal impairment beyond his own subjective complaints. Unsubstantiated subjective evidence is not sufficient to prove disability. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). A Step Four determination of ability to return to past relevant work must be made by an ALJ in light of the burden of proof imposed upon claimant by law. See 42 U.S.C. § 423(d)(5). This Court reviews that determination for support by substantial evidence. Here, substantial evidence supports the ALJ's determination that claimant failed to present sufficient proof of rectal bleeding to meet his burden that he did not have the RFC to return to his past relevant work.<sup>4</sup>

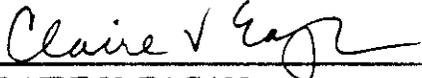
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<sup>4</sup> This Court doubts that claimant could ever prove an intestinal-related disability based solely on the opinion of a chiropractor. Although statements from a chiropractor may sometimes be used to determine how an impairment affects a claimant's ability to work, chiropractors are not "acceptable sources" of medical evidence as defined by 20 C.F.R. § 404.1513(a). Cf. 20 C.F.R. § 404.1513(e)(3). This distinction is particularly relevant here, where the intestinal-related impairment alleged would clearly be outside a chiropractor's expertise.

## VI. CONCLUSION

The ALJ's finding that claimant was limited to light work by his impairment of degenerative joint disease is supported by substantial evidence. A vocational expert testified that claimant's past relevant work as a packer and as a label coder were both work of light exertion. (R. 63-70) The ALJ properly concluded that claimant retained the RFC to perform his past relevant work and, thus, was not disabled under the Social Security Act at any time through the date of the decision. The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

DATED this 29<sup>th</sup> day of April, 1998.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

APR 28 1998 *mw*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

EARL D. AREHART aka Earl Dean Arehart; )

JOSEPHINE E. AREHART; )

STATE OF OKLAHOMA, *ex rel.* )

Oklahoma Tax Commission; )

FIDELITY FINANCIAL SERVICES, INC; )

COUNTY TREASURER, )

Tulsa County, Oklahoma; )

BOARD OF COUNTY COMMISSIONERS, )

Tulsa County, Oklahoma; )

HILLCREST MECICAL CENTER, )

a corporation, )

Defendants. )

ENTERED ON DOCKET

DATE APR 29 1998

Civil Case No. 96-CV-510-B

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 29<sup>th</sup> day of April, 1998.

The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendant, State of Oklahoma, *ex rel.* Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; 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, Hillcrest Medical Center, appears by its attorney Fred A. Pottorf; and the Defendants, Earl D. Arehart aka Earl Dean Arehart, Josephine E. Arehart, and Fidelity Financial Services, Inc., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Earl D. Arehart aka Earl Dean Arehart, was served by a United States Deputy

with Summons and Amended Complaint on October 24, 1996; that the Defendant, Josephine E. Arehart, was served with Summons and Amended Complaint by certified mail, return receipt requested, delivery restricted to the addressee on July 9, 1997; that the Defendant, Fidelity Financial Services, Inc., executed a Waiver of Service of Summons through its service agent on June 7, 1996; that the Defendant, Hillcrest Medical Center, a corporation, executed a Waiver of Service of Summons on September 10, 1996.

It appears that the Defendants, Earl D. Arehart aka Earl Dean Arehart and Josephine E. Arehart, filed their Entry of Appearance through their attorney Scott E. Coulson on November 7, 1996, but have failed to answer and their default has therefore been entered by the Clerk of this Court; that the Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, filed its Answer on July 12, 1996 and its Response to Amended Complaint on August 21, 1996; that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on June 21, 1996; that the Defendant, Hillcrest Medical Center, a corporation, filed its Answer on September 11, 1996; and the Defendant, Fidelity Financial Services, Inc., has failed to answer and its default has therefore been entered by the Clerk of this Court.

The Court further finds that on February 28, 1986, Earl D. Arehart and Josephine E. Arehart executed and delivered to Commonwealth Mortgage Corporation, their mortgage note in the amount of \$48,889.00, payable in monthly installments, with interest thereon at the rate of 9½ percent per annum.

The Court further finds that as security for the payment of the above-described note, Earl D. Arehart and Josephine E. Arehart, husband and wife, executed and delivered to

Commonwealth Mortgage Corporation, a real estate mortgage dated February 28, 1986, covering the following described property, situated in the State of Oklahoma, Tulsa County:

LOT THIRTY-THREE (33), BLOCK FOURTEEN (14), VAL-CHARLES ADDITION TO THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

This mortgage was recorded on March 7, 1986, in Book 4928, Page 1719, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 10, 1986, Commonwealth Mortgage Corporation, assigned the above-described mortgage note and mortgage to Citicorp Homeowners Services, Inc. This Assignment of Real Estate Mortgage was recorded on June 9, 1986, in Book 4947, Page 1840, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 19, 1990, CitiCorp Mortgage, Inc., successor in interest to Citicorp Homeowners Services, Inc., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, his successors and assigns. This Assignment was recorded on January 22, 1990, in Book 5231, Page 2488, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 1, 1990, Earl D. Arehart and Josephine E. Arehart 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. Superseding agreements were reached between these same parties on September 1, 1990, September 1, 1991, December 1, 1991, June 1, 1992, and September 1, 1992.

The Court further finds that the Defendants, Earl D. Arehart aka Earl Dean Arehart and Josephine E. Arehart, 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, Earl D. Arehart aka Earl Dean Arehart and Josephine E. Arehart, are indebted to the Plaintiff in the principal sum of \$47,762.35, plus administrative charges in the amount of \$608.64, less escrow in the amount of \$39.48, plus accrued interest in the amount of \$20,416.45 as of June 1, 1995, plus interest accruing thereafter at the rate of 9.5 percent per annum 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 \$13.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action by virtue of sales taxes in the amount of \$1,531.55, together with interest on the total tax at the rate of 12% per annum, which became a lien on the property as of June 4, 1980. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Hillcrest Medical Center, a corporation, has a lien on the property which is the subject matter of this action by virtue of a judgment, in the amount of \$4,147.54 which became a lien on the property as of August 31, 1995. Said lien is inferior to the interest of the Plaintiff, United States of America.

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 the Defendants, Earl D. Arehart aka Earl Dean Arehart, Josephine E. Arehart, and Fidelity Financial Services, Inc., are in default, and have 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, Earl D. Arehart aka Earl Dean Arehart and Josephine E. Arehart, in the principal sum of \$47,762.35, plus administrative charges in the amount of \$608.64, less escrow in the amount of \$39.48, plus accrued interest in the amount of \$20,416.45 as of June 1, 1995, plus interest accruing thereafter at the rate of 9.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.407<sup>0/10</sup> percent per annum until paid, plus the costs of this action, 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 Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$13.00, plus costs and interest, for personal property taxes for the year 1993, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, have and recover judgment in

the amount of \$1,531.55, together with interest on the total tax at the rate of 12% per annum, for sales taxes, plus the costs and interest.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, Hillcrest Medical Center, a corporation, have and recover judgment in the amount of \$4,147.54 for its judgment, plus the costs and interest.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Earl D. Arehart aka Earl Dean Arehart, Josephine E. Arehart, Fidelity Financial Services, Inc., and Board of County Commissioners, Tulsa County, Oklahoma, 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, Earl D. Arehart aka Earl Dean Arehart and Josephine E. Arehart, to satisfy the in rem judgment 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 appraisalment 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 the judgment rendered herein in favor of the Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission;

**Fourth:**

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma;

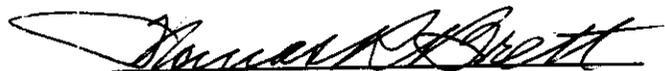
**Fifth:**

In payment of the judgment rendered herein in favor of the Defendant, Hillcrest Medical Center, a corporation.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

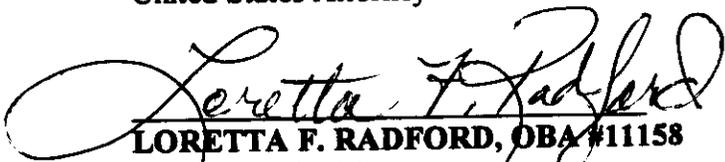
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

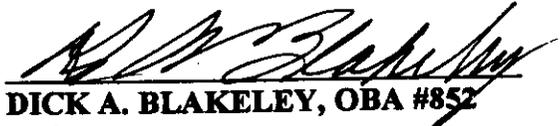
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed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

  
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

  
LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
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,

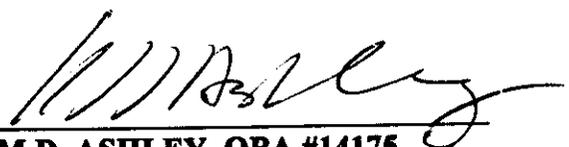
County Treasurer and Board of County Commissioners,

Tulsa County, Oklahoma

Judgment of Foreclosure

Civil Action No.96-CV-510-B (Arehart)

LFR:css

  
**KIM D. ASHLEY, OBA #14175**  
Assistant General Counsel  
P.O. Box 53248  
Oklahoma City, Oklahoma 73152-3248  
(405) 521-3141  
Attorney for Defendant,  
State of Oklahoma, *ex rel.*  
Oklahoma Tax Commission

*A 96-420*

Judgment of Foreclosure  
Civil Action No.96-CV-510-B (Arehart)

LFR:cm

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**FRED A. POTTORF, OBA #7248**  
1437 South Boulder, Suite 900  
Tulsa, Oklahoma 74119  
(918) 582-3191  
Attorney for Defendant,  
Hillcrest Medical Center

Judgment of Foreclosure  
Civil Action No.96-CV-510-B (Archart)

LFR:cas

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 28 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 RAMON MILLER, )  
 )  
 Defendant. )

Civil Action No. 97CV1112BU

ENTERED ON DOCKET

DATE APR 29 1998

DEFAULT JUDGMENT

This matter comes on for consideration this 28 day of April, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Ramon Miller, appearing not.

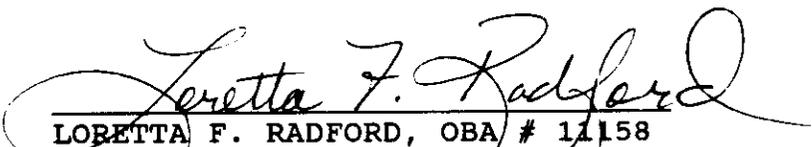
The Court being fully advised and having examined the court file finds that Defendant, Ramon Miller, was served with Summons and Complaint on March 11, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has 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.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Ramon Miller, for the principal amounts of \$2,852.52 and \$1,000.00, plus accrued interests of \$1,707.45 and \$560.23, plus administrative charges in the amounts of \$40.00 and \$43.50, plus interest

thereafter at the rates of 8 percent and 5 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

  
LORETTA F. RADFORD, OBA # 11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/llf

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

**FILED**

APR 28 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LLOYD DEAN HARJO, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
STEPHEN KAISER, )  
 )  
Respondent. )

Case No. 96-CV-1012-BU (J)

ENTERED ON DOCKET

DATE APR 29 1998

**ORDER**

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #9) filed on March 26, 1998, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that the petition for writ of habeas corpus be denied. On April 3, 1998, Petitioner filed his objection to the Report (#11). On April 9, 1998, Petitioner also filed a motion for leave to file amended petition (#12).

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Petitioner has objected, and concludes that, for the reasons discussed below, the Report should be adopted and affirmed. The Court also finds that Petitioner's motion for leave to file amended petition should be denied.

**BACKGROUND**

The Magistrate Judge has succinctly summarized the facts underlying Petitioner's criminal convictions in the Report and the Court will only briefly repeat those facts here. The events giving rise to Petitioner's criminal convictions occurred in August of 1990 at Mohawk Park, a municipal

(13)

park located in Tulsa, Oklahoma, where Petitioner had been attending a "pow-wow." Petitioner, along with his four (4) co-defendants, became involved in a serious confrontation with two Tulsa police officers, which ultimately resulted in injury to one of the officers and severe damage to two police cars. In January, 1991, Petitioner was tried, along with his co-defendants, and found guilty of felony assault and battery on a police officer (after conviction of two or more felonies), riot (after conviction of two or more felonies), and malicious injury to an automobile. He was sentenced to forty-five years for assault and battery of a police officer, twenty-five years for riot, and was fined \$500.00 for malicious injury to an automobile. Petitioner's sentences are being served consecutively.

Petitioner filed a direct appeal to the Oklahoma Court of Criminal Appeals. On June 16, 1994, the appellate court affirmed Petitioner's convictions and sentences. Petitioner has also sought post-conviction relief in the state trial court. The Oklahoma Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief on February 28, 1996.

### *DISCUSSION*

Petitioner filed the instant petition for writ of habeas corpus on October 31, 1996. He raises the following grounds allegedly justifying habeas relief: (1) the trial court erred in overruling the magistrate's dismissal of the charge of assault and battery against a police officer at the preliminary hearing, (2) the trial court erred in improperly instructing the jury and in overruling the motion for mistrial, (3) prosecutorial misconduct during closing and the sentencing phase requires a reversal of the conviction, (4) the trial court lacked jurisdiction, (5) the sentence imposed on Petitioner was excessive, (6) Petitioner received ineffective assistance of trial counsel, and (7) Petitioner received ineffective assistance of appellate counsel. The Magistrate Judge determined that although several

of Petitioner's claims were unexhausted, to require Petitioner to return to state court would be futile since the state courts would impose a procedural bar on the claims. The Magistrate Judge then reviewed each of Petitioner's claims and concluded that each claim is without merit.

Petitioner objects to the Magistrate Judge's conclusion that it would be futile to require him to return to state court to exhaust his available remedies and requests that further proceedings in this case be stayed pending exhaustion of the claims in state court.<sup>1</sup> In addition, Petitioner objects to each of the Magistrate Judge's separate findings that his claims lack merit.

**1. Futility**

Petitioner argues that the Magistrate Judge erroneously concluded that to require him to return to state court to present his unexhausted claims would be futile since the state courts would impose a procedural bar. Petitioner correctly points out that under Oklahoma law, a petitioner is entitled to file a second or subsequent application for post-conviction relief if he is able to demonstrate "a sufficient reason" for his failure to raise the claim in prior proceedings. See Okla. Stat. tit. 22, § 1086. Petitioner goes on to state that he has a sufficient reason in that he "did not know the relevant facts and understand their legal significance when he filed the prior state court petition, neither could petitioner have discovered the same by the exercise of reasonable and/or due diligence." (#11, at 2). However, the Court finds that each of Petitioner's unexhausted claims is based on facts contained in the record and could have been raised in previous state court proceedings. Furthermore, Petitioner's lack of knowledge concerning "relevant facts" and their "legal significance" would not be considered "sufficient reason" for the state courts to consider Petitioner's unexhausted

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<sup>1</sup>The Court notes that in his motion for leave to file amended petition, Petitioner requests that he be allowed to delete his unexhausted claims from this action. This appears to contradict Petitioner's request in his objection that this federal habeas action be stayed while he presents his unexhausted claims in state court.

claims on the merits. See Fowler v. State, 896 P.2d 566 (Okla. Crim. App. 1995) (citing a subsequent change in law as an example of "sufficient reason" for failure to raise issue in previous post-conviction efforts), *superseded by statute on other grounds as stated in* Neill v. State, 943 P.2d 145, 148 (Okla. Crim. App. 1997). By analogy, ignorance of the law and *pro se* status have been held to be insufficient as a matter of law to constitute "cause" sufficient to overcome procedural bar imposed after default of constitutional claims in state court. See Klein v. Neal, 45 F.3d 1395, 1400 (10th Cir. 1995) (finding that Petitioner's assertions he is not a lawyer and he was unaware of a statute's existence are insufficient as a matter of law to constitute "cause" sufficient to overcome procedural default); see also Cornman v. Armontrout, 959 F.2d 727, 729-30 (8th Cir. 1992) (citing cases for the propositions that neither below-average intelligence, *pro se* status or lack of formal legal training constitute "cause" sufficient to allow filing of successive petition for writ of habeas corpus). Therefore, the Court finds Petitioner's objection is without merit and agrees with the Magistrate Judge's conclusion that to require Petitioner to return to state court to present his unexhausted claims would be futile.

**2. Petitioner's challenges to the Report's findings on specific claims**

The Court has reviewed each of Petitioner's objections to the Magistrate Judge's findings on his habeas claims and finds them to be without merit. The case law cited and discussed by the Magistrate Judge supports the conclusion that none of Petitioner's claims is meritorious. Therefore, the Court agrees with the conclusion of the Magistrate Judge and finds that Petitioner's petition for writ of habeas corpus should be denied.

**3. Petitioner's motion for leave to amend petition**

The Court also finds that Petitioner's belated request to amend his petition for writ of habeas

corpus should be denied. Although Fed. R. Civ. P. 15(a) provides that leave to amend should be freely given when justice so requires, the Court finds that Petitioner had sufficient time and opportunity to seek leave to amend prior to the entry of the Magistrate Judge's Report and Recommendation. However, Plaintiff did not seek to amend his complaint, to add an additional allegation of ineffective assistance of trial counsel, until after the Magistrate Judge had issued the Report. Therefore, the Court concludes that Petitioner's request to amend his petition is untimely, see Frank v. U.S. West, Inc., 3 F.3d 1357, 1365-66 (10th Cir.1993) (holding that untimeliness is sufficient reason to deny amendment), and would prejudice Respondent, see Foman v. Davis, 371 U.S. 178, 182 (1962) (undue prejudice to opposing party is sufficient reason to deny request to amend). In the alternative, the Court finds that after reviewing Petitioner's amended complaint, the additional claim is without merit<sup>2</sup> and to allow plaintiff to file his amended complaint would be futile. See id. (request to amend can be denied as futile).

### *CONCLUSION*

The Court has reviewed de novo those portions of the Report to which the Petitioner has objected, see Fed. R. Civ. P. 72(b) and 28 U.S.C. § 636(b)(1)(C), and concludes that the Report and Recommendation of the United States Magistrate Judge should be adopted and affirmed, and Petitioner's petition for writ of habeas corpus should be denied. The Court further finds Petitioner's motion for leave to amend petition should be denied.

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<sup>2</sup>Petitioner indicates he wishes to amend his petition to add a claim that his trial counsel provided ineffective assistance when he failed to impeach one of the police officers at trial with allegedly inconsistent testimony given at the preliminary hearing. The Court finds that Petitioner would be unable to satisfy either prong of the Strickland test for ineffective assistance of counsel with this claim. See Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that to establish ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense).

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

1. The Report and Recommendation of the United States Magistrate Judge (#9) is **adopted and affirmed.**
2. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied.**
3. Petitioner's motion for leave to file amended petition (#12) is **denied.**

SO ORDERED THIS 28<sup>th</sup> day of April, 1998.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**

APR 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GEORGE CUNNINGHAM, )

Plaintiff, )

vs. )

Case No. 96-C-858H

~~Judge Kern~~

ALVA THOMAS WHITE, SR., )

Executor of the Estate )

of RAWLINS HARPER, )

Deceased, )

Defendant. )

ENTERED ON DOCKET

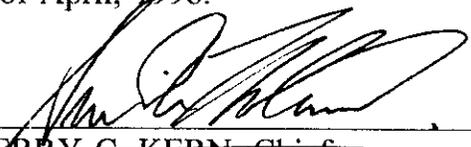
DATE 4-28-98

**ORDER**

Before the Court is the Joint Application of the parties for dismissal with prejudice. This action had previously been dismissed without prejudice but in the present application, the parties represent that they have settled all issues between them.

It is the order of the Court that the Application for Order of Dismissal is granted. This action is hereby dismissed with prejudice.

ORDERED this 24<sup>TH</sup> day of April, 1998.

  
\_\_\_\_\_  
~~FERRY C. KERN, Chief~~  
UNITED STATES DISTRICT JUDGE

Submitted By:

Wilburn, Masterson & Smiling  
7134 S. Yale, Suite 560  
Tulsa, OK 74136  
(918) 494-0414  
FAX (918) 493-3455

16

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

**FILED**

APR 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RIVER OAKS DEVELOPMENT  
CORPORATION, an Oklahoma corporation;  
Lorice T. Wallace, trustee of the LORICE T.  
WALLACE REVOCABLE TRUST, and the  
LORICE T. WALLACE FAMILY LIMITED  
PARTNERSHIP, an Oklahoma limited partnership,

Plaintiffs,

v.

MNA, INC., a Colorado corporation; NAIM  
G. NASSAR, an individual; and MACE L.  
PEMBERTON, an individual,

Defendants.

Case No. 97-C-68-H

ENTERED ON DOCKET

DATE 4-28-98

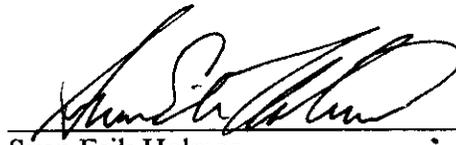
**JUDGMENT**

This matter came before the Court on a motion to dismiss the claims of Plaintiffs by Defendants Nassar and Pemberton. The Court duly considered the issues and rendered a decision in accordance with the order filed on April 3, 1998.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendants Nassar and Pemberton and against Plaintiffs.

IT IS SO ORDERED.

This 24<sup>th</sup> day of April, 1998.



Sven Erik Holmes  
United States District Judge

65

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

**FILED**

APR 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN RE: )  
 )  
 SAMMIE JO BROOKS, )  
 SSN: 446-52-8826 )  
 )  
 Debtor. )  
 \_\_\_\_\_ )  
 SAMMIE JO BROOKS, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 UNITED STATES OF AMERICA, )  
 EX REL INTERNAL REVENUE )  
 SERVICE, )  
 )  
 Appellee. )

No. 98-C-59-B(E)

ENTERED ON DOCKET  
DATE APR 28 1998

**ORDER AND JUDGMENT**

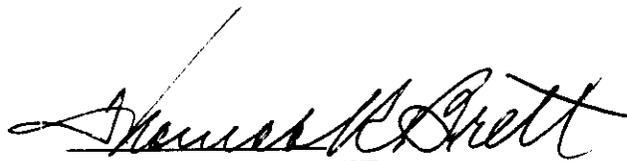
This case is an appeal from the United States Bankruptcy Court for the Northern District of Oklahoma of the order of the Bankruptcy Court denying debtor/appellant's motion for reconsideration/rehearing of an order dismissing her complaint and adversary proceeding against the United States, ex rel Internal Revenue Service ("United States"). On March 12, 1998, Magistrate Judge Claire V. Eagan issued Proposed Findings and Recommendation to affirm the Bankruptcy Court. Debtor/Appellant Sammie Jo Brooks ("Brooks") filed an Objection to the Proposed Findings and Recommendation on March 23, 1998.

Upon a *de novo* review of the record before it, the Court finds no merit to Brooks' objection and adopts the Findings and Recommendation of the Magistrate Judge.

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Accordingly, the Court affirms the decision of the Bankruptcy Court.

ORDERED this 28 day of April, 1998.

A handwritten signature in black ink, appearing to read "Thomas R. Brett". The signature is written in a cursive style with a prominent initial "T" and "B".

THOMAS R. BRETT  
UNITED STATES DISTRICT COURT

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

**FILED**

APR 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FOUR-D ENERGY, INC., an )  
Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
UNION PACIFIC RAILROAD )  
COMPANY, a Utah corporation; )  
and RALPH ROSS CONSTRUCTION )  
CO., INC., a purported )  
corporate entity, )  
 )  
Defendants. )

No. 98-CV-0002 H (M)

ENTERED ON DOCKET

DATE 4-28-98

ORDER OF PARTIAL DISMISSAL

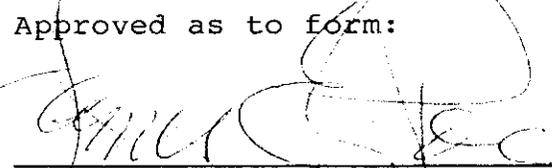
Upon stipulation of Plaintiff and Defendant, UNION PACIFIC RAILROAD COMPANY, is herewith ordered that Plaintiff's action against UNION PACIFIC RAILROAD COMPANY be and is now dismissed with prejudice. Plaintiff's action against Defendant, RALPH ROSS CONSTRUCTION CO., INC., is likewise dismissed at this time without prejudice.

Defendant, UNION PACIFIC RAILROAD COMPANY's cross action against RALPH ROSS CONSTRUCTION CO., INC., is unaffected by this order and remains for further proceedings.

Dated this 24<sup>th</sup> day of April, 1998.

  
HONORABLE SVEN ERIK HOLMES  
U.S. District Judge

Approved as to form:

  
JAMES E. POE, OBA #7198  
STEPHEN R. CLOUSER, OBA #1737  
Covington & Poe  
111 West 5th Suite 740

9

Tulsa, Oklahoma 74103  
(918) 585-5537

Attorneys for Plaintiff



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TOM L. ARMSTRONG, OBA #329  
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Attorneys for Defendant, UNION  
PACIFIC RAILROAD COMPANY

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

**FILED**

UNITED STATES OF AMERICA for use )  
and benefit of METRO ROOFING, INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
INNOVATIVE SYSTEMS, INC. and )  
AMERICAN CASUALTY COMPANY OF )  
READING, PENNSYLVANIA, )  
 )  
Defendants. )

APR 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 98-CV-0253-K

**ENTERED ON DOCKET**  
**DATE APR 28 1998**

**NOTICE OF DISMISSAL WITH PREJUDICE**

Pursuant to Fed R. Civ. P. 41(a)(1), Metro Roofing, Inc. notifies the Court that all causes of action asserted in this case are hereby dismissed with prejudice, and each party shall bear its own costs and attorneys fees.

Dated this 27th day of April, 1998.

Respectfully submitted,



Charles S. Plumb, OBA #7194  
Steven K. Metcalf, OBA #14780  
Doerner, Saunders, Daniel & Anderson, L.L.P.  
320 South Boston Avenue, Suite 500  
Tulsa, Oklahoma 74103  
(918) 582-1211

Attorneys for Plaintiff, Metro Roofing, Inc.

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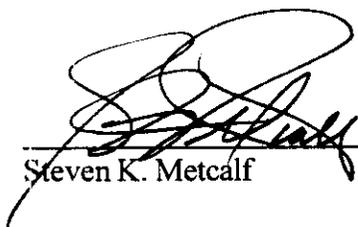
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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 27<sup>th</sup> day of April, 1998, a true and correct copy of the above and foregoing instrument was mailed, with proper postage thereon, to:

Steve Wright  
Innovative Systems, Inc.  
2915 Strong Avenue  
Kansas City, KS 66106

Pam Reed  
American Casualty Company of Reading, Pennsylvania  
7400 College Blvd., Suite 225  
Overland Park, KS 66210

  
\_\_\_\_\_  
Steven K. Metcalf

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

JOHN HENRY PETERS,  
  
Plaintiff,  
  
vs.  
  
NORTHLAND INSURANCE CO.,  
  
Defendant.

ENTERED ON DOCKET

DATE APR 28 1998

No. 97-C-128-K

**F I L E D**

APR 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. 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 sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 27 day of April, 1998.



TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

**FILED**

APR 24 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ANTHONY JOSEPH THANNISCH,

Petitioner,

vs.

STEVEN KAISER,

Respondent.

Case No. 97-CV-102-H

ENTERED ON DOCKET

DATE 4-27-98

**REPORT AND RECOMMENDATION**

Petitioner, Anthony Joseph Thannisch, an Oklahoma state inmate, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254 alleging he received ineffective assistance of counsel when his counsel failed to perfect an appeal. The Respondent seeks dismissal of this PETITION FOR HABEAS CORPUS claiming Petitioner's claims are procedurally barred from federal court review. The matter has been referred to the undersigned United States Magistrate Judge for report and recommendation.

For reasons stated below, the undersigned United States Magistrate Judge RECOMMENDS that the petition for habeas corpus be DISMISSED as procedurally barred.

**BACKGROUND**

Petitioner was convicted of conspiracy to commit murder and solicitation to commit murder in Tulsa County Case No. CFR-88-3843. He was sentenced to ten (10) years and forty-five (45) years, respectively. Petitioner appealed the convictions. The Oklahoma Court of Criminal Appeals reversed the conspiracy conviction and remanded the solicitation conviction with directions to the trial court to request a

presentence report in compliance with 22 Okla. Stat. § 982 before re-sentencing Petitioner. [Dkt. 1, Ex. A]. In May 1992 Petitioner was resentedenced to 45 years imprisonment. [Dkt. 4, Ex. C]. Petitioner through retained counsel, Matt Dowling, appealed the new sentence claiming he was denied the right to a jury trial at the re-sentencing hearing. However, the Oklahoma Court of Criminal Appeals dismissed the appeal for lack of jurisdiction because the original record had not been filed in the appeal. [Dkt. 4, Ex. D].

Petitioner through different retained counsel, Joseph O. Minter V., raised two issues on his first application for post-conviction relief filed in February 1995: (1) the trial court failed to advise him of his appeal rights at re-sentencing; and (2) the trial court erroneously refused to provide a transcript at no cost to him. The Tulsa County District Court denied post-conviction relief finding "Petitioner was well aware of his appeal rights after his second sentencing and that an appeal was filed in his [re-sentencing] case." [Dkt. 4, Ex. F, p. 2]. The Court also discussed the local rule which requires "the person seeking the transcript must either pay the court reporter in advance, or have a determination of in forma pauperis status." [Dkt. 4, Ex. F, p. 3]. Since Petitioner satisfied neither requirement, the Court found that "the failure to provide a record was occasioned by the Petitioner and his retained attorneys," and this failure "does not constitute sufficient reason for this court to grant an appeal out-of-time." *Id.* Petitioner's appeal of the denial of post-conviction relief was dismissed because it was not timely filed. [Dkt. 4, Ex. H].

Petitioner filed a second application for post-conviction relief in January 1996, claiming ineffective assistance of counsel on appeal of the re-sentencing. He argued that counsel's failure to obtain a transcript and failure to file a supplemental brief as requested by the Oklahoma Court of Criminal Appeals resulted in dismissal of his appeal which deprived him of rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. This second application for post conviction relief was denied as procedurally barred because Petitioner could have raised, but did not raise the issue in his first application for post-conviction relief and because he had not provided sufficient reason for failing to do so. [Dkt. 4, Ex. I]. The denial was affirmed by the Oklahoma Court of Criminal Appeals which stated, "A review of the record. . . reveals that the Petitioner could have raised the claim of ineffective assistance of appellate counsel on direct appeal of his re-sentencing in his first Application for Post-Conviction Relief. Therefore, the issue is waived." [Dkt. 4, Ex. K].

### **DISCUSSION**

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the last state court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565, 115 L.Ed. 2d 640 (1991). Federal habeas review is barred

by procedural default only when the last state court to render judgment in the case clearly and expressly states that a state procedural bar is the basis of its judgment. *See Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989).

The Oklahoma Court of Criminal Appeals, relying on Oklahoma law, 22 Okla. Stat. § 1086<sup>1</sup> specifically found that Petitioner could have raised ineffective assistance of appellate counsel in his first application for post-conviction relief, and that his failure to do so waived the issue. [Dkt. 4, Ex. K]. The Court found that "Petitioner is procedurally barred from raising his ineffective counsel claim because Petitioner has not shown sufficient reason to preclude enforcement of a procedural default." [Dkt. 4, Ex. K, p. 6]. Thus, the last state court to render judgment clearly stated that the claim Petitioner raises in this petition, ineffective assistance of appellate counsel, was procedurally barred. The state judgment rests on independent and adequate state procedural grounds. "On habeas review, we do not address issues that have been defaulted in state court on an independent and adequate state procedural ground, unless cause and prejudice or a fundamental miscarriage of justice is shown." *Steele v. Young*, 11 F.3d 1518, 1521 (10th Cir. 1993).

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<sup>1</sup>22 Okla. Stat. § 1086 provides:

All grounds for relief available to an applicant under this [Post-Conviction Relief] act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately asserted in the prior application.

A federal court may proceed to the merits of a procedurally defaulted habeas claim if the petitioner establishes either cause for the default and actual prejudice or a fundamental miscarriage of justice if the merits of the claim are not reached. *Demarest v. Price*, 130 F.3d 922, 941 (10th Cir. 1997). Cause for a procedural default generally involves "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). Cause may be established by showing that "the factual or legal basis for a claim was not reasonably available to counsel" or that there was "some interference by officials that made compliance impracticable." *Id.* (quoting *Brown v. Allen*, 344 U.S. 443, 486, 73 S.Ct. 397, 422, 97 L.Ed. 469 (1953)). If cause is established, then petitioner must show that he suffered actual prejudice as a result of the alleged violation of federal law. *Demarest*, 130 F.3d at 941.

Petitioner has filed a "Motion of Request by Petitioner to Supplement Habeas Corpus." [Dkt. 6]. He seeks to have the court consider proceedings undertaken by the Oklahoma Supreme Court to discipline attorney Joseph O. Minter V., his counsel on the first application for state post-conviction relief, for his failure to properly perfect an appeal in a criminal case for another client. Since the Oklahoma Supreme Court found Mr. Minter had engaged in a pattern of neglecting his client's matters, Petitioner asserts that the proffered document lends credibility to his claims. Construing Petitioner's submission liberally, in accordance with *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30 L.Ed.2d 652 (1972), the Court considers it as an attempt

to establish "cause" for his failure to assert ineffective assistance of counsel in his first application for post-conviction relief.

Although Petitioner's counsel on the first application for post-conviction relief may be blameworthy for failing to raise the issue, ineffective assistance of counsel in the post-conviction proceeding does not constitute "cause" under federal law. Only attorney error that rises to the level of constitutionally ineffective assistance may constitute "cause" for a procedural default. *Coleman*, 111 S.Ct. at 2567. The Constitution does not require that a criminal defendant be provided counsel beyond exhaustion of direct appellate review. *Id.*, at 2568. Since counsel is not constitutionally required for proceedings to obtain state post-conviction relief, ineffectiveness of counsel at that level cannot be a constitutional deficiency. Therefore, any attorney error that led to the default of claims in state court post-conviction proceedings cannot constitute cause to excuse the default in federal habeas. *Demarest*, 130 F.3d at 941 (quoting *Coleman*, 501 U.S. at 757, 111 S.Ct. at 2568).

Petitioner has not shown that any factor external to the defense impeded his efforts to raise the issue of ineffective assistance of appellate counsel in his first application for post-conviction relief. The "cause and prejudice exception is conjunctive, requiring proof of both cause and prejudice. Since Petitioner has failed to demonstrate "cause", the court need not assess the "prejudice" component of the test. *Klein v. Neal*, 45 F.3d 1395, 1400 (10th Cir. 1995).

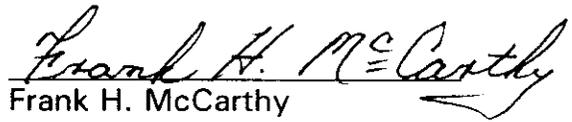
The fundamental miscarriage of justice exception is available only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence. *Steele*, 11 F.3d at 1522 (quoting *Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 862, 122 L.Ed.2d 203 (1993)). Petitioner has not made any showing or claim that he is factually innocent. Therefore, since the state judgment rests on adequate and independent state procedural grounds, Petitioner's claims are procedurally barred from federal habeas review.

### CONCLUSION

Based on the foregoing, the undersigned United States Magistrate Judge RECOMMENDS that the Petition for Writ of Habeas Corpus be DISMISSED WITH PREJUDICE.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 24<sup>th</sup> day of April, 1998.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

### CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the

24<sup>th</sup> Day of April, 1998.

C. Portello, Deputy Clerk

M  
4-17-98

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

**FILED**

APR 24 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ROBERT P. DUNNE, D.C., )  
 )  
Defendant. )

CASE NO. 97-C-775-M

ENTERED ON DOCKET

DATE APR 27 1998

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.
2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.
3. The defendant hereby agrees to the entry of Judgment in the amount of \$24,606.73, plus interest at the rate of 6.71% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate 5.41% until paid, plus costs of this action, until paid in full.

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that Robert P. Dunne, D.C. will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 5th day of April, 1998, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$400.00, and a like sum on or before the 5th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Financial Litigation Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103-3809.

Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

(d) It is agreed between the parties that if the defendant remains current on his payments under the terms of this agreement, he will only repay the total amount of \$20,555.01, plus interest at the rate of 6.71% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate until paid, plus the costs of this action, until said sum of \$20,555.01 is paid in full; at which time the judgment will be satisfied.

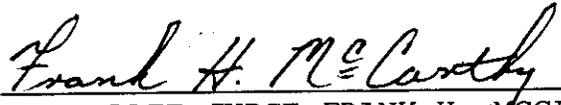
If the defendant fails to remain current on his payments under the terms of this agreement and payment is not received within 10 days of the due date, the defendant is in default and he will repay the judgment in the full amount as entered by the Court pursuant to paragraph three (3) of this Agreed Order and Judgment.

5. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

6. The defendant has the right of prepayment of this debt without penalty.

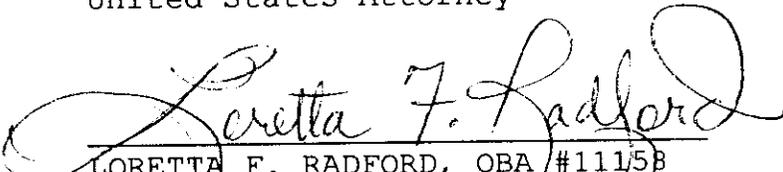
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Robert P. Dunne, D.C., in the amount of \$24,606.73, plus interest at the

rate of 6.71% until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus the costs of this action.

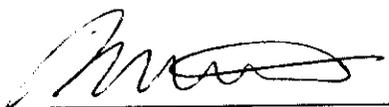
  
MAGISTRATE JUDGE FRANK H. MCCARTHY

APPROVED AS TO FORM:

Stephen C. Lewis  
United States Attorney

  
LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney

  
STEVEN M. KWARTIN  
Attorney for Defendant

  
ROBERT P. DUNNE, D.C.  
Defendant

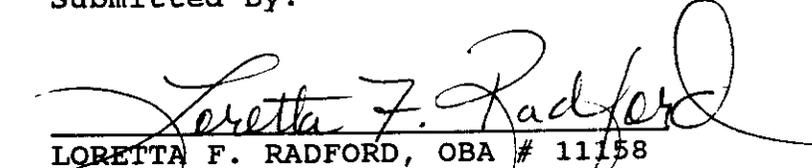
LFR/LLF



until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.391 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

  
LORETTA F. RADFORD, OBA # 11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/llf

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

JORDAN F. MILLER CORPORATION, )  
a California corporation, )

Plaintiffs, )

vs. )

MID-CONTINENT AIRCRAFT SERVICE, )  
INC., an Oklahoma corporation, and JET )  
CENTER TULSA, INC., an Oklahoma )  
corporation, )

Defendants. )

ENTERED ON DOCKET

DATE APR 27 1998

No. 95-C-469-B ✓

**FILED**

APR 24 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Before the Court for decision is Defendants' Amended Motion for Judgment as a Matter of Law Pursuant to Fed.R.Civ.P. 50, or in the Alternative to Alter or Amend Judgment or New Trial Under Fed.R.Civ.P. 59(a) (Docket No. 200).

The dispute in this case arose from the purchase of a Cessna 421B aircraft by Plaintiff, Jordan F. Miller Corporation, ("Miller") from Defendants Mid-Continent Aircraft Service, Inc. ("Mid-Continent") and Jet Center Tulsa, Inc. ("Jet Center") and the trade-in of Miller's Cessna 340 pursuant to a Purchase Contract dated November 22, 1991. The case was tried to a jury for six days on the dates of February 17, 18, 19, 23, 24 and 25, 1998. The jury returned with its verdicts for Plaintiff Miller on its negligence, breach of contract and warranty claims against the Defendant Mid-Continent in the amount of \$20,500.00, and against Defendant Jet Center in the amount of \$25,000.00. Defendant Mid-Continent was

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awarded a verdict by the jury in the amount of \$5,909.27, and Defendant Jet Center was awarded a verdict by the jury in the amount of \$10,000.00, against Plaintiff Miller on Defendants' counterclaims for breach of contract.

Defendants assert that they are entitled to a judgment as a matter of law because the Court erred in not giving defendants' proposed instruction on Miller's obligation to provide reasonable notice to defendants of the alleged breach of contract and warranty as required by Okla. Stat. tit. 12A, §§ 2-606 and 2-607. The Court notes that defendants never pled lack of notice under Oklahoma's version of the Uniform Commercial Code ("UCC"), but rather raised the issue for the first time in their Amended Requested Jury Instructions filed on February 17, 1998. However, defendants' requested instruction entitled "Acceptance or Rejection of Goods Under Contract" addressed a buyer's waiver of his right to reject goods for non-conformity or nondelivery under UCC §2-605, and what constitutes acceptance of goods under UCC §2-606;<sup>1</sup> neither of which were issues in this case. Plaintiff Miller at no time exercised its right to reject or refuted its acceptance of the subject Cessna 421B aircraft. Although defendants ultimately proposed an instruction on the applicable UCC provision, §2-607, at the jury instruction conference, defendants' proposed instruction was conclusory and incomplete.<sup>2</sup> In addition, defendants never objected to the verdict form which did not

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<sup>1</sup>Defendants proposed an additional instruction on UCC §2-606 - "What Constitutes Acceptance of Goods" at the jury instruction conference. The Court rejected the instruction as plaintiff Miller's acceptance of the 421B was never in dispute.

<sup>2</sup> Section 2-607(3)(a) states in pertinent part the following:

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy. . .

distinguish recovery on plaintiff's claim of negligence from recovery on its breach of contract and warranty claims, although the notice requirement under UCC §2-607 is inapplicable to plaintiff's negligence claim.<sup>3</sup>

Further, the Court concluded at the instruction conference and concludes now that to instruct the jury on plaintiff's failure to provide timely notice of defendants' breach would have been error in this case. Plaintiff Miller claimed that defendants breached the Purchase Contract and warranty to deliver the 421B in a "normal, safe operating condition" through their negligent and improper reassembly, maintenance, inspection and certification of the aircraft. The undisputed facts establish as a matter of law that plaintiff met the notice requirement of UCC §2-607.

The parties stipulated that plaintiff and defendant Jet Center entered into the Purchase Contract, Exhibit A to which states that Mid-Continent's employee, Victor Miller, "will be involved in the assembly and adjustment of the aircraft (Cessna 421-B) for the buyer and will keep the buyer informed of progress and any problems." Plaintiff Miller took possession of the 421B on December 17, 1993 at Mid-Continent's place of business at Tulsa International Airport. With the knowledge and approval of Mid-Continent, Victor Miller accompanied

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Defendants' proposed §2-607 instruction, to wit, "The failure of a buyer to give timely notice of the breach to the seller bars the buyers from any remedy," fails to address the questions of what constitutes a "reasonable time" for the buyer to give notice of the breach and when did the buyer discover or when should the buyer have discovered the breach.

<sup>3</sup>Plaintiff Miller contends that UCC §2-607 applies only to a breach of warranty claim and not to a breach of contract claim. Section 2-607 clearly does not distinguish between the two claims. However, the Court need not reach this issue as the Court concludes that the instruction on notice under UCC §2-607 would have been error even if plaintiff only brought a breach of warranty claim.

his father Jordan F. Miller on the maiden flight of the 421B from Tulsa to Montgomery Field in San Diego, California. Upon landing in San Diego on December 18, 1993, the 421B's left main landing gear collapsed, causing extensive damage to the left landing gear, left wing, propeller and engine.<sup>4</sup> Defendants do not dispute that they were promptly informed of the accident and damage to the aircraft. Rather defendants assert that such did not constitute timely notice under §2-607 because (1) they were not informed at that time that plaintiff expressly claimed the accident to be a result of defendants' breach of the Purchase Contract or warranty therein; and (2) any notice to Victor Miller was not notice to Defendant Jet Center as Victor Miller was an employee of Mid-Continent, a separate corporation.

First, the notice requirements under UCC §2-607 are loose and ill-defined, especially where, as here, the buyer is a retail consumer and not a merchant buyer. Comment 4 to UCC §2-607(3) states:

The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection. (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

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<sup>4</sup>The damage sustained as a result of the left landing gear failure was ultimately deleted from the case due to the spoilation of material evidence.

Defendants argue that Plaintiff Miller should have done more than inform defendants of the damage to the 421B and the ongoing investigation of Miller's insurer to determine the cause of the accident to place defendants on notice that the transaction may involve a breach. Defendants, however, appear to have confused the notice requirements imposed on transactions between merchants and those for a consumer sale. As noted by the Sixth Circuit in *Standard Alliance Industries, Inc. v. Black Clawson Co.*, 587 F.2d 813 (6th Cir. 1978), a case cited by defendants, the distinction between these types of transactions is pivotal in an evaluation of whether or not the seller has received "reasonable notice" of a breach. In *Standard Alliance*, the circuit court as a matter of law set aside the jury finding for plaintiff on the notice issue under UCC §2-607 because of the nature of the business relationship between the parties.

[The] events further demonstrate the merit in those cases which hold merchants to higher standards of good faith than consumers. . . . Black Clawson and Standard Alliance worked together at all times. Black Clawson responded promptly when informed that the machine was not working properly; commercial good faith mandated that it be told that repair efforts had failed and that it was being held in breach. A new car buyer can be excused for failing, in ignorance and exasperation, to notify a car dealer of an obvious breach after persistent repair efforts have ended in failure. A merchant like Standard Alliance cannot be so excused, it should have met section 2-607's non-rigorous notice requirements.

*Id.* at 827 (citations omitted).

The facts in this case parallel that of *Standard Alliance's* example of a new car buyer who fails "in ignorance and exasperation, to notify a car dealer of an obvious breach after persistent repair efforts have ended in failure," rather than a transaction arising out of an

ongoing business relationship between merchants. *Id.* On December 20, 1993, two days after the accident, Miller turned over the investigation of the accident to its insurer, American Eagle Insurance Company, which hired an adjuster, Kenneth S. Harris ("Harris") of Arnold and Arnold, Inc., to determine the cause of the accident and whether the insurer would have a subrogation claim against defendants. In January 1994 Harris requested that Ted Hazlewood ("Hazlewood"), the president and owner of Southern Cal Aircraft Repair ("Southern Cal"), inspect the 421B and estimate the cost of repair. Hazlewood was subsequently hired to repair the aircraft. Harris notified Victor Miller as early as January 10, 1994 of the necessity of "proper log book entries for this aircraft in the area of repairs conducted and all AD notes" and that such entries must be forwarded to Hazlewood at Southern Cal. *Letter from Harris to Victor Miller dated 1/19/94.* The record also establishes that "[o]nce the repairs were awarded to Ted Hazlewood of Southern CAL Aircraft Repairs, they started running into one problem after another in bringing this aircraft up to an airworthy condition," and as a result, "Hazlewood had to go back and forth several times with Victor Miller the son of the insured and an employee of Millionaire to get the log books brought up to date." *Letter from Ken Harris to Tom Snyder dated 9/19/94.* The evidence thus shows that despite the difficulty in identifying the deficiencies in the 421B, Plaintiff, Harris and Hazlewood remained in ongoing communication with Mid-Continent's representative, Victor Miller, regarding the deficiencies and necessary repairs, insofar as such were discoverable. These early communications between Plaintiff and his agents and Victor Miller commencing from the time of the accident provided adequate, timely notice

that the purchase of the 421B was “troublesome and must be watched,” and were sufficient to defeat defendants’ claim of lack of notice under UCC §2-607 as a matter of law. *Comment 4 to UCC §2-607; American Fertilizer Specialists, Inc. v. Wood*, 635 P.2d 592, 596 (Okla. 1981) (finding notice sufficient “if it is informative to the seller of the general nature of the difficulty encountered with the warranted goods”).

Particularly irksome to the Court is defendants’ second argument that even if Victor Miller were in contact with Plaintiff and/or his agents regarding the ongoing discovery of deficiencies in the 421B, he was not an employee of Jet Center and therefore notice to Victor Miller is not notice to Jet Center. The Court finds this argument disingenuous given defendants consistent position before and during trial that the two defendants were in essence the same for purposes of the dispute arising from the Purchase Contract. That defendants consistently took this position is not surprising given that Mid-Continent claimed a breach of the Purchase Contract although it was not a party to the contract. In answer to the Court’s repeated questions as to who were the proper party defendants in this lawsuit, the defendants maintained that Mid-Continent and Jet Center were one and the same in regard to plaintiff’s claims under the Purchase Contract. Further, it was Jet Center who entered into the Purchase Contract with Plaintiff Miller which expressly appointed Victor Miller as the agent in charge of the assembly and adjustment of the 421B. Jet Center cannot now be heard to disavow sufficient connection with Mid-Continent and Victor Miller to sustain its untenable position that notice to Victor Miller was not notice to Jet Center.

The Court also finds that the latent nature of many of the alleged defects in the 421B

attests to the difficulty of discovery of those defects. *Larrance Tank Corp. v. Burrough*, 476 P.2d 346, 349 (Okla. 1970); *Environmental Elements Corp. v. Mayer Pollock Steel Corp.*, 497 F.Supp. 58, 61-62 (D. Md 1980). Indeed, some of the Cessna 421-B's alleged assembly deficiencies were discovered even after this litigation was commenced, resulting in the filing of an Amended Complaint.

In view of the facts and circumstances of this case, the Court concludes as a matter of law that adequate notice of the alleged breach of contract was given by Plaintiff to Defendants. Thus, Plaintiff's amended motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50 is overruled.

Regarding Defendants' Amended Alternative Motion to Alter and Amend Judgment or New Trial under Fed.R.Civ.P. 59(a), due to the Plaintiff's violations of the Court's *in limine* orders, the Court concurs with Defendants' assertions that there were clearly various violations by Plaintiff and its counsel. However, in retrospect and in view of the jury's verdicts, the Court concludes these violations, while serious, do not warrant granting defendants' motion as they did not prejudice the jury.<sup>5</sup> The motions for mistrial in regard thereto are overruled.

In light of the evidence and issues presented, the Court concludes the instructions on the law were appropriate and the jury's damage awards adequately supported by the record. *Hardesty v. Andro Corporation-Webster Division*, 555 P.2d 1030, 1034 (Okla. 1976) ("The

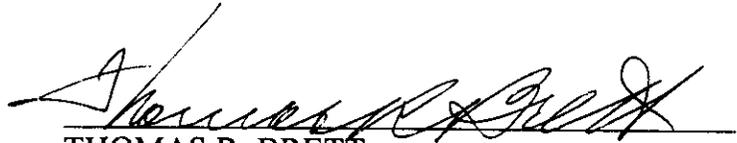
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<sup>5</sup> The Court considers the violations of the *in limine* orders to be egregious and are dealt with in the accompanying Order on the parties' requests for attorney fees.

prohibition of recovery of damages because of uncertainty and too speculative in nature applies to the fact of damage and not to the amount of damage.”); *Larrance*, 476 P.2d at 350 (finding “mere uncertainty as to the exact amount of damages will not preclude the right of recovery” if the “evidence shows the extent of the damages as a matter of just and reasonable inference”).

Therefore, Defendants’ Amended Motion for Judgment as a Matter of Law or in the Alternative to Alter or Amend Judgment or for New Trial (Docket No. 200) is hereby overruled.

DATED this 24<sup>th</sup> day of April, 1998.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

JORDAN F. MILLER CORPORATION, )  
a California corporation, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
MID-CONTINENT AIRCRAFT SERVICE, )  
INC., an Oklahoma corporation, and JET )  
CENTER TULSA, INC., an Oklahoma )  
corporation, )  
 )  
Defendants. )

ENTERED ON DOCKET  
DATE APR 27 1998

No. 95-C-469-B ✓

**FILED**

APR 24 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Before the Court are Plaintiff's Motion for Attorney Fees (Docket No. 202) and Application for Costs (Docket No. 203), and Defendants' Application for Attorney Fees and Costs (Docket No. 204).

The dispute in this case arises from the purchase of a Cessna 421B aircraft by Plaintiff, Jordan F. Miller Corporation, ("Miller") from Defendants Mid-Continent Aircraft Service, Inc. ("Mid-Continent") and Jet Center Tulsa, Inc. ("Jet Center") and the trade-in of Miller's Cessna 340 pursuant to a Purchase Contract dated November 22, 1991. The case was tried to a jury for six days on the dates of February 17, 18, 19, 23, 24 and 25, 1998. The jury returned its verdicts for Plaintiff Miller on its negligence, breach of contract and warranty claims against the Defendant Mid-Continent in the amount of \$20,500.00, and against Defendant Jet Center in the amount of \$25,000.00. The jury also returned verdicts

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against Plaintiff and for Defendant Mid-Continent in the amount \$5,909.27, and for Defendant Jet Center in the amount of \$10,000.00, on Defendants' counterclaims for breach of contract. Plaintiff and Defendants now seek attorney fees and costs.

Oklahoma law governs the award of attorney fees, while federal law governs the assessment of costs in this diversity action. *Gobbo Farms & Orchards v. Poole Chemical Co., Inc.*, 81 F.3d 122, 123 (10th Cir. 1996). Plaintiff Miller asserts that it is entitled to attorneys fees under 12 O.S. §§ 936<sup>1</sup> and 939<sup>2</sup> and costs pursuant to Fed.R.Civ.P. 54(d)(1)<sup>3</sup> as the "prevailing party" on its claims for breach of contract and breach of warranty against defendants. Defendants also assert entitlement to attorney fees and costs under 12 O.S. §936 and Rule 54(d)(1) as "prevailing parties" on their respective breach of contract counterclaims.<sup>4</sup>

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<sup>1</sup> Section 936 provides:

In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

<sup>2</sup>Section 939 provides:

In any civil action brought to recover damages for breach of an express warranty or to enforce the terms of an express warranty made under Section 2-313 of Title 12A of the Oklahoma Statutes against the seller, retailer, manufacturer, manufacturer's representative or distributor, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, which shall be taxed and collected as costs.

<sup>3</sup>Rule 54(d)(1) states in pertinent part the following:

Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . .

<sup>4</sup> Defendants' application requests attorney fees and costs incurred by defendants for their representation by counsel Richard T. Garren and Richard A. Gann only. Defendants' other counsel, James Daniel and Richard Howard, did not file an application for fees or costs.

Although all the parties prevailed on their claims, plaintiff argues it is the only prevailing party because it received “the most points at the end of the contest,” or the “greatest affirmative judgment” of the three litigants, citing *Arkla Energy Resources, Inc. v. Roye Realty & Developing, Inc.*, 9 F.3d 855, 866 (10th Cir. 1993)(quoting *Quapaw Co. v. Varnell*, 566 P.2d 164, 167 (Okla.Ct.App. 1977)). Plaintiff notes it received net judgments against defendant Mid-Continent in the amount of \$14,590.73 (\$20,500 minus \$5,909.27) and against Jet Center in the amount of \$15,000 (\$25,000 minus \$10,000); thus plaintiff has received “the most points.” While defendants “do not concede that plaintiff is the prevailing party under the circumstances of the case,” defendants fail to offer the Court any authority for its claim of prevailing party status under Section 936 or Rule 54(d)(1), other than to cite to *Arkla* for the proposition that the determination of who is the prevailing party rests within the sound discretion of the Court. *Defendants' Response to Plaintiff's Motion for Attorney's Fees*, pp. 1-2.

The Court, however, does not make this determination in a vacuum, as it is guided by applicable law. What the Tenth Circuit stated in *Arkla* is the following:

Although an award to a prevailing party is mandatory [under 12 O.S. §936], “the determination of which party prevails in cases of this sort [where neither or both parties prevailed] is, like the award of attorney's fees, within the discretion of the trial judge.”

*Arkla*, 9 F.3d at 865 (citations omitted)(quoting *Owen Jones & Sons, Inc v. C.R. Lewis Co.*, 497 P.2d 312, 314 (Alaska 1972); see also *Strickland Tower Maintenance, Inc. v. AT&T Communications, Inc.*, 128 F.3d 1422, 1428 (10th Cir. 1997)(“The determinations of which

party prevailed in the litigation and the reasonableness of the attorney's fees award . . . fall within the discretion of the trial judge and are reviewed under an abuse of discretion standard."'). The *Arkla* court continued,

A prevailing party under section 936 must have prevailed upon the merits. Furthermore, section 936 allows only one prevailing party, which is the party that has "the most points at the end of the contest," or that receives the greatest affirmative judgment. However, when both parties successfully defend against major claims by the other, and thus no party receives an affirmative judgment, the court may decide that neither has prevailed.

The district court entered judgment in favor of [defendant] on [plaintiff's] claims and in favor of [plaintiff] on [defendant's] claims. Neither side received an affirmative judgment against the other. Furthermore, the district court found that [defendant] had breached the contract. We therefore hold that the district court did not abuse its discretion by concluding that neither was a prevailing party under section 936.

*Id.* at 866 (citations omitted). In other words, *Arkla* interprets §936 as providing fees to the "prevailing party" who secures a net judgment in cases in which both plaintiff and defendant receive "affirmative judgments." Further, an "affirmative judgment" is distinguished from a successful defense, at least in cases in which both parties successfully defend against the claims of the other.

In a recent case, however, the Tenth Circuit found there were two prevailing parties under §936 in a breach of contract action involving three corporate defendants and one individual defendant, none of whom asserted counterclaims. *Tulsa Litho Co. v. Tile and Decorative Surfaces Magazine Publishing, Inc.*, 69 F.3d 1041(10th Cir. 1995). In *Tulsa Litho*, plaintiff Tulsa Litho Company ("Tulsa Litho") entered into an agreement with Jerry Fisher ("Fisher"), the president of three magazine corporations to print magazines published

by the companies. When the corporations terminated their relationship with Tulsa Litho, plaintiff sued the three corporations and Fisher individually for breach of contract. Prior to trial, the district court granted summary judgment to defendant Fisher finding that Fisher entered into the agreements with Tulsa Litho in his capacity as president of the corporations and not in his individual capacity. After a jury trial, the court entered judgment in favor of plaintiff against the corporate defendants. Both Tulsa Litho and Fisher requested attorney fees on the ground each was a “prevailing party.” The district court awarded Tulsa Litho attorney fees and denied fees to Fisher relying on *Quapaw* and *Arkla* for the proposition that there could be only one prevailing party and Tulsa Litho had received the affirmative judgment.

The Tenth Circuit reversed the denial of fees to defendant Fisher finding that in cases involving multiple parties, “each defendant was a separate party,” and Fisher was the “prevailing party as between himself and Tulsa Litho,” while Tulsa Litho was “the prevailing party with respect to it against each of the corporate defendants.” *Id.* at 1043. The circuit court distinguished this “multi-party” case from “actions pitting a single party against another single party” as in *Quapaw* and *Arkla*, noting the “general rule that attorney fees and costs in multi-party cases as well as in certain consolidated cases are awarded to different parties on the basis of the separate judgments obtained, not the overall trial result.”<sup>5</sup> *Id.* quoting

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<sup>5</sup> In support of its conclusion that Oklahoma follows this general rule, the Tenth Circuit cited *Hardesty v. Andro Corp.-Webster Division*, 555 P.2d 1030 (Okla. 1976). *Hardesty*, however, is distinguishable from *Tulsa Litho* in that it involved a cross-claim between defendants. The plaintiff owner-contractor of an apartment complex brought suit against the manufacturer of the chilling unit of the air-conditioning system and the subcontractor who installed the system in plaintiff’s apartment complex for loss sustained as a result of the malfunction of the system. The

*Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wash.App. 298, 693 P.2d 161, 166 (1984).<sup>6</sup> *Tulsa Litho*, therefore, holds that a defendant who successfully defends against plaintiff's claim may also be a prevailing party under §936, even though the plaintiff receives affirmative judgments against his co-defendants on a claim arising from the same transaction.

An analysis of Oklahoma law interpreting "prevailing party" under §936 provides the following guidance. In cases in which there is one plaintiff and one defendant who defends without counterclaim, the prevailing party is (a) the defendant, if the plaintiff receives no relief; (b) the plaintiff, if the plaintiff receives all relief requested, some of the requested relief,<sup>7</sup> or alternative relief.<sup>8</sup> In cases in which the plaintiff and defendant each state a

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subcontractor cross-claimed against the manufacturer. Prior to trial the court dismissed plaintiff's claim against the manufacturer. The jury returned verdicts in favor of the plaintiff owner against the defendant subcontractor and for the subcontractor on its cross-claim against the manufacturer. The Oklahoma Supreme Court affirmed the trial court's grant of attorney fees to the defendant manufacturer against the plaintiff, to the plaintiff against the defendant subcontractor and to the subcontractor against the manufacturer. *Id.* at 1037. In so ruling, the Supreme Court reasoned that the defendant subcontractor's cross-claim against the defendant manufacturer was "separate and apart" from plaintiff's claims against defendants. *Id.* at 1036.

<sup>6</sup> The Tenth Circuit also cited *Sisney v. Smalley*, 690 P.2d 1048 (Okla. 1984) in support of its holding. The Oklahoma Supreme Court in *Sisney*, however, held that the trial court did not err in apportioning fees for legal services based on whether the services were attributable to the defense of an action for property damage rather than the defense of a personal injury action for which fees were not compensable under 12 O.S. §940. As with *Hardesty*, the case involved more than a single claim.

<sup>7</sup> See *Quapaw Co. v. Varnell*, 566 P.2d 164, 167 (Okla. Ct. App. 1977)(finding plaintiff the prevailing party although plaintiff prevailed on only two of his claims because where there is one plaintiff and one defendant "[e]ach side may score, but the one with the most points at the end of the contest is the winner, and . . . is entitled to recover his costs"); *Commercial Communications, Inc. v. State*, 613 P.2d 473, 476 (Okla. 1980)(finding plaintiff the prevailing party because it received a net judgment against the defendant, although it did not receive all relief requested); *American Superior Feeds, Inc. v. Mason Warehouse, Inc.*, 943 P.2d 171 (Okla. Ct. App. 1997); see also *Underwriters at Lloyd's of London v. North American Van Lines*, 829 P.2d 978, 981 (Okla. 1992)(defense which limits plaintiff's damages but does not result in a judgment for defendant does not entitle defendant to attorney fees under 12 O.S. §940).

<sup>8</sup> See *Rambo v. Hicks*, 733 P.2d 405 (Okla. 1986)("[T]he mere availability of more than one form of remedial relief upon a single cause of action, does not abrogate the rule that there can be only one prevailing party."); *The Company, Inc. v. Trion Energy*, 761 P.2d 470, 471-72 (Okla. 1988).

claim/counterclaim, the prevailing party/(ies) is/(are) (a) neither party if neither prevails; and (b) both plaintiff and defendant if they each prevail on separate claims and rely on two different attorney fee statutes,<sup>9</sup> *i.e.*, 12 O.S. § 936 and 42 O.S. §176. What is unclear under Oklahoma law is whether both plaintiff and defendant can be prevailing parties if they each prevail on their claims against the other, yet seek fees solely under §936.

In *Smith v. Jenkins*, 873 P.2d 1044 (Okla. 1994), the Oklahoma Supreme Court rejected the “net judgment” rule for determining the prevailing party in the award of attorney fees under 12 O.S. §940<sup>10</sup> in comparative negligence litigation. In so holding, the court noted that the “term ‘prevailing party’ has been construed to mean one (a) who, at the conclusion of the case, has an affirmative judgment in its favor or (b) who has secured a net recovery on its own claim.” *Id.* at 1047. However, the court concluded that the application of the net judgment rule to attorney fee awards would conflict with the comparative negligence scheme.

It would greatly undermine, if not indeed offend, the comparative-negligence regime if in the case at bar the litigant with a net recovery were declared the only prevailing party in the action. The §940 counsel-fee statute must be

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<sup>9</sup>*Welling v. American Roofing and Sheet Metal Co., Inc.*, 617 P.2d 206, 210 (Okla. 1980)(finding defendant prevailing party and entitled to attorney fees under §936 on counterclaim for unjust enrichment, and plaintiff entitled to attorney fees under 42 O.S. §176 on her lien claim); *Walls v. Russell*, 519 P.2d 936, 938 (Okla. Ct. App. 1974) (reversing trial court's denial of attorney's fees to both parties, concluding that plaintiff was entitled to attorney's fees under 42 O.S. §176 on his mechanic's lien claim and defendant was entitled to fees under §936 on his breach of contract counterclaim because “[t]echnically, actually, and legally two separate actions were involved -- two actions which were in effect consolidated for trial . . . [and] [e]ach action was such as to come within the terms of two separate statutes authorizing recovery of attorney fees by the prevailing party.”)

<sup>10</sup> Section 940(A) provides in pertinent part that “in any civil action to recover damages for the negligent or willful injury to property and any other incidental costs related to such action, the prevailing party shall be allowed reasonable attorney’s fees . . .”

construed together with both our comparative-negligence system as well as with the inexorable command of Art. 23, §6, Okl. Const. The last cited source of our law makes both primary and contributory negligence an issue of fact. Were we to allow the party gaining net recovery to be considered the prevailing party in the action, even when both parties are adjudged equally liable on their interrelated claims for the same tortious event, one's prevailing-party status would be assessable on the basis of pure fortuity -- one litigant's higher amount of monetary loss than that of its adversary. This result would lead to a grossly disproportionate aggregate recovery for the party with a net recovery. The latter could "tack on" a generous counsel fee against the less damaged opponent.

*Id.* at 1047-48. However, the court cautioned that the rejection of the net judgment or net recovery rule under §940 was a "departure" from the general rule regarding Oklahoma attorney fee statutes: "Today's departure from our general counsel-fee regime under prevailing party statutes will apply only in comparative-negligence cases to claims and compulsory counterclaims for the same tortious event." *Id.* at 1049.

From its review of the above cases, the Court agrees with Plaintiff that the "net judgment" rule is applicable in the instant case to determine the prevailing party. Plaintiff's claims and defendants' counterclaims clearly arise from the same transaction - the exchange of the Cessna 421B and 340 pursuant to the Purchase Contract. As Miller received net judgments against both defendants, Miller is the prevailing party for purposes of §936 and §939. The Court thus denies attorney fees and costs to defendants. (Docket No. 204).

Although Miller is the prevailing party in this action, the Court finds that Miller is not entitled to any fees under the circumstances of this case.<sup>11</sup> *Burk v. Oklahoma City*, 598 P.2d

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<sup>11</sup>The Court is guided by the factors to determine a reasonable attorney fee as set forth in *Burk v. City of Oklahoma City*, 598 P.2d 659, 661 (Okla. 1979): *i.e.*, "1. Time and labor required. 2. The novelty and difficulty of the questions. 3. The skill requisite to perform the legal service properly. 4. The preclusion of other employment by the

659, 661 (Okla. 1979) (in determining a reasonable fee, the court takes into account the “quality of an attorney's work”). First, Miller’s request for attorney fees in the amount of \$118,662.50 based on 949.30 hours at \$125/hour is unreasonable relative to time purportedly expended.<sup>12</sup> Despite Miller’s attestations to the contrary, this case was not complex. At best, this case required no more than four hundred (400) hours to prepare and try. Unfortunately, too many hours were spent on motions to reconsider (although no new issues were raised), delays in trial, and delays during trial due to lack of preparation. Second, Plaintiff sought damages of approximately \$350,000, yet only recovered a net judgment against both defendants of approximately \$29,590.73, or about 8.5% recovery. Plaintiff's lack of success in recovering its claimed damages was a direct result of its failure to adequately prepare and present evidence in support of its claim for consequential damages, which were in excess of two-thirds of plaintiff's total damage claim. Third, in excess of one hundred (100) hours were spent on the issue of plaintiff's spoliation of the left landing gear and plaintiff's unsuccessful interlocutory appeal of this Court's Order dismissing plaintiff's left landing gear claims. *See Order of March 17, 1997, Order of April 2, 1997, and Order and Judgment from the Tenth Circuit Court of Appeals dated February 20, 1998 affirming this Court's Dismissal.* Plaintiff expended a significant amount of time and expense on the left landing

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attorney due to acceptance of the case. 5. The customary fee. 6. Whether the fee is fixed or contingent. 7. Time limitations imposed by the client or the circumstances. 8. The amount involved and the results obtained. 9. The experience, reputation and ability of the attorneys. 10. The ‘undesirability’ of the case. 11. The nature and length of the professional relationship with the client. 12. Awards in similar cases.”

<sup>12</sup>Defendants state, not objected to by plaintiff, that plaintiff's counsel previously indicated to defense counsel that he assumed employment in this case on a contingent fee contract basis. *Defendants' Response to Motion for Attorney Fees filed 3/24/98 p.9 ¶13.*

gear spoilation and forced defendants to do the same although plaintiff inexplicably argues that “[f]ar from being, as counsel for the defendants state ‘the real thrust of the plaintiff’s law suit,’ [the damage claim relating to the left landing gear collapse] was relatively insignificant.” *Reply to Defendant’s Response to Plaintiff’s Motion for Attorney Fees*, p.2.

Fourth, approximately one hundred (100) hours were spent on Plaintiff’s right engine damage claim, which due to Plaintiff’s noncompliance with Fed.R.Civ.P. 26(a)(2)(B), was never submitted to the jury as the Court granted defendants summary judgment on the claim. *See Order of October 28, 1997 and Order of November 10, 1997*. Included in that time were plaintiff’s motion to alter or amend judgment or in the alternative for reconsideration (Docket No. 164), supplement to motion to alter or amend judgment (Docket No. 168), motion to amend order to permit appeal of interlocutory order (Docket No. 171), motion to strike trial and for reconsideration based on “new” authority (Docket No. 178), emergency motion to stay pending petition for writ of mandamus (Docket No. 184) and petition for writ of mandamus which was denied by the Tenth Circuit Court of Appeals. Needless to say, if plaintiff’s counsel had devoted the time to preparing exhibits and witnesses for trial, rather than filing repetitive, meritless motions for reconsideration and seeking the extraordinary remedy of a writ of mandamus, his client would have been much better served. For all of these reasons, the Court denies plaintiff’s request for fees.

In addition, as noted in the accompanying Order on defendants’ motion for new trial, plaintiff’s representative, Jordan Miller, and his counsel violated this Court’s *in limine* orders repeatedly during the course of the trial. Mr. Miller blatantly disregarded this Court’s order

not to refer to his terminal cancer only minutes after he was so instructed. In addition, Brett Miller referred to the \$5000.00 offered as settlement which the Court ruled inadmissible. Further, in spite of the Court's repeated admonitions that the right engine was not an issue in this case, plaintiff's witness, Bob Garavello, testified (although incorrectly) that the left engine had blown up and plaintiff's counsel referred to the damage to the right engine in closing argument. Also, plaintiff's expert, Dr. Hynes, violated the Court's order prohibiting any reference to "fraud" in front of the jury when he testified that the actions of defendants were "fraudulent." Finally, although this Court spent in excess of five hours in three different pretrial conferences going through every objection to every exhibit, plaintiff's counsel showed up at trial with his exhibits in total disarray and wasted this Court's and the jury's time with mis-marked exhibits throughout the first two days of trial.

The Court concludes that the above failures to abide by this Court's pretrial orders, while not so prejudicing the jury that a new trial would be appropriate, should be sanctioned pursuant to Fed.R.Civ.P. 16(f).<sup>13</sup> The cost to the parties, Court and jury due to plaintiff's counsel inefficiency and delay during trial, as well as plaintiff's counsel blatant disregard for this Court's *in limine* orders should not be tolerated. While the responsibility for most of these transgressions lies with counsel, the Court does not except Jordan Miller,

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<sup>13</sup> Rule 16(f) states in pertinent part:

If a party or party's attorney fails to obey a scheduling or pretrial order . . . , the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B),(C),(D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

representative of the plaintiff, from this sanction due to his total disregard of the Court's admonition not to mention his cancer before the jury. The Court thus exercises its discretion under Rule 16(f) as an additional ground for the denial of attorney's fees to plaintiff. *See Mulvaney v. Rivair Flying Service, Inc.*, 744 F.2d 1438 (10th Cir. 1984).

Finally, the Court denies costs to plaintiff pursuant to 28 U.S.C. §1332(b) which states:

Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.<sup>14</sup>

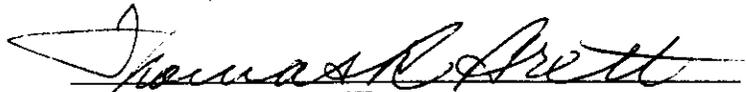
*See Collazo-Santiago v. Toyota Motor Corp.*, 957 F.Supp. 349, 359 (D.Puerto Rico 1997); *Menichini v. Grant*, 1992 WL 78812 \*4 (E.D.Pa. 1992). Even without the set-off of defendants' judgments, plaintiff still fails to meet the jurisdictional amount of \$50,000 in this case. However, although within the Court's discretion under §1332(b), the Court declines to impose defendants' costs on plaintiff, and thus, directs that plaintiff and defendants are to bear their own costs in this action.

Consistent with the above, the Court denies Plaintiff's Motion for Attorney Fees (Docket No. 202) and Application for Costs (Docket No. 203) and Defendants' Application for Attorney Fees and Costs (Docket No. 204).

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<sup>14</sup>Section 1332(b) was amended on October 16, 1996, after the filing of this lawsuit, to reflect the new jurisdictional amount of \$75,000.

IT IS SO ORDERED, this 24<sup>th</sup> day of April, 1998.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

DATE 4-27-98

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

ELLSWORTH MOTOR FREIGHT )  
LINES, INC., )

Plaintiff, )

v. )

Case No. 96CV901K

NORTH AMERICAN RESOURCES, INC.; )  
BLACK CREEK LAND AND MINERAL, )  
INC.; SILVER CREEK RESOURCES, )  
INC.; FOSTER COAL COMPANY; BARR )  
LAND, INC.; and DERRELL CHAMBLEE, )  
an Individual, )

Defendants. )

**FILED**

APR 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER FOR ADMINISTRATIVE CLOSURE

Upon the Joint Application of Plaintiff and Defendants for administrative closure pursuant to LR41.0, and for good cause shown,

IT IS HEREBY ORDERED that the Clerk of this Court shall forthwith close this action administratively. The action shall be reopened upon application by either party. In the event an application to reopen is not filed on or before May 24, 1998, the action shall be deemed dismissed without prejudice.

Dated this 24 day of April, 1998.

  
TERRY C. KEEN  
United States District Judge



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

DWAYNE L. SHEPHERD,  
SSN: 441-68-5062

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,<sup>1/</sup>

Defendant.

ENTERED ON DOCKET

DATE APR 24 1998

No. 97-C-146-J ✓

**FILED**

APR 23 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 23rd day of April 1998.

  
Sam A. Joyner  
United States Magistrate Judge

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<sup>1/</sup> On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

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

DWAYNE L. SHEPHERD,  
SSN: 441-68-5062

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,<sup>1/</sup>

Defendant.

ENTERED ON DOCKET

DATE APR 24 1998

No. 97-C-146-J ✓

**FILED**

APR 23 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER<sup>2/</sup>

Plaintiff, Dwayne L. Shepherd, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.<sup>3/</sup> Plaintiff asserts that the Commissioner erred because (1) Plaintiff's case involves a period of "closed disability" but the ALJ failed to appropriately follow the "medical improvement" standard, (2) the ALJ's findings as to Plaintiff's RFC are arbitrary and not supported by substantial evidence, (3) the ALJ failed to properly consider Plaintiff's pain and limited mobility, (4) the consultative examinations of Dr. Lee and Dr. Grewe establish

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<sup>1/</sup> On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

<sup>2/</sup> This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

<sup>3/</sup> Administrative Law Judge James D. Jordan (hereafter "ALJ") concluded that Plaintiff was not disabled on September 27, 1995. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on December 13, 1996. [R. at 5].

(13)

that Plaintiff cannot perform light work, (5) the ALJ referred to no specific evidence to support his conclusions as to Plaintiff's RFC, (6) the ALJ failed to pose Plaintiff's true limitations to the vocational expert, (7) some of the testimony of the vocational expert conflicted with the Dictionary of Occupational Titles ("DOT"), and (8) the ALJ's credibility findings do not comply with Kepler. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

### **I. PLAINTIFF'S BACKGROUND**

Plaintiff was born May 31, 1960. [R. at 34]. Plaintiff did not finish high school, but testified that he had completed and obtained his GED. [R. at 34-35]. Plaintiff testified, at his hearing on August 23, 1995, that the last time he had seen a doctor was in June or July of 1995, but that he did not see the doctor for treatment. [R. at 43]. Plaintiff said that he experiences a lot of pain. [R. at 48].

In Plaintiff's request for reconsideration of the decision of the Social Security Administration, Plaintiff reported that he was "unable to do the work I'm trained in and wish to learn another occupation/trade." [R. at 124].

A Residual Functional Capacity Assessment ("RFC Assessment") completed by Dr. Thurma Fiegel on July 10, 1992, noted that Plaintiff could occasionally lift 20 pounds, frequently lift ten pounds, stand or walk six out of eight hours, and sit six out of eight hours. [R. at 75]. An RFC Assessment completed by Dr. Paul Woodcock on July 13, 1993 noted that Plaintiff could occasionally lift ten pounds, frequently lift five to ten pounds, stand two out of eight hours, and sit six out of eight hours. In

addition, Plaintiff was reported as being to able to ambulate without aide, and having good range of motion at knees.

When Plaintiff was sixteen, he tore ligaments and cartilage in his knee which required surgery. When Plaintiff was twenty-one he was injured while working in oil field construction. He tore cartilage and ligaments in his left knee and underwent several subsequent surgeries. In November of 1983 Plaintiff had a motorcycle accident and had a compound fracture of his right tibia and fibula which was treated with a bone graft. The fragment subsequently healed, but Plaintiff had a deformity. In December 1991 Plaintiff had a motorcycle accident and suffered a compound fracture of his right tibia and fibula with the right patella split in half. Plaintiff had numerous subsequent operations including a metal plate and screws. [R. at 242].

At an examination on June 15, 1994, Plaintiff stated that he could walk only three to six blocks and stand only one to two hours before he would have to rest. [R. at 249]. Plaintiff takes ibuprofen to control his pain. [R. at 242, 309].

## **II. SOCIAL SECURITY LAW & STANDARD OF REVIEW**

experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.<sup>4/</sup> See 20 C.F.R. § 404.1520.

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the

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<sup>4/</sup> Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an

Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary<sup>5/</sup> as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

### **III. THE ALJ'S DECISION**

In this case, the ALJ awarded to Plaintiff a "closed period of disability" on July 29, 1994, effective December 8, 1991, through December 31, 1992. The closed period of disability was based on the injuries Plaintiff received in a motorcycle

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<sup>5/</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

accident.<sup>6/</sup> Plaintiff additionally had a prior period of disability from November 1983 until July 1988 based on injuries in a previous motorcycle accident. [R. at 13].

The ALJ concluded that after December 31, 1992, the Plaintiff retained the RFC to perform light and sedentary work with no prolonged standing, and no prolonged use of his feet or legs. [R. at 17]. The ALJ analyzed Plaintiff's complaints of pain, but noted that for several reasons he discounted some of Plaintiff's complaints.

The ALJ concluded that Plaintiff could not return to his past relevant work. Based on the testimony of a vocational expert, the ALJ concluded that numerous sedentary and light jobs existed which Plaintiff could perform.

#### **IV. REVIEW**

##### **Closed Period Case**

Plaintiff initially asserts that this appeal involved a "closed period of disability," and that in such a case the "medical improvement" standard applies. Plaintiff argues that the ALJ failed to properly follow the medical improvement standard.

In a typical social security case, benefits are granted for an indefinite period. That is, benefits continue unless they are terminated in a proceeding brought by the Secretary at some later date. After much wrangling in the federal circuit courts of appeal, it is now clear that the "medical improvement" standard, now codified at 20

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<sup>6/</sup> The ALJ notes that based on "disability status," Plaintiff was entitled to disability through February 1993, but that Plaintiff was incarcerated in January and February of 1993 and was therefore not entitled to benefits for those months. [R. at 13].

C.F.R. § 404.1594, is to be applied in a proceeding to terminate benefits. Brown v. Sullivan, 912 F.2d 1194, 1196 (10th Cir. 1990).

A question not yet answered in a published decision by the Tenth Circuit Court of Appeals is whether the "medical improvement" standard applies in a closed period case.

In a 'closed period' case, the decision maker determines that a new applicant for disability benefits was disabled for a finite period of time which started and stopped prior to the date of his decision. Typically, both the disability and the cessation decision are rendered in the same document.

Pickett v. Bowen, 833 F.2d 288, 289 n.1 (11th Cir. 1987). Plaintiff's argument is essentially that a closed period case consists of two distinct parts -- a disability determination and a termination of benefits. Plaintiff argues, therefore, that the § 404.1594's medical improvement standard applies to the termination portion of a closed period determination, just as it would in a traditional termination proceeding. A split of authority exists on this issue. Compare Chrupcala v. Heckler, 829 F.2d 1269, 1274 (3rd Cir. 1987) (holding that "[f]airness would certainly seem to require an adequate showing of medical improvement whenever an ALJ determines that disability should be limited to a specific period.") with Ness v. Sullivan, 904 F.2d 432, 434 n.4 (8th Cir. 1990) (holding that the normal sequential evaluation process and not the medical improvement standard applies in closed period cases). The Tenth Circuit, in Pittser v. Apfel, 1997 WL 755148 (10th Cir. Dec. 4, 1997), in an unpublished opinion, noted that Plaintiff argued in a closed period case that the Commissioner had the burden to establish that Plaintiff's disability ceased and must consider the medical

improvement. The Pittser court referred to the Eighth Circuit opinion in Camp v. Heckler, 780 F.2d 721, 721-22 (8th Cir. 1986) in declining to adopt Plaintiff's argument.

In accord with the Eighth and Tenth Circuit Courts of Appeals, the Court is inclined to conclude that the ALJ is not required to abide by the full dictates of the "medical improvement standard." Regardless, the Court finds that the issue does not have to be resolved. Initially, the Court does not perceive that a substantially different result would occur in this case regardless of whether the traditional five step sequential evaluation process<sup>71</sup> is applied or the medical improvement standard is applied. The ALJ's findings contain conclusions that Plaintiff underwent medical improvement and was able to work after the medical improvement. [R. at 21].

Pursuant to 20 C.F.R. § 404.1594, the following evaluation process must be followed to terminate disability benefits:

1. Is the claimant engaged in substantial gainful activity? [Step one of the traditional sequential evaluation process]. If he is, disability benefits will be terminated.
2. Does the claimant have an impairment which meets or equals the severity of an impairment in the "Listings"? See 20 C.F.R. Pt. 404, Subpt. P, App. 1. [Step three of the traditional sequential evaluation process]. If he does, disability benefits will be continued.
3. Has the claimant experienced "medical improvement"? If not, disability benefits continue.
  - a. Medical improvement is defined as "any decrease in the medical severity" of the claimant's impairments since the last disability

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<sup>71</sup> See, footnote 4, *supra*.

determination. "A determination that there has been a decrease in medical severity must be based on changes (improvement) in the symptoms, signs and/or laboratory findings associated with [the claimant's] impairment(s)." 20 C.F.R. § 404.1594(b)(1).

4. Looking only at the impairments present at the last disability determination, has the claimant's medical improvement resulted in an increase in the claimant's residual functional capacity ("RFC") since the last disability determination? If not, disability benefits will continue?
5. Do any exceptions to the application of the medical improvement standard apply? If an exception applies, the Secretary is relieved of her burden of showing medical improvement, and disability benefits will be terminated. None of the exceptions are applicable in this case. (None of the exceptions apply to this case.) See 20 C.F.R. § 404.1594(d) and (e).
6. Looking at all of the claimant's current impairments, not just those present at the last disability determination, are these impairments severe? [Step two of the traditional sequential evaluation process]. If not, disability benefits will be denied.
7. Looking at all of the claimant's current impairments, not just those present at the last disability determination, can claimant perform his past relevant work? [Step four of the traditional sequential evaluation process]. If claimant can, disability benefits will be terminated.
8. Looking at all of the claimant's current impairments, not just those present at the last disability determination, does claimant have the RFC to perform an alternative work activity in the national economy? [Step five of the traditional sequential evaluation process].

20 C.F.R. § 404.1594(f).

The Court concludes that even if the ALJ was required to follow the medical improvement standard, substantial evidence supports the ALJ's decision that Plaintiff achieved medical improvement.

### **RFC not Supported by Substantial Evidence**

Plaintiff asserts that the ALJ's RFC findings are based on an incomplete consideration of Plaintiff's impairments. Plaintiff provides no specifics.

The ALJ concluded that Plaintiff could perform a full range of sedentary or a narrow range of light work with the additional limitation of no prolonged standing or prolonged use of his feet or legs. [R. at 17, 21].

A Residual Functional Capacity Assessment ("RFC Assessment") completed by Dr. Thurma Fiegel on July 10, 1992, indicated that Plaintiff could occasionally lift 20 pounds, frequently lift ten pounds, stand or walk six out of eight hours, and sit six out of eight hours. [R. at 75]. An RFC Assessment completed by Dr. Paul Woodcock on July 13, 1993 noted that Plaintiff could occasionally lift ten pounds, frequently lift five to ten pounds, stand two out of eight hours, and sit six out of eight hours. Plaintiff additionally was reported as being able to ambulate without aide, and having good range of motion at his knees.

The Court has reviewed the record and concludes that substantial evidence supports the ALJ's conclusions regarding Plaintiff's RFC.

### **Consideration of Pain and Mobility**

Plaintiff asserts that the ALJ failed to appropriately consider Plaintiff's complaints of pain and Plaintiff's limited mobility.

The ALJ analyzed Plaintiff's complaints of pain but determined based on numerous factors, including, several inconsistent statements by Plaintiff, Plaintiff's infrequent visits to the doctor, the limited medication (aspirin) which Plaintiff took, and

Plaintiff's failure to attend physical therapy sessions, that Plaintiff's testimony regarding his pain was not fully credible. The ALJ's analysis is supported by the record.

#### **Consultative Examiners/Light Work**

Plaintiff further asserts that a consultative examination done by Steven Lee, M.D., and a consultive examination by Terrence Grewe, D.O. establish that Plaintiff cannot sit or stand for six hours out of an eight hour day.

Dr. Lee examined Plaintiff July 7, 1993. [R. at 242]. After an examination, Dr. Lee concluded:

This young man basically was healthy with the exception of multiple injuries with subsequent deformity of both knees, malalignment of the fracture and some difficulty with walking. At the present time he is wearing a brace on the right leg. He could not tolerate prolonged standing and he apparently could not tolerate prolonged walking. On a short distance he seemed to be able to walk fairly steadily. He was advised to seek alternative employment because he was no longer able to work as a construction worker. He expresses interest in becoming a trained mechanic for motorcycle repair with an interest to go to a training school for motorcycle repair type of job. This young man appeared to be quite pleasant and I believe he might be motivated to seek alternative occupation and training. Occupational rehabilitation probably will be worthwhile to explore for him.

[R. at 244]. Dr. Lee's assessment is not inconsistent with the findings of the ALJ.

Dr. Grewe examined Plaintiff on June 15, 1994. He noted that Plaintiff reported to him that he could walk only three to six blocks and could stand only one to two hours. [R. at 249]. Dr. Grewe reported arthritis secondary to trauma and multiple

trauma of the lower extremities secondary to a motorcycle vehicle accident. [R. at 250]. Dr. Grewe's assessments are not inconsistent with the ALJ's findings.<sup>8/</sup>

### **Evidence to Support RFC**

Plaintiff notes that the ALJ made his decision at Step Five and therefore was required to have evidence to support his conclusions. The record contains two RFC Assessments which support the conclusion of the ALJ that Plaintiff can do sedentary work.

### **Limitations Posed to Vocational Expert**

Plaintiff additionally asserts that the ALJ failed to pose all appropriate limitations in his question to the vocational expert. The ALJ provided several sedentary and light jobs which an individual who cannot stand for prolonged periods of time and cannot use his feet or legs could perform. The record substantiates the ALJ's findings. [R. at 61].

Plaintiff states that if all of Plaintiff's limitations are posed in a question to the vocational expert no jobs exist which Plaintiff can perform. However, an ALJ is not required to accept all of a plaintiff's testimony with respect to restrictions as true, but may pose such restrictions to the vocational expert which are accepted as true by the ALJ. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). See also Evans v.

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<sup>8/</sup> Plaintiff does not assert that the ALJ erred in his evaluation of the medical report of Michael Farrar, D.O. Dr. Farrar concluded that Plaintiff was 100 percent disabled and unemployable. [R. at 312]. The ALJ adequately discusses Dr. Farrar's conclusions. In addition, Dr. Farrar does not limit his conclusions to Plaintiff's physical limitations. Rather, Dr. Farrar bases his opinion, in part, on Plaintiff's lack of education, training and experience. [R. at 312]. These conclusions obviously invade the province of the ALJ. The Court concludes that the ALJ appropriately evaluated the evidence provided by Dr. Farrar. In addition, as noted, Plaintiff does not address this as an error on appeal.

Chater, 55 F.3d 530, 532 (10th Cir. 1995) (an ALJ need include only those limitations in the question to the vocational expert which he properly finds are established by the evidence).

#### **Conflict with the DOT**

Plaintiff further asserts that a conflict occurred between the ALJ and the DOT and that the DOT controls. Assuming Plaintiff's argument as true, that would eliminate only the job of "hand packer."<sup>9/</sup> The ALJ additionally found that Plaintiff could work in sedentary or light assembly or cashier jobs. The ALJ's conclusion that work exists which Plaintiff is capable of performing is supported by substantial evidence.

#### **Credibility and Kepler**

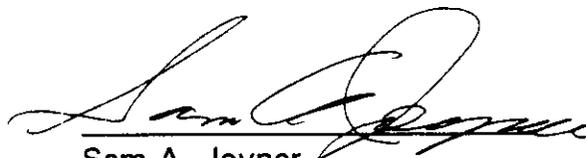
Plaintiff finally asserts that the ALJ failed to appropriately address the Plaintiff's credibility in accordance with Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995). The ALJ addressed Plaintiff's credibility and provided numerous reasons for discounting Plaintiff's subjective complaints. The ALJ's decision is in accord with Kepler.

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<sup>9/</sup> This issue has not yet been decided in a published Tenth Circuit opinion. This Court previously addressed this issue in Simmons v. Chater, 950 F. Supp. 1501 (N.D. Okla. 1992), concluding that the DOT does not "control." See also Conn v. Secretary of Health & Human Services, 51 F.3d 607, 610 (6th Cir. 1995) ("[W]hile the ALJ may take judicial notice of the classification in the Dictionary, the ALJ may accept testimony of a vocational expert that is different from information in the Dictionary of Occupational Titles. . . . The social security regulations do not require the Secretary or the expert to rely on classifications in the Dictionary of Occupational Titles.") (citations omitted).

Accordingly, the Commissioner's decision is **AFFIRMED**.

Dated this 23 day of April 1998.

A handwritten signature in black ink, appearing to read "Sam A. Joyner", written in a cursive style.

Sam A. Joyner  
United States Magistrate Judge

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

PERCY EDMUNDSON, )  
)  
Plaintiff, )  
)  
vs. )  
)  
DAN FULLER, )  
)  
Defendant. )

**FILED**  
No. 95-CV-1154-K  
APR 23 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE APR 24 1998

**JUDGMENT**

This matter came before the Court upon Defendant's motion for summary judgment.  
The Court duly considered the issues and rendered a decision herein.

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

IT IS SO ORDERED.

This 22 day of April, 1998.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT



(Count 4) Assault and Battery upon a Police Officer; and (Count 5) Driving under Suspension.

Following a preliminary hearing on these counts in Tulsa County District Court, Case No. 95-5239, three of the charges were dismissed: Possession of Stolen Vehicle, Actual Physical Control, and Violation of Protective Order. On June 17, 1996, Plaintiff entered a plea of *nolo contendere* to Count 4, assault and battery of a police officer. The trial court determined Plaintiff's plea was knowingly and voluntarily entered and imposed 2 years confinement to run concurrent with Plaintiff's previous conviction in CF 95-2427.

Plaintiff filed the instant civil rights action on November 21, 1995, alleging Defendant Dan Fuller, a Tulsa Police Officer, lacked probable cause for the October 24, 1995 arrest and used excessive force during the false arrest. On September 9, 1996, Defendant filed his motion for summary judgment submitting his own affidavit as well as the affidavit of Tulsa Police Officer Perry Lewis, the transcript of a revocation proceeding conducted in Case No. CRF-95-2427 on March 14, 1996, and the Amended Information filed in Case No. CF-95-5239, Tulsa County District Court as evidence supporting his motion. Defendant argues that (1) he is entitled to qualified immunity on Plaintiff's claims, and (2) Plaintiff's Eighth Amendment claim, as asserted in the "Amended Complaint" filed March 27, 1996,<sup>2</sup> is frivolous.

In his response to the motion for summary judgment, Plaintiff argues that questions of fact exist precluding the entry of summary judgment in this case. In the alternative, Plaintiff requests leave to amend the instant complaint so as to include the "other proper parties thereto and to more properly set forth Plaintiff's claim(s)." (#21).

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<sup>2</sup>The "Amended Complaint" submitted by Plaintiff on March 27, 1996, was not filed of record in this case.

## ANALYSIS

### A. Qualified Immunity -- Summary Judgment Standard

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Widon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment") (emphasis in original). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

However, special rules apply when a defendant raises the defense of qualified immunity in a summary judgment motion. Cummins v. Campbell, 44 F.3d 847, 850 (10th Cir. 1994). Where qualified immunity has been asserted by the defendant, the plaintiff bears an initial heavy two-part burden. Albright v. Rodriguez, 51 F.3d 1531, 1534 (10th Cir. 1995). He must show defendant's alleged conduct violated the law, and he must show the law was clearly established at the time of the alleged unlawful conduct. Id. at 1535. "The key to the inquiry is the objective reasonableness

of the official's conduct in light of the legal rules that were clearly established at the time the action was taken." Laidley v. McClain, 914 F.2d 1386, 1394 (10th Cir. 1990). If plaintiff carries his burden, however, defendant then has the "usual summary judgment burden of establishing that there is no genuine controversy over a material fact which would defeat [his] claim for qualified immunity and that [he is] entitled to judgment as a matter of law." Thompson v. City of Lawrence, 58 F.3d 1511, 1515 (10th Cir. 1995). In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Id.

**B. Plaintiff's claims**

*1. Excessive force claim*

Plaintiff insists that the force used during this encounter was constitutionally excessive. To sustain such a claim, a plaintiff must show that the officer's use of force was not "objectively reasonable" in light of the facts and circumstances confronting them. Graham v. Connor, 490 U.S. 386, 397 (1989). This standard requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. Id. at 396. The Court notes that the substantive inquiry that decides whether the force exerted by police was so excessive that it violated the Fourth Amendment is the same inquiry that decides whether the qualified immunity defense is available to the government actor. Mick v. Brewer, 76 F.3d 1127, 1135 n.5 (10th Cir. 1996) (quoting Quezada v. County of Bernalillo, 944 F.2d 710, 718 (10th Cir. 1991)).

In his complaint, Plaintiff states that on October 24, 1995, he was arrested at 3010 East

Independence by Defendant Dan Fuller. Plaintiff alleges that Defendant, "after handcuffing my hands and putting restraint on my feet left me sitting in the patrol car for few minutes. Upon his return, he suddenly and for no reason sprayed my eyes with pepper gas and asked me how it felt." (#1). Plaintiff contends that this action constituted "unjustified use of force" and "police brutality." (#1).

Defendant Fuller submitted his own affidavit in support of his motion for summary judgment (#13, Ex. A). In his affidavit, he states that he was radio dispatched to the "Doll House," 2409 East Admiral Place, Tulsa, Oklahoma, to investigate an auto theft. Upon arrival at the "Doll House," Defendant met with the auto theft victim identified as Lisa Hirn, Plaintiff's former fiancé, and with other Tulsa Police Officers. Defendant states that Ms. Hirn informed him that her 1988 Chevrolet Corsica had been taken earlier that day by Plaintiff. She also told Defendant that she possessed a victim's protective order against Plaintiff and that he had violated the protective order earlier that day by striking her at least three times with the back of his hand. She indicated Plaintiff could probably be found at an apartment complex located at 3010 East Independence. Ms. Hirn also stated that Plaintiff "could be armed." While en route to the apartment complex, Defendant confirmed the existence of the protective order and obtained the license tag number for Ms. Hirn's vehicle. Upon arrival at the apartment complex, Defendant saw another Tulsa Police Officer, Sgt. Sam McCullough, standing next to Plaintiff on the sidewalk. Defendant states that Plaintiff "appeared extremely intoxicated. He had an odor of alcoholic beverage about his person, was unstable on his feet, and had poor manual coordination. He was very hostile and belligerent towards the other officers and I." (#13, Ex. A). After being directed by Sgt. McCullough to take Plaintiff into custody, Defendant states that "when we first attempted

to place handcuffs on [plaintiff], he pulled his arms back and became argumentative and combative." He continued to resist the officers' efforts to place him in the front passenger seat of the patrol car. He repeatedly kicked the door, dashboard and windshield of the patrol car. Defendant also states that Plaintiff kicked him several times when he tried to reposition Plaintiff's body inside the vehicle and fasten a seatbelt around him. Because he was unable to secure Plaintiff in the patrol car and fearful he might hurt the other officers or himself if this behavior continued, Defendant states he administered a small amount of oleoresin capsicum spray ("pepper spray") to Plaintiff's face. Once the spray took effect, Plaintiff calmed enough to allow the officers to move him into a proper seating position, fasten a seatbelt around him, and restrain his legs. Defendant maintains that his use of pepper spray in this case was consistent with Tulsa Police Department Policy and Procedure No. 31-101F.

Defendant's recollection of these events is supported by the affidavit of Perry A. Lewis, a Tulsa Police Officer who assisted Defendant Fuller at the "Doll House" and at the apartment complex where Plaintiff was taken into custody. (#13, Ex. B). In addition, at the revocation hearing in Case No. 95-2427, held March 14, 1996, Plaintiff testified that "[Officer Fuller and I] was struggling, I kicked him in accident, it was not physical." (#13, Ex. C, at 13). He also admitted that he resisted arrest, albeit his resistance was not "physical." (#13, Ex. C, at 14-15).

In his recently filed reply to Defendant's motion for summary judgment, Plaintiff admits that "[d]uring the ensuing (sic) struggle Plaintiff, while properly defending himself against unlawful assault, inadvertently kicked Defendant Fuller." (#21, at 3). Also, in responding to the motion for summary judgment, Plaintiff provides absolutely no evidence to counter Defendant's evidence or to support his contention that Defendant Fuller used constitutionally excessive force.

In contrast, the officers' affidavits plainly reflect an objectively reasonable use of force to apprehend a resisting felon who posed a potential danger to himself and to the officers in the immediate area. The Court concludes that Plaintiff has failed to carry his burden of demonstrating a substantial correspondence between Defendant's conduct and prior law allegedly establishing that the conduct was clearly prohibited. Therefore, Defendant is immune from suit and is entitled to summary judgment on the excessive force claim.

*2. Arrest without probable cause claim*

Defendant is also immune from suit on Plaintiff's claim that he was arrested without probable cause because the uncontroverted facts demonstrate that probable cause existed. "Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense. When a warrantless arrest is the subject of a § 1983 action, the defendant arresting officer is 'entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest' the plaintiff. Even law enforcement officers who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." Romero v. Fay, 45 F.3d 1472, 1476 (10th Cir. 1995) (citations omitted).

In this case, Defendant states in his affidavit that he proceeded to take Plaintiff into custody after being so directed by Sgt. McCullough, a Tulsa Police Officer who witnessed Plaintiff getting out of the driver's door of a vehicle matching the description of a vehicle reported stolen by Plaintiff's former fiancé. See #13, Ex. C, at 10. Defendant had proceeded to the apartment complex where Plaintiff was arrested after gathering information from Plaintiff's former

fiancé, confirming that the tag number of the vehicle observed at the apartment complex matched that of the vehicle reported stolen by the victim, and verifying the existence of a protective order against Plaintiff. In addition, the officers at the scene testified in their affidavits or at the revocation hearing that Plaintiff was intoxicated and belligerent when he was taken into custody. See #13, Exs. A, B and C. The Court concludes that, although the charges of possession of a stolen auto and actual physical control were later dismissed after the person who reported the vehicle as stolen testified at a preliminary hearing that Plaintiff had permission to use the auto, facts and circumstances within the Defendant's knowledge and of which he had reasonably trustworthy information were sufficient to lead a prudent person to believe that Plaintiff had committed the offenses for which he was arrested.<sup>3</sup> Defendant is entitled to immunity because a reasonable officer could have believed that probable cause existed to arrest Plaintiff.

3. *Cruel and unusual punishment claim*

The protection of the Eighth Amendment's prohibition against cruel and unusual punishment applies only after conviction and sentencing. Graham v. Connor, 490 U.S. 386, 392-93 n.6 (1989); Ingraham v. Wright, 430 U.S. 651, 671 (1977). Therefore, to the extent Plaintiff raises an Eighth Amendment claim in any of his pleadings, the Court finds Defendant is entitled to judgment as a matter of law since none of the acts alleged by Plaintiff occurred after he was convicted and sentenced.

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<sup>3</sup>The Court notes that at the revocation hearing conducted in Tulsa County District Court, Case No. CRF-95-2427, the Hon. B. R. Beasley took judicial notice not only that the charges of possession of stolen auto and actual physical control were dismissed after a preliminary hearing but also that "apparently there was some present indication that there was an accusation that the defendant committed that crime and apparently a warrant for him." See #13, Ex. C, at 9.

**C. Plaintiff's request to amend his complaint**

The analyses applied to Plaintiff's claims herein would preclude claims against any of the Tulsa Police Officers present during Plaintiff's arrest. Therefore, any effort by Plaintiff to amend his complaint to add the other officers as defendants would be futile and his request to amend should be denied. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (dismissal appropriate where the plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile).

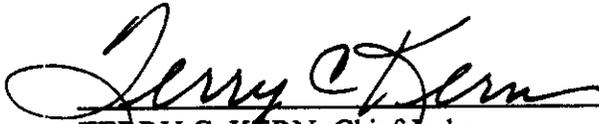
**CONCLUSION**

After viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Defendant is immune from suit and is entitled to judgment as a matter of law as to each claim alleged against him. Furthermore, Plaintiff's request to amend his complaint should be denied.

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

1. Defendant's motion for summary judgment (#12) is **granted**.
2. Plaintiff's request to amend his complaint is **denied**.

SO ORDERED THIS 22 day of April, 1998.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT



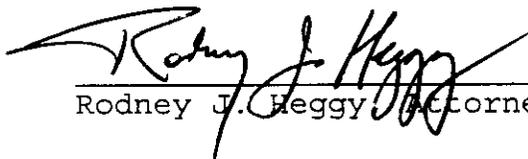
Rules of Civil Procedure and dismiss this case without prejudice upon terms and conditions that preserve the Plaintiff's rights under 12 Okl. St. Ann. Sec. 100. More specifically, the parties agree and stipulate that this dismissal without prejudice shall be deemed not to constitute a dismissal which invokes the operation of 12 Okl. St. Ann. Sec. 100, and this dismissal shall not operate to adversely affect or limit the Plaintiff's right to file a new action if the aforementioned state court case should fail otherwise than on the merits.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that this action is dismissed without prejudice upon terms and conditions set forth above.

  
\_\_\_\_\_  
Judge Thomas Brett

approved as to form:

  
\_\_\_\_\_  
Gary A. Eaton, Eaton & Sparks,  
Attorneys for Plaintiff

  
\_\_\_\_\_  
Rodney J. Heggy, Attorney for Defendant

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

LARRY DEAN PORTER, )  
)  
Petitioner, )  
vs. )  
)  
KEN KLINGER, Warden, )  
)  
Respondent. )

ENTERED ON DOCKET  
DATE APR 24 1998

No. 96-CV-1059-K ✓

**F I L E**

APR 24



**ORDER**

Phil Lombardi, CL  
U.S. DISTRICT COURT

Before the Court is the petition for writ of habeas corpus filed by the petitioner, a state inmate appearing *pro se*. Respondent has filed a Rule 5 Response to the petition alleging that this petition is time-barred pursuant to 28 U.S.C. § 2244(d) or that, in the alternative, Petitioner's claims are procedurally barred from federal habeas review (#5). Petitioner has filed a reply to Respondent's response (#8).

**BACKGROUND**

On November 8, 1993, Petitioner pled guilty to Larceny of Merchandise from a retailer, after former conviction of two or more felonies, in Case No. CRF-93-5374 in the District Court of Tulsa County, and was sentenced to twenty years imprisonment.<sup>1</sup> Petitioner did not seek to withdraw his guilty plea within the applicable time period or otherwise attempt to appeal his conviction. Approximately two years later, Petitioner filed an application for post-conviction relief. He asserted that: (1) he received ineffective assistance of trial counsel because his attorney failed to properly

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<sup>1</sup>The chronology of the case is taken from the Order Denying Application for Post-Conviction Appeal Out of Time, filed May 16, 1995, in the Court of Criminal Appeals of the State of Oklahoma, attached as Exhibit A to the State's motion to dismiss (docket #5).

prepare the case and allowed Petitioner to plead guilty and receive a 20 year sentence for a crime which carries a 1-5 year sentence; (2) insufficient proof existed for enhancement of sentence; and (3) in the alternative, he be granted an appeal out-of-time "because petitioner alleges he did not understand the range of punishment and the court failed to adequately advise petitioner of his appeal rights." (#5, Ex. A). This post-conviction application was denied by the Tulsa District Court on January 31, 1995, and filed of record on February 2, 1995.

Thereafter, on March 22, 1995, Petitioner filed an appeal from the District Court's denial of his application for post-conviction relief in the Oklahoma Court of Criminal Appeals (OCCA), raising these same three issues. Simultaneously, Petitioner filed an "affidavit petition for appeal out of time," stating as "cause" for the late filing of his petition in error that he was "misinformed by a law clerk" as to the number of days in which to file an intent to appeal in the Oklahoma Court of Criminal Appeals. On May 16, 1995, the OCCA stated petitioner had not established "to the satisfaction of the district court that he was denied a post-conviction appeal through no fault of his own," and thus, denied Petitioner's request for a post-conviction appeal out of time.

Petitioner filed the instant habeas corpus action on November 18, 1996, identifying as grounds for habeas relief the same three issues raised in his state application for post-conviction relief.

Respondent now argues that while Petitioner's grounds for relief are essentially unexhausted, this Court should nonetheless dismiss the petition as procedurally barred from federal review. Respondent also contends the petition for writ of habeas corpus should be dismissed for lack of jurisdiction pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

## *ANALYSIS*

### **A. Applicability of the Antiterrorism and Effective Death Penalty Act**

On April 24, 1996, President Clinton signed the AEDPA into law. Because Petitioner filed his petition for writ of habeas corpus on November 18, 1996, more than six (6) months after enactment of the AEDPA, the Court concludes that the provisions of the Act apply to this case.<sup>2</sup>

### **B. Statute of Limitations/Laches**

Pursuant to 28 U.S.C. 2244(d), as amended by the AEDPA, a one-year limitations period shall apply to an application for a writ of habeas corpus submitted by a state prisoner. Respondent contends that in this case, since Petitioner's conviction became final "long ago," the one year limitation period "ran for Petitioner approximately three years ago." (#5, at 4). As a result, Respondent alleges that the instant petition, filed on November 18, 1996, is time-barred. However, the Tenth Circuit Court of Appeals has held that in this circuit, prisoners, such as the petitioner in this case, whose convictions became final on or before April 24, 1996 had to file their habeas corpus actions before April 24, 1997 to avoid the time bar imposed by the AEDPA's one-year statute of limitations codified at 28 U.S.C. § 2244(d). United States v. Simmonds, 111 F.3d 737, 746 (10th Cir. 1997) (citing Lindh, 96 F.3d at 866, for the proposition that the time period imposed by the Antiterrorism and Effective Death Penalty Act is "short enough that the 'reasonable time' after April 24, 1996, and the one-year statutory period coalesce; reliance interests lead us to conclude that no collateral attack filed by April 23, 1997, may be dismissed under 28 U.S.C. § 2244(d) and . . . 28

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<sup>2</sup>Although no effective date is specified for those provisions of the AEDPA applicable to non-capital cases, rules of general construction provide that new statutory law applies to cases filed on or after the date of enactment. See Lindh v. Murphy, 117 S.Ct. 2059 (1997); Landgraf v. USI Film Products, 511 U.S. 244 (1994).

U.S.C. § 2255."). Consequently, because Petitioner in this case filed his § 2254 petition prior to April 23, 1997, the Court concludes that the petition was timely filed.

**C. Exhaustion of Available State Remedies and Procedural Bar**

Exhaustion of state remedies is required by persons in custody pursuant to state judgments prior to obtaining federal habeas relief. See 28 U.S.C. S 2254(b),(c); Rose v. Lundy, 455 U.S. 509, 519 (1982); Pitchess v. Davis, 421 U.S. 482, 486 (1975). The exhaustion requirement for habeas relief has two purposes. First, it allows state courts an opportunity to correct alleged violations of prisoners' federal rights, thus avoiding unnecessary friction between federal and state court systems. Duckworth v. Serrano, 454 U.S. 1, 3 (1981). Second, application of the rule of exhaustion allows the development of a complete factual record to aid the federal court in its review. Rose v. Lundy, 455 U.S. at 519. Further, exhaustion can prevent unnecessary federal court review where the state court has reviewed the merits and entered written findings which are entitled to judicial deference under 28 U.S.C. S 2254(d). With regard to the exhaustion requirement, the United States Supreme Court has stated that "the federal claim must be fairly presented to the state courts. [I]t is not sufficient merely that the federal habeas applicant has been through the state courts." Picard v. Connor, 404 U.S. 270, 275-76 (1971). Only after a petitioner has provided the state courts with a fair opportunity to consider his constitutional claim will this Court take cognizance of his habeas corpus claim. Rose v. Lundy, 455 U.S. at 519; Anderson v. Harless, 459 U.S. 4, 6 (1982); Naranjo v. Ricketts, 696 F.2d 83, 86 (10th Cir.1982). When a petitioner has not presented his claim to the highest state court having jurisdiction, his petition must be dismissed. 28 U.S.C. S 2254; Duckworth v. Serrano, 454 U.S. at 4; Osborn v. Shillinger, 861 F.2d 612, 616 (10th Cir.1988).

However, the exhaustion requirement may be waived when a procedural doctrine in the state court would prevent a habeas petitioner from pursuing his unexhausted claim. See Harris v. Reed, 489 U.S. 255, 263 n.9 (1989) ("Of course, a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred."); see also Grey v. Hoke, 933 F.2d 117, 120 (2d Cir. 1990) (applying the futility rule in Harris to waive the exhaustion requirement of section 2254 because of a state procedural bar). As Justice O'Connor noted in her concurrence in Harris, one of the dangers in strictly applying the exhaustion requirement in cases where exhaustion would be futile is that a dismissal in such circumstances "would often result in a game of judicial ping-pong between the state and federal courts, as the state prisoner returned to state court only to have the state procedural bar invoked against him." Harris, 489 U.S. at 270 (O'Connor, J., concurring)

In the instant case, while Petitioner could return to the state district court to pursue a post-conviction appeal-out-of-time,<sup>3</sup> this Court has no doubt that Oklahoma's courts would refuse to consider Petitioner's claims should this Court dismiss this action for failure to exhaust. Even if Petitioner were granted a post-conviction appeal out of time, the OCCA routinely denies post-conviction relief where, as in this case, the petitioner has failed to pursue a direct appeal or where the

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<sup>3</sup>In an attempt to excuse his untimely post-conviction appeal filed in the Oklahoma Court of Criminal Appeals, Petitioner claims a jail law clerk "misinformed" him of the appeal period. According to the affidavit filed simultaneously with the petition-in-error, Petitioner stated he was "informed of having (40) forty [sic] day's [sic] from the filing of the notice of intent to appeal which was filed Feb. 14, 1995. Another inmate with access [sic] to A Rule and Procedure manuel [sic] informed petitioner it is (30) thirty day's [sic] from the date of denial." Petitioner continued, requesting the OCCA grant an "existention," and to "take in account Petitioner is not a Practitioner [sic] of law and is acting Pro Se. Petitioner was late through incompetent advice through untrained Law Clerk, this was the only advice available to Petitioner." (Docket #5, Exhibit "Affidavit Petition for Appeal Out of Time - (Esxtention)") The OCCA rejected Petitioner's argument as he "ha[d] not established to the satisfaction of the District Court that he was denied a post-conviction appeal through no fault of his own, a necessary requirement for a post-conviction appeal out of time to be granted." See Smith v. State, 611 P.2d 276, 277 (Okla. Crim. App. 1980); 22 O.S. 1991, §§ 1080-1089. His request for a post-conviction appeal out of time was denied on May 16, 1995.

petitioner knew the facts supporting his allegation at the time of his direct appeal. 22 O.S. §§ 1080, et seq.; see also Revilla v. State, 946 P.2d 262, 264 (Okla. Crim. App. 1997) (stating that this Court will not consider an issue which was raised on direct appeal and is therefore barred by res judicata nor will we consider an issue which has been waived because it could have been raised on direct appeal but was not); Mann v. State, 856 P.2d 992, 993 (Okla. Cr. 1993); Hale v. State, 807 P.2d 264, 266-67 (Okla. Cr. 1991); Webb v. State, 661 P.2d 904 (Okla. Crim. App. 1983); Maines v. State, 597 P.2d 774 (Okla. Crim. App. 1979). Clearly, to require Petitioner to return to the state courts to "fairly present" his claims to the OCCA would be futile since that court would find that Petitioner had procedurally defaulted his claims by failing to perfect a direct appeal.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined, or would decline, to reach the merits of the claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

The Court must apply these principles to each of Petitioner's claims to determine whether the procedural default doctrine bars federal habeas review.

*1. Ineffective Assistance of Counsel Claim*

While there is no question that the Oklahoma procedural bar at issue here is "independent" of federal law concerns, the Tenth Circuit Court of Appeals has held that Oklahoma's procedural bar requiring a criminal defendant to raise on direct appeal any claims alleging the ineffectiveness of trial counsel is inadequate to preclude federal habeas review. Brecheen v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994); Brewer v. Reynolds, 51 F.3d 1519, 1522 (10th Cir. 1995); Sack v. Champion, No. 97-7017, 1998 WL 3280 (10th Cir. Jan. 7, 1998). According to the Tenth Circuit, Oklahoma's waiver rule denies any meaningful review of ineffective assistance claims. Brecheen, 41 F.3d at 1364. This Court is bound by the Tenth Circuit precedent which declines to apply Oklahoma's waiver rule to procedurally defaulted ineffective assistance claims. Therefore, the Court will review Petitioner's ineffective assistance claims on the merits.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. A federal court reviewing an ineffective assistance of counsel claim will begin by presuming that counsel's representation was within that wide range of reasonable, professional assistance that can be considered sound trial strategy. A federal court will also review counsel's performance from counsel's perspective at the time the representation was rendered, and not through the distorting lens of hindsight.

To prevail on a claim of ineffective assistance of counsel under the Sixth Amendment, Petitioner must first overcome the presumption of constitutionally adequate representation and show that his counsel committed a serious error in light of prevailing professional norms. In other words, Petitioner must conclusively demonstrate that counsel's representation fell below an objective

standard of reasonableness and so undermined the proper functioning of the adversarial process that the result reached in the trial court cannot be relied on as just. If Petitioner establishes that his counsel's performance was constitutionally ineffective, he must then demonstrate that there is a reasonable probability that the outcome in the trial court would have been different had counsel performed effectively. Strickland v. Washington, 466 U.S. 668 (1984); Brecheen v. Reynolds, 41 F.3d 1343, 1365 (10th Cir. 1994).

In the instant application, Petitioner alleges his attorney was ineffective because he "answered question's (sic) during sentencing that were directed to defendant, he allowed petitioner to plead to 21 O.S. 51(B) without petitioner (sic) pleading to former convictions, he did not investigate facts, and allowed petitioner (sic) to be oversentenced." (#1, at 4). In denying post-conviction relief, the trial court concluded, and this Court agrees, that an examination of the record reveals Petitioner's arguments fail to overcome the first prong of the Strickland test. (#5, trial court's Order Denying Application for Post-Conviction Relief, filed February 2, 1995). Other than Petitioner's conclusory allegations, there is no indication counsel's investigation and preparation of Petitioner's case was inadequate. Nor does the record reflect Petitioner involuntarily and unknowingly entered his guilty plea or that Petitioner was insufficiently advised of the punishment or sentence to be imposed. After reviewing the transcript provided by Respondent and under the totality of the circumstances surrounding the guilty plea, the Court finds the following exchange in the record reflects a constitutionally valid plea:

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THE COURT: Now Mr. Sewell tells me that you not only want to give up your right to a jury trial, but you want to waive your right to any type of a trial and plead guilty to this charge?

MR. PORTER: Yes.

THE COURT: And are you guilty?

MR. PORTER: Yes.

THE COURT: Now you were present at your preliminary hearing in this matter back in August, so you understand the nature of the charge that's pending against you?

MR. PORTER: Yes.

THE COURT: And you understand basically what the states evidence is?

MR. PORTER: Yes.

THE COURT: Charged in this case with Larceny of Merchandise from a Retailer. It's alleged to have occurred on July 6 of this year. It's alleged that on that day, while you were acting in concert or together with Herman Gatewood, Jr. you stole property from Dillards, property alleged to be over \$500.00 value. Now do you understand that's the charge?

MR. PORTER: Yes.

THE COURT: And are you guilty of that offense?

MR. PORTER: Yes.

THE COURT: Did you steal that property from Dillards on that day?

MR. PORTER: Yes.

THE COURT: And did you commit that offense while acting in concert or together with Herman Gatewood Jr.?

MR. PORTER: Yes.

\*\*\*\*\*

(Docket #5, transcript of proceeding, pp.5-6) Further, the Court finds that the following exchange indicates that Petitioner was sufficiently advised of and understood the enhancement and length of his sentence:

THE COURT: Now, it's my understanding that, um, due to the value of the property, that larceny --- well, excuse me, let me ask you first, it's alleged in a second page that you have two or more felony convictions here in the State of Oklahoma, correct?

MR. PORTER: Yes.

THE COURT: It's my understanding, based on the value of this property, that Larceny of Merchandise from a Retailer, by itself, carries a penalty ranging from a minimum of one up to five years. If they were able to prove beyond a reasonable doubt you were guilty of this offense and had one prior felony, then it would carry up to 10 years, this offense, with two or more felony convictions, the minimum sentence you could receive would be 20 years. Is that your understanding?

MR. PORTER: Um-hum, yes.

THE COURT: What do you understand your sentence is going to be, Mr. Porter, if you plead guilty here today?

MR. PORTER: What is it?

THE COURT: What did Mr. Sewell talk to you about?

MR. PORTER: Twenty.

THE COURT: Twenty years. Are those your plea negotiations, Mr. Sewell?

MR. SEWELL: That's correct, Your Honor, 20 years in the Department of Corrections without an agreement with regards to fines and cost.

THE COURT: Is that the state's recommendation?

MR. NELSON: It is, Your Honor.

THE COURT: So it's my understand, Mr. Porter, on a plea of guilty you are

going to receive the minimum sentence for this offense, with two or more felony convictions of 20 years.

MR. PORTER: Yes.

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THE COURT: Do you understand what's going on here today?

MR. PORTER: Yes.

THE COURT: Do you have any questions you want to ask me about the proceeding here today or the legal effect of your plea of guilty?

MR. PORTER: No.

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(Docket #5, transcript of proceeding, pp.6-8, pp.31-33). Considering all the circumstances, and indulging "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," the Court finds Petitioner has failed to establish that his counsel's representation fell below an objective standard of reasonableness and so undermined the proper functioning of the adversarial process that the result reached in the trial court cannot be relied on as just. Having determined that Petitioner has failed to meet the first prong of the Strickland test, the Court need not address the second prong. Therefore, the Court finds that Petitioner's ineffective assistance of trial counsel claim is without merit and does not warrant habeas relief.

## *2. Petitioner's Remaining Grounds*

The Court finds that Petitioner's remaining grounds are barred from federal habeas review by the doctrine of procedural default. As stated supra, the Oklahoma state courts would not consider a claim first raised in an application for post-conviction relief if petitioner could have raised the claim

on direct appeal and did not. This outcome is based on state rules of procedure and is clearly "independent" of federal law. In addition, the state procedural bar has been "strictly" applied and is, therefore, clearly "adequate." See Steele v. Young, 11 F.3d 1518, 1522 (10th Cir. 1993); Johnson v. State, 823 P.2d 370, 372 (Okla. Crim. App. 1991). Where a petitioner's claims have been procedurally defaulted, a federal court cannot address the merits of the federal claims, "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991).

The "cause" standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

In this federal habeas action, Petitioner submits as "cause" for his procedural default that he is "not an attorney" and "does not possess [sic] the skills necessary or know of certain facts that constitute a legal ground for habeas relief." (#8, at 3-5). Relying on Pearson v. Norris, 52 F.3d 740 (8th Cir. 1995), Petitioner, "who is proceeding (sic) pro-se, does not possess the skill and knowledge necessary to have overcome or met the requirements to the Oklahoma state's procedural bar barriers, and cannot be fairly expected to know all the facts necessary to present his claim properly before the

court." (#8, at 6). However, the fact that Petitioner is a layman proceeding *pro se* does not constitute sufficient cause to overcome his procedural default. See Rodriguez v. Maynard, 948 F.2d 684, 688 (10th Cir. 1991) (petitioner's *pro se* status and lack of awareness and training of legal issues do not constitute sufficient cause under the cause and prejudice standard).

In addition, as his third ground for relief, Petitioner requests a "motion for appeal out-of-time" and states for the first time that "attorney never contacted petitioner (sic) during ten day period even after petitioner diligent (sic) effort's (sic) to contact attorney." (#1, at 7). However, after entry of a guilty plea, an attorney is not obligated to contact his client regarding an appeal unless the client indicates a desire to appeal or the attorney knows of a constitutional violation. See Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989) ("An attorney has no absolute duty in every case to advise a defendant of his limited right to appeal after a guilty plea . . . If a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right, counsel has a duty to inform him."). Petitioner fails to provide any supporting evidence for his bald assertion that he diligently attempted to contact his attorney during the ten day period. Thus, the Court finds Petitioner's claims fail to constitute "cause" sufficient to overcome his procedural default.

Finally, this case does not present one of those "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey, 499 U.S. at 494. Petitioner makes no assertion that he is actually innocent of the crime of which he was convicted. Id. Therefore, the Court denies Petitioner's remaining grounds for federal habeas relief as procedurally barred.

*CONCLUSION*

Petitioner's claim that he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution is without merit. Petitioner's remaining claims are barred from federal habeas review by the doctrine of procedural default. The petition for writ of habeas corpus should be denied.

**ACCORDINGLY, IT IS HEREBY ORDERED** that the Petition for Writ of Habeas Corpus is **denied**.

SO ORDERED this 22 day of April, 1998.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

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

FOUR CORNERS BOAT DOCK AND )  
MARINAS, INC., )  
 )  
Plaintiff, )

vs. )

TRANSCONTINENTAL INSURANCE )  
CO., a CNA INSURANCE COMPANY, )  
a New York Corporation, and MEECO )  
MARINAS, INC., )  
 )  
Defendant. )

ENTERED ON DOCKET

DATE April 23, 1998

No. 97-C-608-K ✓

FILED

APR 23 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ADMINISTRATIVE CLOSING ORDER**

The Court, having been advised that the parties to this action have agreed to a settlement, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 22 day of April, 1998.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

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

**FILED**

APR 22 1998

PHIL LOMBARDI, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

VICTORIA LaMARR CONKLIN,  
Plaintiff,

vs.

UNITED STATES OF AMERICA, ex rel.  
BRUCE BABBITT, SECRETARY OF THE  
INTERIOR FOR THE UNITED STATES  
DEPARTMENT OF THE INTERIOR,

Defendant.

Case No.97-CV-789-H(M) ✓

ENTERED ON DOCKET

DATE April 23, 1998

**REPORT AND RECOMMENDATION**

Plaintiff's appeal of the determination of the Secretary of the Department of the Interior regarding the validity of a holographic codicil of the decedent Abe M. Conklin, an Osage Indian, has been referred to the undersigned United States Magistrate Judge for report and recommendation.

**BACKGROUND**

The decedent executed a will dated December 6, 1994, wherein he provided that his Osage Indian headright<sup>1</sup> was to be divided into six equal shares with one share going to his wife, Plaintiff Victoria LaMarr Conklin, for life with the remainder to his living children of Osage Indian Blood. [Dkt. 2, Ex. 1]. Plaintiff sought to have the following handwritten letter written to decedent's attorney, Geoffrey Standing Bear, dated August 22, 1995, approved as a codicil to the decedent's will:

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<sup>1</sup>A headright is an interest in the income from oil wells held in trust for the Osage Indian Tribe by the United States. *Crawley v. United States*, 977 F.2d 1409, 1410, n.2 (10th Cir. 1992).

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Dear Geoffrey:

I would like to make a codicil to my Last Will and Testament of December 6, 1994, to give and devise my Osage Headright interests that I now have or may have in the future that is remaining in my estate at the time of my death to my wife as life tenant and upon her death to go as directed to my children in the Last Will and Testament.

[Dkt. 2, Ex. 2].

The Superintendent, Osage Agency, entered an order dated October 24, 1996, approving the will, but recommending "that the holographic codicil dated August 22, 1995, be disapproved as the piece of paper was not intended to serve as the codicil, but rather he intended a formal codicil to be made." [Dkt. 2, Ex. Ex. 18]. The matter was appealed, and an Order Affirming Superintendent's Order was entered July 28, 1997. The Administrative Judges rejected the argument that the August 22, 1995, letter is entitled to recognition as a holographic codicil, finding that the letter expresses an intent to make a testamentary disposition in the future, but does not express an intent that the letter itself affect a testamentary disposition. *Id.*

Plaintiff argues that the case law relied upon by the Administrative Judges is distinguishable and that the August 22, 1995, letter should have been accepted as a holographic codicil because it met all the statutory requirements for a valid holographic codicil and clearly expressed the decedent's intention with respect to the disposition of his headright.

The scheduling order entered November 20, 1997, gave the parties an opportunity to brief their positions and required them to advise the court by March 30, 1998, whether they desired oral argument. Neither party has requested oral argument.

#### STANDARD OF REVIEW

The court's role is governed by federal statutes known as "Osage Indian Statutes," Act of Apr. 18, 1912, Pub.L. No. 62-125, 37 Stat. 86, amended by Act of Oct. 21, 1978, Pub.L. No. 95-496, 92 Stat. 1660, and further amended by Osage Tribe of Indians Technical Corrections Act of 1984, Pub.L. No. 98-605, 98 Stat. 3163. See *Crawley v. United States*, 977 F.2d 1409, 1410 (10th Cir. 1992). Judicial review of the decisions of the Secretary of the Department of the Interior with respect to Osage wills is provided for, as follows:

No court except a Federal court shall have jurisdiction to hear a contest of a probate of a will that has been approved by the Secretary. Such appeals shall be on the record made before the Secretary and his decisions shall be binding and shall not be reversed unless the same is against the clear weight of the evidence or erroneous in law.

1978 Act § 5(a), 92 Stat. at 1662. Pursuant to this section, the court conducts a de novo review of the Secretary's decision disapproving the codicil for error of law. *Crawley*, 977 F.2d at 1410, citing *Akers v. Hodel*, 871 F.2d 924, 933 (10th Cir. 1989).

In accordance with the 1978 Act, the laws of the State of Oklahoma govern the Secretary's decision concerning admission of evidence and the execution of wills. 92 Stat. 1661.

## DISCUSSION

In the July 29, 1997, Order Affirming Superintendent's Order disapproving the August 22, 1995, letter as a holographic codicil, the Secretary relied on what he termed "critical language" in *Hooker v. Barton*, 294 P.2d 708 (Okla. 1955) and *Craig v. McVey*, 195 P.2d 753 (Okla. 1948). In these cases the Oklahoma Supreme Court affirmed its commitment to the rule that: "Where an instrument is tendered for probate as an holographic will, it must be plainly apparent that it was the intention of the deceased that the paper should stand for her last will and testament." See July 29, 1997, Order, quoting *Craig v. McVey*, 195 P.2d at 754. [emphasis added by Secretary]. Since the letter did not express an intent that the letter itself affect a testamentary disposition, the Secretary found that the letter did not qualify to be admitted as a holographic codicil. Plaintiff argues that the tenet of law expressed in the *Hooker* and *McVey* cases and relied upon by the Secretary is correct as applied to the facts of those cases but is not applicable to the present case because the facts are dissimilar. This Court disagrees.

In *Hooker*, the Oklahoma Supreme court firmly held that a document that refers to something which the deceased intended to do in the future, as opposed to something then being done by him, is not a testamentary disposition, regardless of whether the document otherwise meets the statutory requirements<sup>2</sup> for a holographic

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<sup>2</sup>The statutory requirements for a holographic will are found at 84 Okla. Stat. § 54: "A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed."

will. *Hooker*, 284 P.2d at 710. Plaintiff has not cited the Court to any Oklahoma cases holding contrary to the rule expressed in *McVey* and *Hooker*, nor has the Court's research found any such cases. Accordingly, the Court concludes that the Secretary's decision is not erroneous in law.

The text of the letter contains no language suggesting that the letter is intended to affect a present change in the decedent's will. The letter begins: "I would like to make a codicil," it contains no indication that the letter itself is to serve as the codicil, and it does not directly state that the property is distributed. The Court cannot find that the Secretary's conclusion concerning the absence of intent that the letter serve as a codicil is contrary to the clear weight of the evidence.

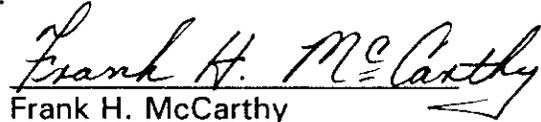
#### **CONCLUSION**

The Secretary's finding that the decedent did not intend that the letter itself affect a testamentary disposition is not contrary to the clear weight of the evidence. The Secretary's conclusion that Oklahoma law requires an instrument tendered for probate as an holographic will or codicil to plainly state that the paper itself should affect a testamentary disposition is not erroneous in law. Therefore, the undersigned United States Magistrate Judge RECOMMENDS that the decision of the Secretary disapproving the August 22, 1995, letter as a holographic codicil be AFFIRMED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court

based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 22<sup>nd</sup> day of April, 1998.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

SA

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

INTERFAB, LTD.,

Plaintiff,

v.

SYLVESTER INDUSTRIER, AS,  
PHILLIPS PETROLEUM COMPANY NORWAY,  
E.M. KERN, AND  
GATING INTERNATIONAL, INC.,

Defendants.

ENTERED ON DOCKET

DATE April 23, 1998

Case no. 97 CV 918 BU(M) ✓

FILED

APR 22 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT



**NOTICE OF DISMISSAL**

Pursuant to Rule 41 (a)(1) the plaintiff, Interfab, Ltd., herewith dismisses this action, without prejudice.



Robert G. Green, OBA #3573  
2420 South Owasso Place  
Tulsa, Oklahoma 74114-2642  
(918) 743-0515 FAX (918) 743-6577

Attorney for Plaintiff, Interfab, Ltd.

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CT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

UNITED STATES OF AMERICA,  
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

DAVID R. THORNTON, et al.,

Defendants.

DATE April 23, 1998

**FILED**

APR 23 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CIVIL ACTION NO. 96-CV-1119-K

**ADMINISTRATIVE CLOSING ORDER**

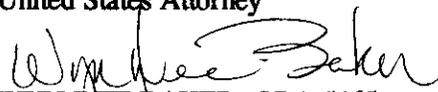
The Court has reviewed the Motion Requesting Administrative Closing filed by Plaintiff, United States of America. Having done so, the Court concludes that this matter should be administratively closed during the pendency of the reinstatement payments. It is therefore **ORDERED** that the Clerk administratively close this action pending the resolution of the reinstatement payments. The Plaintiff is directed to notify the Court of the resolution of the reinstatement payments by October 31, 1999, or this action shall be deemed dismissed without prejudice.

IT IS SO ORDERED this 22 day of April, 1998.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

  
WYN DEE BAKER, OBA #465  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

WDB:css

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

WESLEY COX, )  
)  
Petitioner, )  
)  
vs. )  
)  
EDWARD L. EVANS, and THE )  
ATTORNEY GENERAL OF THE STATE )  
OF OKLAHOMA, )  
)  
Respondents. )

ENTERED ON DOCKET  
DATE April 23, 1998

Case No. 96-CV-300-K ✓

**F I L E D**

APR 23 1998

*RL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge filed on March 31, 1997 (#11),<sup>1</sup> in this habeas corpus action pursuant to 28 U.S.C. § 2254. Petitioner raises two claims in his petition for writ of habeas corpus: (1) "Delaware County had no jurisdiction over Mr. Cox and his children;" and (2) "improper venue." (#1, at 6 and 8). The Magistrate Judge recommends that the petition for habeas corpus be dismissed as procedurally barred since the Oklahoma Court of Criminal Appeals imposed a procedural bar based on an independent and adequate ground and Petitioner has failed to establish cause and prejudice or that a fundamental miscarriage of justice will result if his claims are not considered.

On April 11, 1997, Petitioner filed his objection to the Report. Specifically, Petitioner objects to the Magistrate's findings and conclusions arguing that his challenge to jurisdiction could not be waived. Petitioner states that "[f]rom the onset of these proceedings the State of Oklahoma has avoided the issues of jurisdiction and venue and the Report and the recommendation of the Magistrate

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<sup>1</sup>Reference is to docket number assigned to document as filed in the Court's record.

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Judge has followed suit in not deciding the real issues." (#12, at 4). In addition, Petitioner states that he "should not be barred on a Constitutional issue, such as in this case, because trial and appellant (sic) counsel's (sic) have failed to perform their duties as professional lawyers." (#12, at 4).

On March 6, 1998, this Court directed Respondent to supplement the record by providing copies of the preliminary hearing transcript, the trial transcript, the Information and Amended Information, the Pre-Sentence Investigation, and the Judgment and Sentence filed in Delaware County District Court Case No. CRF-93-46. Respondent has complied with the Court's Order.

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which Petitioner has objected. Based on careful review of the facts of this case as well as the applicable law, the Court affirms, for the reasons discussed infra, the Magistrate Judge's recommendation that this habeas petition should be denied.

### ***BACKGROUND***

Petitioner was convicted by a jury in Delaware County District Court, Case No. CRF-93-46, of two counts of injury to a minor child. He was sentenced, on April 21, 1994, to 25 years imprisonment on each count, to run consecutively, with five years of count two to be suspended. Petitioner appealed and on November 17, 1995, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed the conviction and sentences. Petitioner then filed, on February 14, 1996, a petition for writ of habeas corpus in the OCCA alleging for the first time that the (1) the Delaware County Court had no jurisdiction over him and his children, and (2) the trial was not held in the proper venue. On March 14, 1996, the OCCA denied the relief requested, finding that Petitioner had failed to state a

sufficient reason why the claims had not been raised on direct appeal. The OCCA stated that "[w]e begin by noting Petitioner has offered no proof to support his contentions. The issue raised by Petitioner could have and should have been raised in his direct appeal. Lamb v. State, 481 P.2d 485, 486 (Okl.Cr.1971). Therefore, the petition for writ of habeas corpus should be, and is hereby, DENIED." (#9, Ex. D).

On April 17, 1996, Petitioner filed the instant federal habeas corpus petition raising the same issues raised in his state habeas corpus action. Respondent filed his response to the petition for writ of habeas corpus, arguing that Petitioner's failure to comply with the state procedural rule bars the Petitioner from raising the claims before this Court (#9). Petitioner replied to the response, arguing that his claims are not procedurally barred because "jurisdiction is never waved (sic) and can be brought up at any time in the proceedings" (#10).

### *DISCUSSION*

Because this case was filed on April 17, 1996, before enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), this Court must apply pre-AEDPA habeas corpus law to this case. See Lindh v. Murphy, 117 S.Ct. 2059, 2063 (1997).

In the Report, the Magistrate Judge found that Petitioner could not demonstrate either cause and prejudice to overcome his procedural default or that a fundamental miscarriage of justice would result if his claims are not considered, and that each of his claims was barred by the procedural default doctrine. See Coleman v. Thompson, 501 U.S. 722, 750 (1991). The state court's procedural bar as applied to Petitioner's claims is an "independent" state ground if "it was the exclusive basis for the state court's holding." Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995). Additionally, the

procedural bar is an "adequate" state ground if the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not raised on direct appeal. Moore v. State, 809 P.2d 63, 64 (Okla. Crim. App.), cert. denied, 502 U.S. 913 (1991) (the doctrine of res judicata bars consideration in post-conviction proceedings of issues which have been or which could have been raised on direct appeal).

The state's procedural bar as to Plaintiff's claim of improper venue is clearly "independent" and "adequate" based on the standards cited above. However, as to Plaintiff's claim of lack of jurisdiction, the state court's imposition of a procedural bar is not an adequate state procedural bar and, therefore, would not preclude federal habeas review. See Sack v. Champion, No. 97-7017, 1998 WL 3280 (10th Cir. Jan. 7, 1998) (stating that "a state post-conviction determination that petitioner defaulted his jurisdictional claims by not raising them on direct appeal would not represent an adequate state procedural bar and, therefore, would not preclude federal habeas review") (citing Johnson v. Mississippi, 486 U.S. 578, 587, 589 (1988)); see also Wallace v. State, 935 P.2d 366, 372 (Okla. Crim. App. 1997) (holding that "even though not raised on direct appeal, issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal"). Based on this conclusion, the Court will consider each of Plaintiff's claims separately.

**A. Plaintiff's claim of lack of jurisdiction**

Petitioner maintains that "[t]he record is undisputable (sic) that the petitioner is and was a resident at Route 2, Gravette Arkansas 73736, in Benton County, and that his children attended Gravette Elementary School." (#10, at 4). However, after reviewing the supplemental record provided by Respondent, the Court finds the record is replete with evidence indicating that Petitioner lived in Mayesville, Oklahoma, and that the District Court of Delaware County had jurisdiction to

hear the claims lodged against Petitioner. In contrast to Petitioner's assertion, nothing in the record indicates Petitioner resided at Route 2, Gravette, Arkansas. For example, the transcript from the preliminary hearing indicates that at least two witnesses testified that the family lived in Delaware County, State of Oklahoma at the time of the incidents of child abuse and that the incidents occurred at the family home. Leslie Cox, Petitioner's fifteen (15) year-old son, testified as follows:

Q. . . . where were you living in January of this year?

A. Mayesville.

Q. In Mayesville? Is that in Oklahoma?

A. Yes

Q. Okay and is that in Delaware County?

A. Yes

(Prelim. Hrg. at 34).

\* \* \*

Q. Okay, and it was your testimony that back in January you lived in Mayesville, is that correct?

A. Yes

Q. Uh, Mayesville is over in Arkansas, isn't that true?

A. Well part of it is and part of it isn't.

Q. Okay, and what part did you live in?

A. Behind the store.

Q. Behind the store in Mayesville?

A. Yes

Q. All right. Uh, are you satisfied that you know what state that is in?

A. Oklahoma

Q. Where you were living behind the state -- behind the store?

A. Oklahoma.

Q. Oklahoma. How far is that from the Arkansas line?

A. I don't know.

Q. Was it close?

A. Yes.

(Prelim. Hrg. at 48).

\* \* \*

Q. . . . did they come and pick you later?

A. No, the next day I went to school, and at school DHS come and picked me up.

Q. Over in Gravette?

A. Yes

Q. Oklahoma DHS?

A. Arkansas.

Q. Okay, so where did you go with them? With the Arkansas DHS, where did they take you?

A. To Mayesville in front of the store and then I went with the Oklahoma DHS.

Q. I see.

(Prelim. Hrg. at 80).

In addition, Kim Cox, Petitioner's sister-in-law, testified at the preliminary hearing as follows:

Q. Let me direct your attention back to January 20th, of this year, uh where were you living at that time?

A. Mayesville, Oklahoma.

\* \* \*

Q. You said that you lived in a house in Mayesville, Oklahoma?

A. Uh hum.

Q. Is Mayesville, in Arkansas? Do you know whether or not this house was actually in Oklahoma?

A. It was in Oklahoma.

Q. Is it in Delaware County?

A. Yes.

(Prelim. Hrg. at 83-84).

The Information and Amended Information also indicate that Petitioner violated Okla. Stat. tit. 21, § 843 in Delaware County, State of Oklahoma. Nothing in the record and nothing provided by Petitioner in this habeas action corroborate his claim that he lived in Arkansas at the time of the incidents of child abuse for which he was convicted. Petitioner's bald assertion that he lived in Arkansas at the time of the incidents underlying his criminal convictions is insufficient to overcome the evidence cited supra. The Court finds that Petitioner's claim that the District Court of Delaware County, State of Oklahoma, lacked jurisdiction is without merit.

**B. Plaintiff's claim of improper venue**

Unlike a challenge to jurisdiction, a challenge to venue may be waived. Omalza v. State, 911 P.2d 286, 295 (Okla. Crim. App. 1995) (citing Smith v. State, 554 P.2d 851, 854-55 (Okla. Crim.

App. 1976) (venue); Snodgrass v. State, 478 P.2d 965, 967 (Okla. Crim. App. 1970) (venue); Munson v. State, 758 P.2d 324, 332 (Okla. Crim. App. 1988) (jurisdiction); Guthrey v. State, 374 P.2d 925, 927 (Okla. Crim. App. 1962) (jurisdiction)). Therefore, imposition of a procedural bar in a collateral proceeding attacking a conviction for improper venue based on failure to follow state procedural rules is adequate to preclude federal habeas review of this claim. This Court cannot consider the improper venue claim on the merits unless Petitioner can overcome his procedural default by demonstrating either "cause and prejudice" or that a fundamental miscarriage of justice will occur if his claims are not considered. Coleman, 501 U.S. 722 (1991).

The "cause" prong of the standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for "prejudice," a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

In his amended response to Attorney General's brief (#7), Petitioner argues that appellate counsel erred in failing to raise the venue and jurisdiction issues on direct appeal. Constitutionally ineffective assistance of counsel may establish cause excusing Petitioner's procedural default of the improper venue claim. Coleman, 501 U.S. at 753-54; McClesky v. Zant, 499 U.S. at 493-94. To prevail on an ineffective assistance of counsel claim, Petitioner must first show that his counsel's performance was deficient. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Petitioner

must allege facts that indicate counsel's representation "fell below an objective standard of reasonableness." Id. at 688. This Court presumes that Petitioner's counsel provided him reasonable professional assistance, and Petitioner must overcome the presumption that, under the circumstances, the challenged representation "might be considered sound trial strategy." Id. (internal quotation marks and citation omitted). Petitioner must also establish prejudice by showing "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. If Petitioner fails to establish either the performance or prejudice prong of the Strickland test, the ineffective assistance claim fails. See id.

Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel. See, e.g., Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992), cert. denied, 113 S. Ct. 2347 (1993). In attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument that could be made. See Jones v. Barnes, 463 U.S. 745, 754 (1983). A petitioner, however, may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker.

When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986); see also Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987) (ineffective assistance of counsel when appellate counsel ignored "a substantial,

meritorious Fifth Amendment issue" raising instead a weak issue"). The claim whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim, so long as the "failure to raise the state . . . claim fell 'outside the wide range of professionally competent assistance.'" Claudio, 982 F.2d at 805 (quoting Strickland, 466 U.S. at 690).

In this case, Petitioner claims that the reason he failed to raise these issues in his direct appeal was "due to incompetency of his appellate attorney, Barry Benefield. Mr. Benefield was appointed by the Court to represent Mr. Cox on his direct Appeal. Mr. Cox was unable to get hold of his attorney about the issues being brought up on appeal, and that is the reason why the Habeas Corpus was presented in the court of appeals." (#7, at 1). However, after reviewing the supplemental record provided by Respondent, the Court finds counsel's failure to raise on appeal the claim of improper venue does not fall below the standard of reasonably effective assistance. Because the record, as cited supra, demonstrates that venue was proper in the District Court of Delaware County and does not support Petitioner's claim that he lived in Arkansas, a claim of improper venue raised on appeal would appear to have been weak.

In contrast to the instant claims challenging jurisdiction and venue, the claims presented by appellate counsel on direct appeal were significant and obvious. Appellate counsel raised two claims, (1) the state was allowed to introduce extensive irrelevant and prejudicial evidence regarding other crimes, and (2) other improper and prejudicial evidence and prosecutorial comment were admitted. Although Petitioner's conviction and sentences were affirmed by the OCCA, these claims prompted a dissenting opinion from one of the OCCA judges who wrote:

I would affirm the judgment, but not the sentence. During the course of the trial, certain evidence of sexual abuse by Appellant upon his daughter was improperly introduced. While I would agree that in light of all the evidence in this case the

improper evidence was overcome by overwhelming evidence of guilt, I cannot say with a sufficient degree of certainty that the evidence did not wrongfully have an adverse affect on the sentence. I would therefore reduce the sentence.

(#9, Ex. B). Clearly, appellate counsel chose significant evidentiary issues to present on direct appeal. The Court finds that the issues now raised by Petitioner are not "clearly stronger" than those presented on appeal by appellate counsel and Petitioner has failed to overcome the strong presumption that counsel provided professional assistance. Petitioner cannot succeed on an ineffective assistance of counsel claim. Therefore, Petitioner has failed to establish "cause" to excuse his procedural default. In light of Petitioner's failure to demonstrate "cause," the Court need not analyze the "prejudice" component.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992). The "fundamental miscarriage of justice" exception to the procedural bar doctrine is narrow and applies only in "extraordinary" cases where an individual is "actually innocent" of the crime for which he has been convicted. McClesky, 499 U.S. at 494. This case is not one of those "extraordinary" cases.

Having failed to demonstrate cause and prejudice or a fundamental miscarriage of justice, Petitioner is unable to overcome the procedural default of his claim of improper venue. Therefore, this Court is precluded from considering the claim on the merits.

### *CONCLUSION*

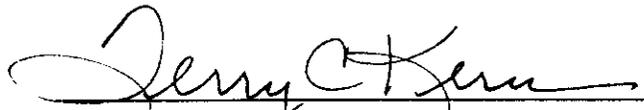
In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which Petitioner has

objected. Petitioner's jurisdictional challenge is without merit and his claim of improper venue is procedurally barred. The Court concludes that for the reasons discussed in this opinion rather than for the reasons identified in the Report, the recommendation of the Magistrate Judge should be affirmed, and the petition for writ of habeas corpus should be denied.

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

- (1) The recommendation of the Magistrate Judge (#11) is **affirmed**;
- (2) The petition for writ of habeas corpus is **denied**.

SO ORDERED THIS 22 day of April, 1998.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

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

**FILED**  
APR 22 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GARY DEAN MCMACKIN, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
BURLINGTON NORTHERN )  
RAILROAD and JAMES O. DAVIDSON, )  
 )  
Defendants. )

Case No. 97-C-1026-H

ENTERED ON DOCKET

DATE 4-23-98

**ORDER**

This matter comes before the Court on Defendant's notice of removal (Docket # 1). Plaintiff Gary D. McMackin originally brought this action in the District Court of Ottawa County. Plaintiff's Petition alleges that Defendants Burlington Northern Railroad ("Burlington") and James O. Davidson negligently operated a freight train which collided with a vehicle driven by Plaintiff. In his Petition, Plaintiff seeks damages in excess of \$10,000.<sup>1</sup>

Defendants removed this action to this Court on the basis of diversity jurisdiction. Defendants contend that diversity jurisdiction is properly invoked here because Burlington is a foreign corporation incorporated in Delaware with its principal place of business in Texas and because Mr. Davidson is a citizen of Kansas. Defendants further contend the federal jurisdictional amount in controversy is met, stating:

the amount in controversy, upon information and belief, is in excess of \$75,000 exclusive of interest and costs.

Def. Notice of Removal, ¶ 2 (Docket # 1).

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<sup>1</sup>In Oklahoma, the general rules of pleading require that:

[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000) shall, without demanding any specific amount of money, set forth only that amount sought as damages is in excess of Ten Thousand Dollars (\$10,000), except in actions sounding in contract.

Okla. Stat. tit. 12, § 2008(2).

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Section 1447 requires that a case be remanded to state court if at any time before final judgment it appears the court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). Initially, the Court notes that federal courts are courts of limited jurisdiction. With respect to diversity jurisdiction, “[d]efendant’s right to remove and plaintiff’s right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand.” Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$75,000. 28 U.S.C. § 1332(a). The Tenth Circuit has clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$75,000. The Tenth Circuit stated:

[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. The burden is on the party requesting removal to set forth, in the notice of removal itself, the “underlying facts supporting [the] assertion that the amount in controversy exceeds [\$75,000].” Moreover, there is a presumption against removal jurisdiction.

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995) (citations omitted) (emphasis in original); e.g., Hughes v. E-Z Serve Petroleum Marketing Co., 932 F. Supp. 266 (N.D. Okla. 1996) (applying Laughlin and remanding case); Barber v. Albertson’s, Inc., 935 F. Supp. 1188 (N.D. Okla. 1996) (same); Martin v. Missouri Pacific R.R. Co. d/b/a Union Pacific R.R. Co., 932 F. Supp. 264 (N.D. Okla. 1996) (same); Herber v. Wal-Mart Stores, 886 F. Supp. 19, 20 (D. Wyo. 1995) (same); Homolka v. Hartford Ins. Group, Individually and d/b/a Hartford Underwriters Ins. Co., 953 F. Supp. 350 (N.D. Okla. 1995) (same); Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (same).

Further, “both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.” Laughlin, 50 F.3d at 873. See Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (Anpac) v. Dow Quimica de Colombia S.A., 988 F.2d 559, 565 (5th Cir. 1993) (finding defendant’s conclusory statement that “the matter in controversy exceeds [\$75,000] exclusive of interest and costs” did not establish that removal jurisdiction was proper); Gaus v. Miles, Inc., 980 F.2d 564 (9th Cir. 1992) (mere recitation that the amount in controversy exceeds \$75,000 is not sufficient to establish removal jurisdiction).

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds \$75,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$75,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction at the time of removal, and not by supplemental submission. Laughlin, 50 F.3d at 873. See Herber, 886 F. Supp. at 20 (holding that the jurisdictional allegation is determined as of the time of the filing of the Notice of Removal). And the Tenth Circuit has clearly stated what is required to satisfy that burden. As set out in Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995), if the face of the petition does not affirmatively establish that the amount in controversy exceeds \$75,000.00, then the rationale of Laughlin contemplates that the removing party will undertake to perform an economic analysis of the alleged damages with underlying facts.

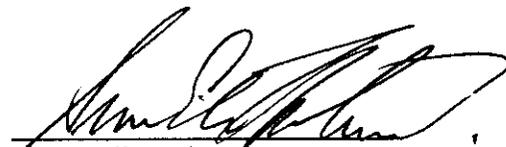
In the instant case, in his Petition, Plaintiff has asserted only one claim for relief that exceeds \$10,000. Therefore, the amount in controversy is not met by the face of the Petition. In its notice of removal, Defendants failed to set forth any specific facts that demonstrate the federal

amount in controversy has been met. Accordingly, the Court finds that Defendants' conclusory assertions do not satisfy the standards set forth by the Tenth Circuit in Laughlin. The Court concludes that removal is improper on the basis of diversity jurisdiction since it has not been established, either in Plaintiff's Petition or in Defendants' notice of removal, that the amount in controversy here exceeds \$75,000.

Based upon a review of the record, the Court holds that Defendants have not met their burden, as defined by the court in Laughlin. Thus, the Court is without subject matter jurisdiction and lacks the power to hear this matter. As a result, the Court must remand this action to the District Court of Ottawa County. The Court hereby orders the Court Clerk to remand the case to the District Court in and for Ottawa County. Accordingly, Plaintiff's motion to consolidate this action with case number 98-CV-248-B is hereby denied as moot.

IT IS SO ORDERED.

This 22<sup>ND</sup> day of April, 1998.

  
Sven Erik Holmes  
United States District Judge

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

ROGER DAVIS; KATHLEEN HENSON;  
JOANN OLMSTEAD; STEVE SNELLING;  
BOBBY SHOCKLEY,

Plaintiffs,

v.

SOFAMOR DANEK GROUP, INC.;  
DANEK MEDICAL, INC.; SOFAMOR, S.N.C.,

Defendants.

ENTERED ON DOCKET

DATE 4-23-98

96-CV-1007 K ✓

FILED  
APR 23 1998  
C

ORDER OF DISMISSAL WITHOUT PREJUDICE

Phil Lombardi, Clerk  
U.S. District Court

Now on this 22 day of April, 1998, this matter comes on for consideration of Plaintiffs Motion to Dismiss Without Prejudice based upon the grounds that they have cases involving the same parties and the same issues pending in concurrent Oklahoma state court cases, and the Court having examined the files and records herein, having considered the legal arguments of and authorities cited by the parties, and being otherwise fully advised in the premises, finds and adjudges as follows:

1. The Plaintiffs Roger Davis and Joann Olmstead have claims pending in Jerry Allen, et. al. v. Sofamor Danek Group, Inc., et. al., Case No. CJ 95-4658, in the District Court of Tulsa County, State of Oklahoma, against this Defendant and others. The state court case encompasses, not only the same issues of fact and law, but additional issues involving additional defendants. The Oklahoma state court litigation will resolve all issues between the parties and will avoid "piecemeal" litigation. When all factors are

considered it is in the best interests of all concerned that the issues between them be litigated in the state court forum.

2. The Plaintiffs Kathleen Henson and Steve Snelling have claims pending in Winford Arnold, et. al. v. Sofamor Danek Group, Inc., et. al., Case No. CJ 95-4657, in the District Court of Tulsa County, State of Oklahoma, against this Defendant and others. The state court case encompasses, not only the same issues of fact and law, but additional issues involving additional defendants. The Oklahoma state court litigation will resolve all issues between the parties and will avoid "piecemeal" litigation. When all factors are considered it is in the best interests of all concerned that the issues between them be litigated in the state court forum.

3. The Plaintiff Bobby Shockley has claims pending in Bobby Shockley, et. al. v. Sofamor Danek Group, Inc., et. al., Case No. CJ 95-4659, in the District Court of Tulsa County, State of Oklahoma, against this Defendant and others. The state court case encompasses, not only the same issues of fact and law, but additional issues involving additional defendants. The Oklahoma state court litigation will resolve all issues between the parties and will avoid "piecemeal" litigation. When all factors are considered it is in the best interests of all concerned that the issues between them be litigated in the state court forum.

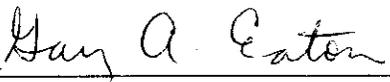
4. This Court should exercise its judicial discretion pursuant to Rule 41 of the Federal Rules of Civil Procedure and dismiss this case without prejudice upon terms and conditions that preserve the Plaintiffs' rights under 12 Okl. St. Ann. Sec. 100. More

specifically, this dismissal without prejudice shall be deemed not to constitute a dismissal which invokes the operation of 12 Okl. St. Ann. Sec. 100, and this dismissal shall not operate to adversely affect or limit the Plaintiffs' right to file a new action if the aforementioned state court case should fail otherwise than on the merits.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that this action is dismissed without prejudice upon terms and conditions set forth above.

  
Judge Terry Kern

approved as to form:

  
\_\_\_\_\_  
Gary A. Eaton, Eaton & Sparks,  
Attorneys for Plaintiffs

\_\_\_\_\_  
Abowitz, Rhodes and Dahnke, P.C.  
Attorneys for Defendants

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

**FILED**  
IN OPEN COURT  
APR 21 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

M. LOYCE McFERRAN, )  
Plaintiff, )

vs. )

KARLA STARKEY, LARRY Y. COLE, )  
PAULA COLE FLY, and DENNIS )  
McFERRAN, collectively known as THE )  
TEXAS McFERRANS, )  
Defendants and Third-Party Plaintiffs, )

vs. )

THE TRUST COMPANY OF )  
OKLAHOMA, an Oklahoma trust )  
company, )  
Third-Party Defendant. )

Case No. 97-CV-694-K(M) /

ENTERED ON DOCKET  
DATE 4-23-98

**JUDGMENT**

NOW on this 21 day of April, 1998, the Court, being fully advised in the premises, and being further advised that the Third-Party Plaintiffs, Karla Starkey, Larry Y. Cole, Paula Cole Fly, and Dennis McFerran, and the Third-Party Defendant, The Trust Company of Oklahoma, have agreed to the terms of this Judgment, as reflected in the pleadings filed in this case, accordingly enters Judgment as follows:

It is hereby ORDERED, ADJUDGED AND DECREED that:

1. Third-Party Defendant The Trust Company of Oklahoma, in its capacity as Personal Representative of the Estate of John Harmon McFerran, is directed to comply with the terms of the Pledge and Security Agreement between the parties hereto, by making all payments or transfers required by paragraph 2 thereof, in the form and amount to be determined either (a) by a binding written settlement agreement between the Plaintiff and Defendants hereto, or (b) by separate order and judgment by this Court

binding upon both Plaintiff and Defendants hereto, to be entered following trial of the claims between the Plaintiff and Defendants hereto or following this Court's consideration and determination of any dispositive motions filed therein. In the event the form and amount of the payments or transfers required by this Judgment are determined by separate order and judgment by this Court binding upon both Plaintiff and Defendants hereto as contemplated above, Third-Party Defendant The Trust Company of Oklahoma's payments or transfers pursuant to this Judgment shall occur only after said order and judgment has become final in all respects, following exhaustion of all rights of appeal by the parties thereto, or following expiration of all deadlines for appeal with respect thereto with no appeal having been filed. Third-Party Defendant The Trust Company of Oklahoma's obligation to make the payments or transfers required by this Judgment shall extend only in its capacity as Personal Representative of the Estate of John Harmon McFerran. In no event shall the amount to be paid, or assets to be transferred, by Third-Party Defendant The Trust Company of Oklahoma pursuant to this Judgment exceed the net assets available to the Estate of John Harmon McFerran for such payments or transfers.

2. Compliance by Third-Party Defendant The Trust Company of Oklahoma with this Judgment shall discharge the obligations of the Third-Party Defendant pursuant to the Pledge and Security Agreement.

3. By signature of counsel of record affixed hereto, the Defendants and Third-Party Plaintiffs, and Third-Party Defendant waive all rights of appeal from this Judgment.

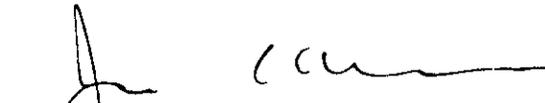
4. With regard to the claims asserted by the Third-Party Plaintiffs against the Third-Party Defendant, in the Third-Party Complaint, each party shall bear its own attorney fees and costs.

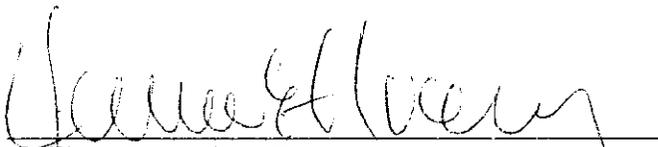
5. The Court expressly determines that there is no just reason for delay of filing a final judgment as to the third-party claims asserted by the Third-Party Plaintiffs named herein against the Third-Party Defendant named herein, and, therefore, expressly directs that this Judgment be entered as final judgment with regard to said third-party claims.

Dated this 21 day of April, 1998.

  
TERRY KERN, DISTRICT JUDGE

AGREED:

  
Richard P. Hix, OBA No. 4241  
James C. Milton, OBA No. 16697  
DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.  
320 South Boston Ave., Ste. 500  
Tulsa, Oklahoma 74103-3725  
918-582-1211; fax 918-591-5362  
Attorneys for the Third-Party Defendant, The Trust Company of Oklahoma

  
William E. Hughes, Esq.  
320 South Boston Ave., Ste. 1020  
Tulsa, Oklahoma 74103  
Attorney for the Defendants and Third-Party Plaintiffs



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Bill V. Wilkinson, Esq.

Lawrence W. Zeringue

WILKINSON LAW FIRM

7625 East 51st Street, Ste. 400

Tulsa, Oklahoma 74145

Attorneys for the Plaintiff

**F I L E D**

APR 22 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

DAVID BRUCE HAWKINS, )  
)  
Plaintiff, )  
vs. )  
)  
STEVE W. KAISER, et al., )  
)  
Defendants. )

Case No. 96-CV-47 I-B  
Consol.

ENTERED ON DOCKET

**APR 23 1998**

**ORDER**

Plaintiff David Bruce Hawkins ("Plaintiff"), a *pro se* prisoner, filed this 42 U.S.C. §1983 action on May 24, 1996, in the Northern District of Oklahoma, Case No. 96-CV-471-B. In his Complaint, Plaintiff advances five (5) primary claims against Steven Kaiser ("Kaiser"), Chief of Security of the Oklahoma Department of Corrections, in his official and individual capacities. Plaintiff also asserts the same claims against John Does #1 through #5 and Richard Roes #1 through #5, also in their official and individual capacities.<sup>1</sup>

On July 3, 1996, in Northern District of Oklahoma Case No. 96-CV-607-B, Plaintiff filed a civil rights Complaint alleging virtually the same claims against Rick Peters ("Peters"), Procedures Officer, Jess Dunn Correctional Center, in his official and individual capacities. Unique to this case, Plaintiff asserts Defendant Peters subjected him to physical and sexual abuse prior to 1991.

On September 5, 1996, in Northern District of Oklahoma Case No. 96-CV-804-Bu, Plaintiff filed a civil rights Complaint. Again he alleged almost identical claims against Larry Fields

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<sup>1</sup>Unless otherwise indicated, each consolidated complaint also states the same causes of actions against the John Does and Richard Roes.

10:45 a.m. 60

("Fields"), Director of Oklahoma Department of Corrections, and Kathy Waters ("Waters"), Deputy Director of the Oklahoma Department of Corrections, in their official and individual capacities, as those stated against Defendant Kaiser.

Preceding the three (3) filings in the Northern District of Oklahoma, on February 28, 1996, in Western District of Oklahoma Case No. 96-CV-311-T, Plaintiff, joined by two additional plaintiffs, Charles A. Newby and Gerald Warledo, filed a civil rights Complaint alleging virtually the same claims against Ron Champion ("Champion"), Michael Cody ("Cody"), Steve Hargett ("Hargett"), and Ronald [sic] (Robert) Davis ("Davis") as in the Kaiser Complaint.<sup>2</sup> On April 4, 1997, that case was transferred to the Northern District of Oklahoma and assigned Case No. 97-CV-323-K. Prior to the transfer, defendants Cody and Hargett were dismissed by the plaintiffs and the Court ruled plaintiffs could proceed under their properly filed Amended Complaint. However, the Court dismissed all claims plaintiffs attempted to bring in their Amended Complaint which arose from confinement in other institutions, finding these were improperly joined. Consequently, the case proceeded only as to the originally named defendants even after amendment. Claims against defendants Judy Waken, George Roach, Pricilla Drummond, Robbie Williamson, Josh Lee and Frederick Burris, who were never served, were not allowed to be pursued.

On May 16, 1997, the undersigned consolidated the four (4) actions into Case No. 96-CV-471-B.

### ***Pending Motions***

Before the Court are Defendant Kaiser's Motion to Dismiss and Alternative Motion for

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<sup>2</sup> The additional plaintiffs were allegedly in the same restrictive housing unit as plaintiff Hawkins and also were allegedly subjected to firecrackers being thrown in their cells.

Summary Judgment (Docket # 25), Defendant Peters' Motion to Dismiss (Docket # 4, former Case No. 96-CV-607-B), Defendants Fields' and Waters' Motion to Dismiss (Docket # 12, former Case No. 96-CV-804), and Defendant Champion's Motion to Dismiss (filed July 15, 1996, in former Case No. 96-CV-311-T, Western District of Oklahoma and docketed as part of the entire transferred case file as pleading #1). Plaintiff substantively responded to the stated motions, and also requested sanctions, including dismissal and incarceration, (Docket #'s 12 and 13, Case # 96-CV-607) be levied against certain defendants for what he characterizes as deliberate misconduct in attempting to mislead the Court.<sup>3</sup>

All parties have submitted matters outside the pleadings which have been considered by the Court. Accordingly, each Motion to Dismiss shall be treated as a Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56. See Fed.R.Civ.P. 12(c). Defendants have submitted Court ordered Special Reports to aid the Court in its consideration of Plaintiff's claims.<sup>4</sup> Additionally, the parties have supplemented their pleadings pursuant to Court Order.

### ***Plaintiff's Alleged Claims for Relief***

In summary, Plaintiff seeks damages and injunctive relief primarily as follows:<sup>5</sup>

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<sup>3</sup>Plaintiff has changed the caption of his pleadings to name additional defendants not properly before the Court. There having been no leave granted to amend the pleadings to add these additional parties, and the Court having previously stricken Plaintiff's Amended Complaint for failure to seek leave to file, response as to these nonparties need not be addressed.

<sup>4</sup>Where a *pro se* prisoner is a plaintiff, a court authorized "Martinez Report" (Special Report) prepared by prison officials may be necessary to aid the Court in determining possible legal bases for relief for unartfully drawn complaints. See Hall v. Bellmon, 935 F. 2d 1106 (10th Cir. 1991). The Court may treat the Special Report as an affidavit in support of a motion for summary judgment, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The Court must also construe plaintiff's *pro se* pleadings liberally for purposes of summary judgment. See Haines v. Kerner, 404 U.S. 519 (1972). No special report was ordered in 96-CV-607.

<sup>5</sup>See Plaintiff's Complaint, Case # 96-CV-471. Virtually identical allegations are made against Larry A. Fields and Kathy Waters et. al., in Case #96-CV-804.

- (1) He was injured as a result of firecrackers being thrown into his cell by prison guard Robert Davis at the direction of Kaiser on July 4, 1995, in retaliation for Plaintiff having filed another civil rights action and in an attempt to coerce Plaintiff to dismiss that action.<sup>6</sup> This was a violation of his constitutional rights as guaranteed under the Eighth and Fourteenth Amendments (cruel and unusual punishment);
- (2) He was denied effective medical attention for the injuries sustained in the firecracker incident in violation of his constitutional rights as guaranteed under the Eighth and Fourteenth Amendments as a result of policies approved, instituted and condoned by Kaiser which were designed to cause indifference to Plaintiff's plight (denial of medical care);
- (3) The firecracker incident constituted an assault and battery;
- (4)
  - a. In violation of his Fourth, Eighth, and Fourteenth Amendment rights, other inmates beat him after prison officials told them Plaintiff "snitched" on a former cellmate (the former cellmate subsequently committed suicide); and
  - b. Certain of his personal property has been lost or stolen by employees of a correctional facility in violation of his constitutional rights; and
- (5) The acts complained of constitute intentional infliction of emotional distress.

### ***Motions for Summary Judgment***

Defendant Kaiser states seven propositions in support of summary judgment. They are:

- I. There is no liability on the part of a defendant who did not personally participate in the alleged violation;
- II. Plaintiff's allegations are conclusory, vague, and general;
- III. The named defendant, Steve Kaiser, lacks the capacity to be sued in tort;
- IV. Plaintiff has failed to allege a violation of his Eighth Amendment rights;
- V. Plaintiff has failed to state a claim for his lost property;

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<sup>6</sup>The prison guard who actually lit and threw the firecrackers is Robert Davis, who ceased employment with the Department of Corrections sometime after this incident. Another prison guard who had nothing to do with the incident named Ronald Davis was named as a defendant in Case # 96-CV-311. By Court Order dated June 24, 1997, the Court sua sponte amended Plaintiff's Complaint to correct the name.

- VI. Plaintiff has no standing to bring this action as to other inmates; and,
- VII. Plaintiff has failed to allege a violation of his Eighth Amendment rights relating to attacks by other inmates.

Defendants Larry Fields and Kathy Waters move to dismiss on the grounds Plaintiff has failed to allege exhaustion of administrative remedies. Defendant Rick Peters filed the same motion. Defendant Champion asserted arguments raised by Kaiser and also moved for judgment on the grounds of qualified immunity.<sup>7</sup>

### *Summary Judgment Standard*

Summary judgment pursuant to Fed.R. Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material fact..." Nonmovant "must do more than simply show that there is some metaphysical

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<sup>7</sup>Defendants Cody and Hargett also moved to dismiss, however, this motion was rendered moot by Plaintiffs' voluntary dismissal as to these Defendants. Plaintiffs responded to Defendant Champion's motion by filing an amended complaint in which they abandoned their claim for inadequate medical care and clarified that Defendant Champion was being sued in his individual capacity, thereby confessing Defendant Champion's 11th Amendment immunity defense. In lieu of replying to Plaintiffs' response, Defendant Champion filed a second Motion to Dismiss which alleged improper venue, resulting in the transfer of the action to the Northern District of Oklahoma and eventual consolidation with this action.

doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. See Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. See Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). Id. at 1521.

In support of summary judgment, Defendant Kaiser has submitted thirty-nine (39) material facts as to which he alleges no material dispute exists. Plaintiff counters these facts with general denials, unsupported by evidentiary material, that the statements made are "denied . . . misleading, incorrect, vague and not true". Pursuant to N.D. LR. 56.1 B., Kaiser's undisputed facts are deemed admitted in that Plaintiff wholly failed to state any grounds or cite to any evidence or any reference in the record to controvert any fact asserted by Kaiser. A mere recitation that a fact is

controverted, without supporting authority in the record, is not sufficient to create a controverted fact, particularly where Kaiser has supported his statement of facts with references to the record and evidence in the case. The Court nevertheless reviewed the statement of undisputed facts and finds them to be substantially supported by the evidentiary material submitted.

Having reviewed the voluminous pleadings and authorities filed herein, the Court addresses the issues raised by topic for ease of consideration and finds as follows:

#### ***42 U.S.C § 1983***

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For relief to be granted under section 1983, a plaintiff must prove that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970).

#### ***Cruel and Unusual Punishment***

Plaintiff has alleged Defendant Kaiser encouraged prison guard Davis to throw firecrackers into Plaintiff's cell as part of a conspiracy to inflict cruel and unusual punishment and to threaten, intimidate, and harass Plaintiff with deliberate indifference to his Eighth and Fourteenth Amendment rights. Such actions are alleged to have been taken under color of law. Plaintiff further alleges Kaiser, through Davis, sought to retaliate against him for yet another lawsuit Plaintiff brought against Kaiser in the Western District of Oklahoma. Defendants Peters, Fields, Waters, and Champion are alleged to have promoted, instituted, and condoned the policies and procedures employed by Kaiser as related to the firecracker incident.

To sustain an Eighth Amendment violation based on deliberate indifference, Plaintiff must allege and prove the conditions evidence a wanton disregard for the safety of Plaintiff and that prison officials had a "sufficiently culpable state of mind." Farmer v. Breman, 114 S. Ct. 1970, 1977 (1994). Prison conditions "must not involve the wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Neither can they be disproportionate to the severity of the crime warranting imprisonment. See id. The Eighth Amendment proscribes punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society" or those which "involve the unnecessary and wanton infliction of pain." Estelle v. Gamble, 429 U.S. 97, 102-03 (1976). Conditions resulting in the "unquestioned and serious deprivation of basic human needs" constitute cruel and unusual punishment. Rhodes, 452 U.S. at 347 (citing Hutto v. Finney, 437 U.S. 678 (1978)). In contrast:

[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.

Rhodes, 452 U.S. at 347.

Viewing the evidence in the light most favorable to Plaintiff, the Court concludes Plaintiff's claim that Kaiser, through Davis, inflicted cruel and unusual punishment upon him is unsupported by the record. Plaintiff offers no probative evidence supporting Kaiser was in any way connected with the firecracker incident. Further, the record is devoid of evidence showing Defendants Peters, Fields, Waters, and Champion or any named defendant approved, instituted, or condoned Davis' alleged actions, or were in any way connected to the firecracker incident, save correspondence from Plaintiff after the fact. See e.g., Offender Grievance Report Form of 9/26/95 to Larry Fields and Ron Champion, Special Report, Part I, Attachment G, Docket # 26;

see also Letter to Plaintiff from Kathy Waters, Special Report, Part I, Attachment H, Docket # 26. Further, Defendant Kaiser affirms he did not cause Officer Davis to threaten and physically attack and assault Plaintiff. See Affidavit of Stephen Kaiser, Special Report, Part I, Attachment F, Docket # 26.

Plaintiff's claims of cruel and unusual punishment against Defendants Kaiser, Peters, Fields, Waters, and Champion ("remaining Defendants") are nothing more than unsupported conclusory allegations. Conclusory allegations without supporting factual averments are insufficient. See Dunn v. White, 880 F.2d 1188, 1197 (10th Cir. 1988), cert. denied 493 U.S. 1059 (1990). Such allegations may be disregarded by the Court. See Mitchell v. King, 537 F.2d 385, 386 (10th Cir. 1976). The Court is of the opinion remaining Defendants are entitled to judgment as a matter of law on Plaintiff's claim of cruel and unusual punishment.

#### ***Medical Attention***

Plaintiff contends that as of July 5, 1995, he began to submit requests for medical treatment for injuries allegedly sustained as a direct result of the firecracker incident, but that he was not examined by Dick Conner Correctional Center medical personnel until July 10, 1995. On July 14, 1995, Plaintiff was transferred to Lexington Correctional Center. Plaintiff alleges his requests for medical attention submitted during his incarceration at Lexington Correctional Center were ignored and/or refused by Defendant Kaiser and his employees. Plaintiff alleges Defendant Kaiser's actions were condoned by Defendants Peters, Fields, Waters, and Champion.

The record indicates otherwise. According to a January 8, 1996, memo prepared by Guy Henning, M.D., Staff Physician, Dick Conner Correctional Center, Plaintiff suffered a third degree acromioclavicular separation in 1983. This injury required surgery and left Plaintiff with some

disability and vulnerability to additional injury. See Interoffice Memorandum, Special Report, Part I, Attachment L, Docket # 26.

In connection with the firecracker incident, Plaintiff was originally treated by nurses and then seen by Dr. Henning on July 10, 1995. Dr. Henning diagnosed a muscle strain of the right shoulder and some strain of his back. Id. Plaintiff was seen on July 19, 1995, by Lexington Correctional Center medical staff pursuant to complaints of a painful shoulder. X-rays were taken which showed no abnormalities. Plaintiff was then referred to an orthopedic consult who found no surgically correctable problem. After that, Plaintiff no showed on several appointments. Id.

According to the memo, on November 27, 1995, Plaintiff received a thorough examination from Myra Campbell, P.A., which revealed a frozen shoulder and atrophy of the shoulder girdle compatible with disuse. Id. Thoracic spine x-rays were taken to check for nerve root impingement syndrome, but none was found. Id. In the opinion of Dr. Henning, Plaintiff "was incarcerated with a defective right shoulder girdle with a previous surgery for acromioclavicular separation which made him vulnerable to injury and strain. The July 4, 1995 incident resulted in him straining [the shoulder], resulting in a painful situation in that right shoulder. He did not use it so he got disuse atrophy and now has a frozen shoulder." Id.

X-rays of Plaintiff's right shoulder and spine were taken on February 9, 1996. See Special Report, Part I, Attachment O, Docket # 26. The X-rays revealed no more than mild degenerative changes of thoracic spine and medication and physical therapy were recommended. Id. Records show Plaintiff was also seen on February 12 and 16, 1996. Id.

With respect to Defendant Kaiser's alleged involvement, Plaintiff has failed to provide any evidence which suggests Defendant Kaiser acted in such a manner as to prevent Plaintiff

from obtaining necessary treatment and care. There is no evidence of which employees under Kaiser's supervision assisted in the alleged denial of medical care. The record is void of evidence showing Defendants Peters, Fields, Waters, and Champion condoned the alleged actions of Defendant Kaiser as related to Plaintiff's medical condition. Therefore, remaining Defendants are entitled to judgment as a matter of law on Plaintiff's denial of medical attention claim.

### ***Cellmate's Suicide***

While incarcerated at Unit Six of the James Crabtree Correctional Center, Plaintiff states he was the cellmate of one Terry Fossberg ("Fossberg"). Around March or April of 1995, Plaintiff claims Fossberg conveyed to Plaintiff that he was extremely emotionally upset and was considering suicide. Plaintiff claims to have immediately reported this to prison officials. Plaintiff was subsequently transferred to Unit Three, another locus within the James Crabtree Correctional Center. Shortly after arriving at Unit Three, Plaintiff contends he was severely beaten by other inmates in Unit Three. Plaintiff was then transferred to the Restricted Housing Unit of the James Crabtree Correctional Center. Fossberg later committed suicide by hanging himself with a belt.

Plaintiff contends, without supporting evidence, that the transfer to Unit Three was punishment for reporting the purported problems of Fossberg, and the beating by other inmates was the result of prison officials telling inmates in Unit Three that Plaintiff "snitched" on Fossberg. Plaintiff contends he has suffered "extreme grief, emotional distress, anxiety, depression, mental anguish, and fear of being killed" in prison in violation of his Fourth, Eighth, and Fourteenth Amendment rights. Complaint, at 11.

The record completely refutes Plaintiff's assertions. The affidavit of Jo Gwinn ("Gwinn"), Unit Manager of Housing Unit Six where Plaintiff was incarcerated during the relevant time period, establishes lack of knowledge of Plaintiff notifying any prison official concerning any other offender considering or contemplating suicide. Gwinn goes on to state generally that Plaintiff was transferred to Unit Three based on unacceptable behavior, including abuse of the privilege granted Plaintiff by officials in charge of Unit Six of selecting his cellmates. Finally, Gwinn denies having snitched on Plaintiff, or having any knowledge of any prison official snitching on Plaintiff, or directing any other offender to harm Plaintiff. See Affidavit of Jo Gwinn, Special Report, Part II, Attachment B, Docket # 26. Dan Grogan, a Senior Correctional Case Manager of Housing Unit Six during the relevant time period, testifies in a similar fashion. See Affidavit of Dan Grogan, Special Report, Part II, Attachment C, Docket # 26. Similar affidavits submitted by William Canaas, John Davis, and Curtis Schmidt further refute Plaintiff's claims. See Special Report, Part II, Attachment D, E, and F, Docket # 26.

As to the Fourth Amendment component of Plaintiff's fourth claim for relief, Plaintiff has no constitutional right to be incarcerated in a particular cell or facility, and his transfer from Unit Six to Unit Three, in and of itself, does not implicate a constitutional right of Plaintiff. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); see also Meachum v. Fano, 427 U.S. 215, 224 (1976); see also Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Changing an inmate's prison classification ordinarily does not deprive him of liberty, because he is not entitled to a particular degree of liberty in prison. See Meachum, 427 U.S. at 225 (explaining that the Due Process Clause does not protect a prisoner against transfer to another prison, even if more restrictive). Thus, any expectation

Plaintiff may have had in remaining in Unit Six of the James Crabtree Correctional Center does not rise to the level of a due process violation. See Meachum, 427 U.S. at 228; see also Kincaid v. Duckworth, 689 F.2d 702, 704 (7th Cir. 1982), cert. denied, 461 U.S. 946 (1983); see also Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991) (because an inmate has no right to confinement in a particular institution, "[h]e cannot complain of deprivation of his 'right' in violation of due process"); see also Twyman v. Crisp, 584 F.2d 352 (10th Cir. 1978) (plaintiff's transfer to maximum custody was completely within sphere of authority of prison officials and plaintiff had no legitimate claim of being entitled to remain in general prison population).

Additionally, federal courts do not interfere in prisoner classification and placement decisions. Such decisions are entrusted to the broad discretion of prison administrators, not to the federal courts. See Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228; see also Hewitt v. Helms, 459 U.S. 460, 467-68 (1983); see also Wilkerson v. Maggio, 703 F.2d 909, 911 (5th Cir. 1983); see also Twyman, 584 F.2d at 356-57. Accordingly, remaining Defendants are entitled to summary judgment on this element of Plaintiff's fourth claim for relief.

As to the Fourteenth Amendment component of Plaintiff's fourth claim for relief, the Court concludes Plaintiff has not established remaining Defendants intentionally or purposefully discriminated against him, see Brisco v. Kusper, 435 F.2d 1046, 1052 (7th Cir. 1970) (the "Equal Protection Clause has long been limited to instances of purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers"), or that he is a member of a protected group. Plaintiff's equal protection allegation is simply based on the alleged deprivation of his individual rights. See Gamza v. Aquirre, 619 F.2d 449, 453 (5th Cir. 1980) (holding that "isolated events that adversely affect individuals are not presumed to be a violation of the equal

protection clause"). Accordingly, remaining Defendants are entitled to judgment as a matter of law on this element of Plaintiff's fourth claim for relief.

Lastly, the Court concludes the Eighth Amendment component of Plaintiff's fourth claim for relief must fail. Under the clear legal precedents defining the parameters of an Eighth Amendment claim set forth above, the Court concludes Plaintiff has failed to show remaining Defendants possessed a culpable state of mind surrounding Plaintiff's transfer from Unit Six to Unit Three. The mere fact that the conditions of confinement in Unit Three may have been harsher than those of Unit Six and interfered with Plaintiff's ability to select his cellmates does not suffice to establish that remaining Defendants intentionally subjected Plaintiff to cruel and unusual punishment. Therefore, remaining Defendants are entitled to summary judgment on this element of Plaintiff's fourth claim for relief.

#### ***Stolen/Lost Property***

Plaintiff claims he has suffered a loss of approximately \$2,080.45 worth of personal property as a result of prison officials "deliberately exposing it to be stolen by the inmate population while the Plaintiff was in R.H.U. and almost all of the Plaintiff's personal property was then stolen or lost." Complaint, at 9.

The negligent or intentional taking of property by a state employee does not violate the Due Process Clause if a meaningful postdeprivation remedy for the loss is available. See Hudson v. Palmer, 468 U.S. 517, 533 (1983). Oklahoma law provides a basis for the recovery of money and/or personal property wrongfully taken, see 12 Okl.St. Ann. § 1571 *et seq.* (West 1997), and the Court is of the opinion said postdeprivation remedy is adequate and meaningful. Further, prison regulations clearly state the risk of loss of personal property brought into the

facility falls on the inmate. See OP-030120, Special Report, Part II, Attachment R, Docket # 26. Plaintiff signed Oklahoma Department of Corrections Inmate Personal Property Inventory Forms on August 8, 1993, and May 2, 1995, which state in bold letters the acknowledgment, "I REALIZE THAT I BRING ANY PERSONAL PROPERTY INTO THE FACILITY AT MY OWN RISK." See Special Report, Attachment Q, p. 2, Docket # 26.

Although the legal authority pertinent to this claim proves fatal, Plaintiff ensures the demise of this claim by failing to offer evidence remaining Defendants were in any way connected to the alleged disappearance of his personal property. Those alleged to have been in charge of Plaintiff's personal property at the relevant time, not named as defendants herein, have filed affidavits stating that at no time did any inmate have access to Plaintiff's property and that the rules and procedures of the Oklahoma Department of Corrections were followed. See Special Report, Part II, Attachments K and L, Docket # 26. Accordingly, remaining Defendants are entitled to summary judgment on Plaintiff's claim his personal property was lost or stolen in violation of his constitutional rights.

#### ***Assault and Battery /Intentional Infliction of Emotional Distress***

Plaintiff's pendent state law claims of assault and battery and intentional infliction of emotional distress in connection with the firecracker incident must fail as to remaining Defendants. While the Court is of the opinion fact questions may exist as to Robert Davis on the cruel and unusual punishment claim and the pendent state law claims, the record is void of any evidence connecting remaining Defendants to the firecracker incident. Accordingly, remaining Defendants are entitled to judgment as a matter of law on Plaintiff's pendent state law claims.

#### ***Exhaustion of Administrative Remedies/Sanctions***

The Court next considers the assertions raised by Defendants Fields, Waters and Peters regarding failure of Plaintiff to exhaust administrative remedies. In response to Defendant Peters motion, Plaintiff has presented copies of grievances he claims were submitted to various officials relating to his claims. Defendant Peters replied, stating there is no evidence that the documents tendered by Plaintiff were ever received by anyone involved in the grievance process. The files contain numerous grievances marked as "received" in some fashion, yet none of Plaintiff's proffered exhibits are so marked. Plaintiff has presented no credible evidence that these grievances were properly and timely tendered.

In response to Plaintiff's various requests for sanctions, including incarceration and entry of default judgment, (Docket #'s 12 and 13, Case # 96-CV-607) the Court notes that the retaliatory conduct of the prison guard Robert Davis in throwing firecrackers into Plaintiff's cell took place during the time period in which the procedures submitted by Defendant were in effect. Those procedures would therefore have been applicable to Plaintiff's grievance in regard to any participation or direction of others in the egregious incident, including Defendant Peters. Additionally, the grievance forms submitted by Plaintiff contain a notation in the bottom right hand corner indicating the grievance form was created or last updated in 1986, thereby indicating the form has advised prisoners of the 15 day time period within which a grievance must be filed as far back as that date, which would encompass all of Plaintiff's allegations. The additional materials submitted by Defendants comply with the spirit and intent of the Court's Order for supplementation of the record.

Plaintiff wrote letters to the Court on May 7, 1997 and May 13, 1997, addressed to Magistrate Judge Sam Joyner and the undersigned respectively, accusing Ms. Pauletta Jones of

destroying evidence. These are extremely serious charges for which Plaintiff offers no outside affidavits or evidence. The Court therefore independently directed Ms. Jones to respond to the allegations. By letter of May 21, 1998, Ms. Jones responded, advising the Court that the enclosure which was to have been sent for her response was missing. Nevertheless, Ms. Jones attached a response she had previously provided to Plaintiff which appears to address the issues raised. Absent any independent testimony or evidence that the referenced papers were purposely thrown away, the Court accepts the explanation offered by Ms. Jones as presented through her correspondence. All correspondence relating thereto is now hereby made part of the file.<sup>8</sup>

Based upon the evidence presented, the Court finds Defendants' Fields, Waters and Peters Motions to Dismiss, considered as Motions for Summary Judgment, should be granted.<sup>9</sup> Plaintiff's Motion for Sanctions should be overruled.

### III. OTHER MOTIONS PENDING

In addition to the above referenced motions, the Court also has before it for decision the following motions and/or matters:

1. Following consolidation by this Court of the various pending cases, Plaintiff Gerald Warledo filed a pleading styled "Preliminary Statement and Dismissal of Defendants Steve W. Kaiser, Rick Peters and Kathy Waters" on July 24, 1997. (Docket # 56, Case #96-CV-311) The filing of this pleading, considered by the Court as a Motion to Dismiss, clearly indicates Plaintiff Warledo misunderstands the consequences of consolidation. Plaintiff's claim does not

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<sup>8</sup>The Court struck docketed pleading # 32, the letter addressed to Magistrate Joyner by Order dated 6/17/97 (Docket #40) as being filed without leave of Court in violation of the Court's Order staying the proceedings. The substance of the accusations against Ms. Jones merited the Court's independent review of this issue.

<sup>9</sup>Insofar as the substantive issues raised by Defendants Kaiser and Champion encompass Plaintiff's claims against these Defendants, those claims would also be subject to entry of judgment as stated herein.

automatically encompass all other named defendants without amendment to allege specific acts of other defendants against that plaintiff. Plaintiff Warledo originally sued only Defendant Champion.

In addition to “dismissing” claims against the three named defendants in other cases, Plaintiff Warledo also states within his pleading that he wishes to retain claims against Larry Fields and Defendant Champion. For the reasons given, Plaintiff has no claim to retain as to Defendant Fields. Plaintiff’s Motion is therefore stricken as moot.

2. Plaintiff Warledo also filed a Motion for Production of Documents seeking handwritten statement of Correctional Officer Robert Davis referenced in the Special Report filed herein and copies of disciplinary action taken against the named correction officer. (Docket # 59, Case #96-CV-471) No response to either pleading has been filed. The Court notes the only pleading containing a valid certificate of service on defendant counsel as required by court rules is the Supplemental Brief in Support of the Preliminary Statement, considered by this Court as a Motion to Dismiss. No response was necessary as to this pleading. Accordingly, there being no proof of service as to the Motion for Production, the same is denied.

3. Plaintiff Hawkins filed Response to Report and Recommendation (“R&R”) entered by Magistrate Judge Sam Joyner on February 21, 1997, (Docket # 22, Case # 96-CV-471) in which he objects to the Magistrate’s findings that Plaintiff’s Motions for Default Judgment (Docket #'s 4, 5 and 6) be denied. Following de novo review by the Court as required by 28 U.S.C. § 636(b)(1)(C), the Court concludes Plaintiff’s objections should be overruled and the R&R adopted by this Court.

4. Defendant Kaiser also filed Response to the Magistrate’s R&R (Docket #23, Case #

96-CV-471) entered February 11, 1997 (Docket #20) in which the Magistrate Judge Joyner recommended denial of Defendant's Motion to Dismiss for failure to exhaust administrative remedies. (Docket #10) Based upon this Court's ruling on Defendant Kaiser's Motion for Summary Judgment, the Court finds this motion to now be moot.

5. At the time Case #96-CV-311 was transferred to the Northern District of Oklahoma on the basis of venue and assigned the Case # 97-CV-323, there were three motions pending. The first is Plaintiff Hawkins Motion for Leave to Proceed on Appeal Pursuant to 28 U.S.C. § 1915 and Fed. R. App. P. 24 (Docket #29, Case #96-CV- 311). At the same time, following withdrawal of Plaintiff Hawkins' counsel, Plaintiff Hawkins moved to proceed *pro se*. (Docket #32, Case #96-CV-311 ). The Court finds both motions should be granted.

Additionally, Plaintiff filed a Motion for Default Judgment against Defendant Ronald Davis. (Docket #30, Case # 96-CV-311). Plaintiff filed similar motions for default against Ronald Davis in Case # 96-CV-471. (Docket # 50) Plaintiff is aware that Ronald Davis is not the proper party to this action by virtue of prior Orders of this Court. (See Docket # 68 in which Ronald Davis was dismissed with prejudice) The Court will therefore deny entry of a default judgment against him. The proper party is Robert Davis, upon whom the file reflects no proper service has been achieved.<sup>10</sup> The Court's Order dated June 24, 1997 (Docket # 43) finding proper service on Robert Davis is vacated. In all other respects, the Court's Order remains in full force and effect. Plaintiff is given 60 days from April 16, 1998 within which to serve Robert Davis.

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<sup>10</sup> An unexecuted return of service was submitted to the Court on 8/26/97 with a notation that DOC is unable to provide information on Robert Davis due to privacy issues.

6. At telephone pretrial held April 16, 1998, Plaintiff Warledo stated he had filed a Motion for Appointment of Counsel in July of 1997. No such motion appears in the record. The Court therefore considers the oral request of Plaintiff at pretrial and finds the same should be denied.

7. Finally, the Court has reviewed the various attempts to amend the Complaint tendered by Plaintiff Hawkins and concludes that the only grievance raised therein which relates to the issues remaining before the Court is an inartfully plead prayer for injunctive relief against the Oklahoma Department of Corrections to provide necessary medical attention to Plaintiff Hawkin's shoulder injury. In keeping with this Court's prior rulings regarding medical care for Plaintiff Hawkins, the Court grants Plaintiff Hawkins, by and through his special appearance attorney of record, twenty (20) days within which to file an Amended Complaint adding the Oklahoma Department of Corrections as a party defendant for the purpose of following through with the medical care issues currently before the Court. Insofar as this Order is in conflict with earlier Orders of the Court, (Docket #'s 40, 48 and 68) those Orders are hereby vacated only as to this specific issue and proposed defendant.<sup>11</sup>

#### IV. CONCLUSION

Pursuant to the findings contained herein,

- [1] Defendants Kaiser (Docket #25, Case # 96-CV-471) and Champion (filed July 15, 1996 in former Case # 96-CV-311) are granted summary judgment on each of Plaintiff's claims;

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<sup>11</sup>The Court is in receipt of a medical report prepared by Dr. Norman Dunitz dated April 7, 1998 regarding Plaintiff Hawkin's current condition in which Dr. Dunitz recommends Plaintiff would be a candidate for surgical repair of the chronic dislocating factor of the shoulder, as well as repair of the shoulder cuff on certain stated conditions. Dr. Dunitz also recommends further medical procedures prior to surgery and raises issues which must be addressed post-surgically in the event surgery is ultimately necessary.

- [2] Unnamed Defendants John Does and Richard Roes are dismissed consistent with this Order;
- [3] Plaintiff's requests for sanctions (Docket #'s 12 and 13, Case # 96-CV-607) are denied;
- [4] Defendants Fields, (Docket # 12, Case # 96- CV-804) and Waters, (Docket # 12, Case # 96 -CV-804) Motion to Dismiss based upon failure of Plaintiff to exhaust administrative remedies is granted; Defendant Peters' ( Docket #4, Case # 96-CV-607) Motion to Dismiss is granted on the same ground;
- [5] Plaintiff Warledo's Motion to Dismiss (Docket #56, Case #96-CV-471) is stricken as moot;
- [6] Plaintiff Warledo's Motion for Production of Documents is denied; (Docket # 59, Case #96-CV-471)
- [7] Plaintiff Hawkins' Objection to the Report and Recommendation of the Magistrate (Docket # 22, Case # 96-CV-471) is overruled and the Court adopts the Report and Recommendation as entered;
- [8] Defendant Kaiser's Objection to the Report and Recommendation (Docket #23, Case # 96-CV-471) is denied as moot;
- [9] Plaintiff Hawkins' Motion for Leave to Proceed on Appeal (Docket #29, Case #96-CV-311) is granted;
- [10] Plaintiff Hawkins' Motion to Proceed *Pro Se* (Docket #32, Case #96-CV-311) is granted;
- [11] Plaintiff Hawkins' Motion for Default Judgment (Docket #30, Case # 96-CV-311) is denied and Plaintiff is given sixty (60) days from April 16, 1998 within which to serve Robert Davis;
- [12] The Court's Order of June 24, 1997 (Docket #43, Case # 96-CV-471) is vacated insofar as the finding that Robert Davis was properly served and Plaintiff is given 60 days from April 16, 1998 within which to serve Robert Davis; in all other respects, the Order remains in full force and effect;
- [13] Plaintiff Hawkins is given twenty (20) days from the date of this Order to amend his Complaint consistent with the findings of this Order;
- [14] Plaintiff Warledo's oral Motion for Appointment of Counsel made at pretrial on April 16, 1998 is denied.

[15] Each party shall bear their own attorney fees and costs.

This case shall proceed against Defendant Robert Davis at such time as Plaintiff Hawkins properly serves this defendant as ordered. A case management conference will be scheduled following amendment as set forth herein.

IT IS SO ORDERED THIS 22<sup>nd</sup> day of April 1998.

  
THE HONORABLE THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

DATE APR 23 1998

TYALENA K. FRIEND, an individual, )  
)  
Plaintiff, )  
)  
vs. )  
)  
TRINITY UNIVERSAL INSURANCE )  
COMPANY, a Foreign Insurance Company, and )  
SECURITY NATIONAL INSURANCE )  
COMPANY, a Foreign Insurance Company, )  
)  
Defendants. )

Case No. 98-C-155-E ✓

**FILED**

APR 22 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Now before the Court is the Motion To Remand (docket #4) of Plaintiff, Tyalena K. Friend.

Plaintiff filed suit in the District Court for Osage County, State of Oklahoma, and Defendants were served on January 12, 1998. Defendants filed their notice of removal on February 24, 1998. Plaintiff now seeks remand to Osage County, arguing that Defendants' removal was untimely under the terms of 28 U.S.C.A. §1446(b). That section provides:

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable, except that

a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

Plaintiff argues that removal is untimely because Defendants filed their notice more than 30 days after they were served, and because the “removability of Plaintiff’s original state court petition was apparent upon a reasonable reading of the face of the document.” Defendants argue, on the other hand, that they were unable to ascertain whether plaintiff’s original suit was in excess of the \$75,000.00 jurisdictional amount until receipt of Plaintiff’s response to discovery requests on February 12, 1998. Defendants assert further, relying on Laughlin v. K-Mart Corporation, 50 F.3d 871 (10th Cir. 1995), that “a petition which ‘merely alleges that the amount in controversy is in excess of \$10,000.00’ did not affirmatively establish the requisite amount in controversy for diversity jurisdiction.”

Defendants reliance on Laughlin is misplaced. Laughlin holds that the “amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. 50 F.3d, at p. 873. The fact that the allegations in the Complaint “do not affirmatively establish the requisite amount in controversy for diversity jurisdiction” is not tantamount to a finding that a reasonable reading of the face of the document would not compel an attorney to conclude that the case was removable. In fact, the Court is convinced that a reasonable reading of the complaint, which included claims for “severe” bodily injury, breach of the covenant of good faith and fair dealing, punitive damages, and attorney fees would compel an attorney to conclude that the case was removable, and would provide sufficient facts to allow counsel to satisfy the requirement of Laughlin in the allegations of the notice of removal. See also, Barber v. Albertson’s, Inc., 935 F.Supp. 1188 (N.D. Okla. 1996).

Plaintiff’s Motion to Remand (Docket #4) is granted.

IT IS SO ORDERED THIS 22<sup>d</sup> DAY OF APRIL, 1998.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

DELISA ATCHLEY )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE NORDAM GROUP, INC., )  
 a Delaware Corporation, )  
 )  
 Defendant and )  
 Third Party Plaintiff, )  
 )  
 vs. )  
 )  
 DESIGN SUPPORT SERVICES, INC., )  
 an Oklahoma Corporation, )  
 )  
 Third Party Defendant. )

**FILED**  
 ✓ APR 22 1998  
 Phil Lombardi, Clerk  
 U.S. DISTRICT COURT

ENTERED ON DOCKET  
 DATE APR 23 1998

**ORDER**

Currently pending before the Court is a motion filed by defendant, The Nordam Group, Inc. ("Nordam"), seeking judgment as a matter of law, pursuant to Rule 50 of the Federal Rules of Civil procedure, or in the alternative a new trial, pursuant to Rule 59.

On April 26, 1996, plaintiff Atchley filed the present action against Nordam alleging violations of the Pregnancy Discrimination Act, Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e et seq. ("Title VII"), and the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq. ("FMLA"). On May 9, 1996, Nordam filed a third-party complaint against Design Support Services, Inc. ("DSS"), pursuant to Rule 14 of the Federal Rules of Civil Procedure. On September 17, 1996, Atchley filed an amended complaint naming third-party defendant DSS. Each party subsequently filed motions for summary judgment, pursuant to Rule 56, which the Court denied on December 19, 1996.

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*Clara*

On August 18, 1997, a jury trial commenced regarding Atchley's employment discrimination claim stemming from her pregnancy. At the close of Atchley's evidence, the Court granted DSS's motion for directed verdict and denied Nordam's motion for directed verdict finding that Nordam was in fact Atchley's statutory employer under Title VII. On August 21, 1997, the jury returned a verdict for plaintiff Atchley on both her Title VII and FMLA claims. The jury awarded Atchley \$9,000 in back pay and \$8,000 for emotional distress and other nonpecuniary losses. The jury further awarded Atchley \$9,000 in liquidated damages on her FMLA claim and \$65,000 in punitive damages under Title VII.

On December 22, 1997, Nordam filed its present motion for judgment as a matter of law or, in the alternative, a new trial. Nordam contends that it is entitled to a judgment as a matter of law because: 1) the evidence did not support an award of punitive damages; 2) the evidence was insufficient to support a finding of liability under Title VII; 3) Atchley failed to prove a claim under the FMLA; 4) there was no evidence to support an award of damages for emotional distress; 5) the Court lacked subject matter jurisdiction; 6) awarding both liquidated damages and punitive damages constituted impermissible double recovery; and, 7) the evidence was insufficient to support an award of liquidated damages under the FMLA. Alternatively, Nordam seeks a new trial on the grounds that either DSS should not have been dismissed as a party to the proceedings or that the testimony of plaintiff's witness, Dianna McCuddy, should not have been allowed.

Rule 50(b) of the Rules of Civil Procedure governs the Court's power to grant judgment as a matter of law notwithstanding the verdict. With the passage of the 1991 amendment to Rule 50, both a motion for directed verdict and a motion for judgment notwithstanding the verdict are now termed "motion for judgment as a matter of law." Weese v. Schukman, 98 F.3d 542, 547 (10th Cir.

1996). The standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict. Id. at 547. The standard employed when considering a motion for judgment as a matter of law is well-settled in the Tenth Circuit. In deciding whether to grant judgment as a matter of law, the Court “must determine whether, viewing the evidence in the light most favorably to the nonmoving party, the evidence and the inferences to be drawn from it are so clear that reasonable minds could not differ on the conclusion.” McKenzie v. Renberg’s, Inc., 94 F.3d 1478, 1483 (10th Cir. 1996)(citations omitted), cert. denied, 117 S.Ct. 1468 (1997). “A motion for a judgment as a matter of law is cautiously and sparingly granted and then only when the court is certain the evidence ‘conclusively favors one party such that reasonable men could not arrive at a contrary verdict.’” Schukman, 98 F.3d at 547 (quoting Western Plains Serv. Corp. v. Ponderosa Dev. Corp., 769 F.2d 654, 656 (10th Cir. 1985)). Further, the Court “may not weigh the evidence, pass on the credibility of witnesses, or substitute [its] judgment for that of the jury.” Wolfgang v. Mid-America Motorsports, Inc., 111 F.3d 1515, 1522 (10th Cir. 1997). It is the function of the jury as the finder of fact, not the Court, to weigh conflicting evidence and judge the credibility of witnesses. Brodrick v. Derby, 236 F.2d 35, 37 (10th Cir. 1956).

With the above standard in mind, the Court finds and concludes that Nordam’s motion for judgment as a matter of law is overruled. Nordam first complains that there was insufficient evidence to support an award of punitive damages under Title VII. Nordam argues that it was not Atchley’s employer for statutory purposes and that Atchley failed to present evidence showing that Nordam acted with the requisite intent to support an award of punitive damages. Nordam first asserts that DSS, and not it, was Atchley’s employer under Title VII and therefore owed Atchley no duty to provide employment upon her return from maternity leave. Rather, Nordam maintains that it was

DSS who was responsible for finding Atchley employment after she gave birth. It follows that, if Nordam were not Atchley's employer, it could not be liable for punitive damages.

Alternatively, Nordam maintains that notwithstanding the Court's finding that it was indeed Atchley's employer, its assertion that DSS was the proper employer was made in good faith.<sup>1</sup> Thus, an award of punitive damages would be improper in that such an award requires a showing that the defendant acted "with malice or with reckless indifference." 42 U.S.C. § 1981a(b)(1). As evidence of its good faith, Nordam asserts that the true reason Atchley was not allowed to return to her position was that Nordam underwent a corporate restructuring while she was on maternity leave which resulted in her position being eliminated.

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<sup>1</sup> At the close of Atchley's case, the Court granted DSS's motion for directed verdict finding as a matter of law that the totality of the circumstances dictated that Nordam was Atchley's employer under Title VII. Lambertsen v. Utah Dept. of Corrections, 79 F.3d 1024, 1028 (10th Cir. 1996). While it is true that the Court must consider many factors and that an employee may have more than one employer for Title VII purposes, the "main focus of the court's inquiry is the employer's right to control the 'means and manner' of the worker's performance." Id. at 1028 (citation omitted). With this in mind, the Court stated:

Now it appears to the Court that clearly Nordam, under Title VII, would be considered as an employer, and the Court's fully aware that simply being a qualified employer is not a sufficient showing.

The Court must also find that the individual was an employee of that qualified employer. To do that one must look at all of the circumstances of the duties the employee performs. And the entity here that controlled all the work was Nordam.

I therefore find that Nordam was the employer, under Title VII, of Ms. Atchley.

Trial Transcript of August 21, 1997, Atchley v. Nordam, at p. 9.

In short, the evidence at trial showed inter alia that Nordam controlled every aspect of Atchley's employment and granted her maternity leave. She interviewed with and was hired by Nordam. Additionally, Atchley's evidence showed that Nordam determined her work schedule and that she requested maternity leave from her superior at Nordam: Mr. John Calvert. He subsequently granted her request and told her that nothing more was necessary. Further, Calvert memorialized this understanding on Nordam letterhead and confirmed the anticipated start date of Atchley's maternity leave. The confirmation letter and thereby Atchley's maternity leave were both approved by Mr. Dan Gallagher, Nordam's Director of Engineer. Moreover, it was Nordam who informed Atchley that she had been discharged upon her return from maternity leave.

Even so, Nordam is not entitled to a judgment as a matter of law. An award of punitive damages does require “malice or reckless indifference,” but the employer’s “acts need not have been ‘extraordinarily egregious’ to support a finding of punitive damages.” Luciano v. Olsten Corp., 110 F.3d 210, 220 (2nd Cir. 1997). “The requisite level of recklessness or outrageousness [required to support punitive damages] can be inferred from management’s participation in the discriminatory conduct.” Kim v. Nash Finch Co., 123 F.3d 1046, 1066 (8th Cir. 1997).

In the present case, more than sufficient evidence was presented showing that Nordam’s management was involved in the conduct at question. Indeed, Atchley’s maternity leave was sanctioned by two supervisors: Mr. Calvert and Mr. Gallager. See discussion infra note 1, p. 4. Further, the decision to discharge Atchley, by its very nature, must have been made by management.<sup>2</sup> Additional evidence of Nordam’s culpable intent can be gleaned by the fact that Atchley was the only employee whose position was affected by the purported restructuring. Moreover, the jury heard Nordam’s arguments concerning restructuring and completely rejected them which shows further culpable intent.<sup>3</sup> See generally, U.S. v. Brown, 53 F.3d 312, 314 (11th Cir. 1995)(holding that a

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<sup>2</sup> Management is defined: “Government, control, . . . act of managing by direction . . . or administration, as . . . of servants, or of great enterprises, or of great affairs. Discretionary power of direction.” Black’s Law Dictionary 662 (Abridged 6th ed. 1991). Hence, the power to control the terms of one’s employment, e.g., hire and fire, necessarily implies the actions of management.

<sup>3</sup> The Court’s instruction to the jury regarding punitive damages provides in pertinent part:

Under Title VII a plaintiff may recover punitive damages by showing that the defendant engaged in pregnancy discrimination “with malice or with reckless indifference to her federally protected rights.”

If you find in favor of the plaintiff under the Pregnancy Discrimination Act and award plaintiff compensatory damages, and if you additionally find that Nordam acted with malice or reckless indifference to plaintiff’s right not to be discriminated against on the basis of pregnancy and maternity leave, then you may, but you are not required to, award plaintiff an amount of punitive damages.

jury's rejection of a defendant's theory may be considered as substantive evidence of the defendant's guilt.); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)(stating that intentional discrimination may be proved indirectly by showing that "the employer's proffered explanation is unworthy of credence."). Especially considering that once the Court deems the issue worthy of submittal to the jury, the award of punitive damages is well "within the sound discretion of the trier of fact." Jackson v. Pool Mortgage Co., 868 F.2d 1178, 1182 (10th Cir. 1989).

Based on the Court's own independent review of the evidence, the Court does not find that the evidence so conclusively favors Nordam that reasonable minds could not differ on the conclusion. On the contrary, the Court finds that Nordam's actions and the evidence presented in support thereof were certainly sufficient to warrant the jury's award of punitive damages. Hence, the Court will not disturb the jury's verdict.

Nordam next challenges the sufficiency of the evidence underlying the jury's finding of Title VII liability.<sup>4</sup> Nordam maintains that "there is no evidence that there were any employees who, like Atchley, were employed through DSS but received *from NORDAM* a leave of absence for non-pregnancy medical conditions." This argument is disingenuous and wholly without merit as the evidence at trial indicated that other similarly situated employees were granted leave for non-

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<sup>4</sup> The Court notes that Nordam, in its brief, incorrectly asserts without authority that "Title VII only requires that an employee who is not able to work because she is temporally disabled by pregnancy-related conditions must have her job held open for her return on the same basis as jobs are held open for male employees on sick or disability leave." On the contrary, "the clear language of [Title VII] requires the court to compare treatment between pregnant persons and 'other persons not so affected but similar in their ability or inability to work.'" EEOC v. Ackerman, Hood & McQueen, Inc., 956 F.2d 944, 948 (10th Cir. 1992)(citing 42 U.S.C. § 2000e(k)). "The comparison is, therefore, between pregnant and nonpregnant workers, not between men and women." Id. at 948.

pregnancy related medical conditions and were subsequently returned to their position. Specifically, evidence was introduced which showed that two other persons whom Nordam employed “through” DSS, Carol Lane and David Lafevers, were granted leave for non-pregnancy related ailments and were returned to their positions thereafter.

In the alternative, Nordam asserts that it articulated a non-discriminatory reason for the discharge and that Atchley failed to rebut it. Nordam maintains that Atchley’s employment was terminated due to a corporate restructuring and not because she took maternity leave. Nordam argues that two of its divisions were merged while Atchley was on maternity leave which resulted in her position being eliminated. Nordam further argues that, while this merger did not totally eliminate Atchley’s position, she was not qualified to fill the new position, and that this new position was eventually filled by a full-time Nordam employee. Nordam maintains that such a reason for Atchley’s discharge was valid and that Atchley failed to show “any evidence that cast doubt upon the reason’s articulated by NORDAM for eliminating her position.”

True, “[e]mployers have the right to restructure jobs and job responsibilities, but they cannot use that process to implement discriminatory objectives.” Quarantino v. Tiffany & Co., 71 F.3d 58, 65 (2nd Cir. 1995). Further, “[a]n employee may always show that her employer’s decisions on restructuring--as applied to her--were made to displace her for impermissible reasons such as taking maternity leave.” Id. at 65. The evidence presented at trial painted just such a picture. As previously discussed, Atchley provided evidence that similarly situated employees were indeed granted leave and reinstated. Atchley also provided evidence that indicted disparate treatment in that she was the sole employee displaced by Nordam’s restructuring. Further evidence of Nordam’s discriminatory practices was presented by plaintiff’s witness, Diana McCuddy, who testified that she too was treated

in a discriminatory manner after informing Nordam that she was pregnant. Moreover, the finder of fact completely rejected Nordam's restructuring argument. See Burdine, 450 U.S. at 256 (1981)(stating that intentional discrimination may be proved indirectly by showing that "the employer's proffered explanation is unworthy of credence."). For the foregoing reasons, the Court finds that the evidence was certainly sufficient to find Nordam liable under Title VII.

As its next grounds for judgment as a matter of law, Nordam maintains that Atchley failed to prove a claim under the FMLA. Nordam asserts that Atchley did not prove that she suffered from a "serious health condition." As authority, Nordam cites an unreported district court case, Dormeyer v. Comerica Bank -- Illinois, 1997 WL 403697, at \*3 (N.D. Ill. July 15, 1997), which holds that "pregnancy per se [sic] is not a serious health condition under the FMLA." Nevertheless, Nordam's present claim is overruled as it was not included in the pretrial order, nor was it raised at any other time during the proceedings. A pretrial "order shall control the subsequent course of the action unless modified by a subsequent order." F.R.Civ.P. 16(e). See R.L. Clark Drilling Contractor's, Inc. v. Schramm, Inc., 835 F.2d 1306, 1308 (10th Cir. 1987)(stating that "[a] pretrial order 'measures the dimensions of the law suit, both in the trial court and on appeal.'")(citations omitted). Indeed, in its pretrial order and contrary to its present position, Nordam submitted the following as a fact to be adjudicated at trial: "Has Plaintiff proved that her serious medical condition of pregnancy, and the time from work that she had to miss due to that condition, caused NORDAM not to reinstate her to employment." Nordam simply cannot now assert this novel argument. Accordingly, Nordam's present claim is denied as untimely.

Nordam next attacks the jury's award of damages on Atchley's claim for emotional distress arguing that the award of \$8,000 is unsupported by the evidence. Nordam maintains that Atchley

failed to prove any “genuine injury” and merely offered “vague and conclusory” testimony that the offending conduct caused her to be “shocked.” Thus, citing an EEO policy statement, Carey v. Phipus, 435 U.S. 247 (1978), and Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927 (5th Cir.1996), cert. denied, 117 S.Ct. 767 (1997), Nordam contends, without further explanation, that this testimony does not support an award of damages.<sup>5</sup>

Notwithstanding Nordam’s contention to the contrary, the Court finds that Atchley presented sufficient testimony to uphold the jury’s award. Nordam argues that plaintiff’s evidence failed to show an injury as “evidenced by the factors cited in the EEO policy statement.” EEOC Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act, Fair Employment Practices Manual (BNA) 405:7091, 7096 (July 7, 1992). However, the Court remains unpersuaded as there was testimony directly relating to the EEOC factors warranting an award, such as marital strain, anxiety, and stress. Id. at 7096. The evidence revealed that the offending conduct caused strain to Atchley’s familial and marital relationships. Further, Atchley testified as to the stress and anxiety resulting from her lengthy job search and her ultimately having to move out of state with a new born child. In addition to Atchley’s testimony, Calvert testified as to the initial effect which the discharge had on Atchley. Given the nature of the offending conduct at issue as well as Atchley’s evidence regarding the distress such conduct caused her, the Court is unable to conclude that the jury’s damages award is contrary to the evidence as the issue of emotional distress is easily understood by the jury. Mason v. Oklahoma Turnpike Auth., 115 F.3d 1442, 1457 (10th Cir. 1997). Furthermore,

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The Court notes that Nordam, citing Price v. City of Charlotte, 93 F.3d 1241 (4th Cir. 1996), cert. denied, 117 S.Ct. 1246 (1997), acknowledges that a plaintiff’s testimony alone may support an award of damages and that “Atchley is correct that her own testimony may serve as evidence of emotional distress.” Defendant Nordam’s Reply and Brief, Issue VI (issue is cited as defendant failed to place page numbers on its brief).

the award of \$8,000 is rather modest especially when considering the conduct in question. The Court is therefore unable to conclude that such an award was unsupported by the evidence.

Nordam next seeks judgement as a matter of law alleging that the Court lacked subject matter jurisdiction. Nordam argues that Atchley failed to exhaust her administrative remedies thereby rendering the Court without authority to adjudicate the case. Nordam is correct in that exhaustion of administrative remedies is a jurisdictional prerequisite for bringing Title VII suits in the federal courts and that such exhaustion requires the aggrieved employee to provide all relevant information to the EEOC. Khader v. Aspin, 1 F.3d 968, 971 (10th Cir. 1993). But, that is as far as the Court can agree because the argument is completely frivolous and without merit. Nordam merely recites that Atchley failed to provide all the relevant information to the EEOC without identification of said information. Presumably, Nordam is arguing, in accordance with their position at trial, that Atchley failed to inform the EEOC that she held a “temporary position” meaning that she had two employers; and thus, DSS was the proper defendant in this suit. In any event, Nordam’s present claim is denied. The Court, as previously discussed, found as a matter of law that Nordam was the statutory employer under Title VII. Furthermore, the evidence clearly established that Atchley cooperated fully with the EEOC.

Additionally, Nordam seeks judgment of matter on the issue of exemplary damages under Title VII and the FMLA. Nordam argues that an award of punitive damages under Title VII and liquidated damages under the FMLA constitutes an impermissible double recovery in that both are intended to punish the culpable party. That is, Nordam maintains that the aforementioned recoveries address and punish the same wrong. As authority, Nordam cites Bruno v. Western Elec. Co., 829 F.2d 957 (10th Cir. 1987), in which the Circuit addressed whether punitive and liquidated damages

were both recoverable under the Age Discrimination and Employment Act, 29 U.S.C. §§ 621 et seq. The Circuit held that only liquidated damages were recoverable because both measures of damages are penal in nature and such an approach would constitute double recovery. Id. at 966-67. However, Bruno has no bearing on the instant case as it deals with the recovery of exemplary damages under the same statute which by definition would constitute double recovery. On the other hand, “multiple punitive damage awards on overlapping theories of recovery may not be duplicative at all, but may instead represent the jury’s proper effort to punish and deter *all* the improper conduct underlying the verdict.” Mason, 115 F.3d at 1460. The present case presents just such a scenario. Title VII was enacted to curb racial and gender discrimination in the work place, and the corresponding damage awards are meant to compensate the victim and punish the violator for such discrimination. Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777, 784 (10th Cir. 1995)(citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975)). By contrast, the objectives of the FMLA are inter alia “to balance the demands of the workplace with the needs of the families, to promote the stability and economic security of families, and to promote national interest in preserving family integrity;” and “to entitle employees to take reasonable leave for medical reasons, [such as] for the birth . . . of a child . . .” 29 U.S.C. §§ 2601(b)(1) & (b)(2). The jury award in this case clearly addresses two separate and distinct wrongs, notwithstanding the fact that they are based on the same conduct. Hence, the Court, in light of the separate statutory schemes and purposes thereof, finds that the jury’s award of punitive and liquidated damages does not constitute double recovery. Thus, both awards will stand.

As its final grounds for attacking the verdict, Nordam asserts essentially the same argument made in its punitive damages and subject matter claim: that DSS was the true employer and that

Nordam had reasonable grounds for reaching such a determination. For these reasons, Nordam urges the Court to grant judgment as a matter of law as to the liquidated damages award under the FMLA. However, the Court has previously ruled that Nordam was Atchley's proper employer and will not revisit the issue. See discussion infra note 1, p. 4. The Court has further ruled that the punitive damages award will stand after finding that Nordam had the requisite intent warranting such a result. It follows, a fortiori, that conduct sufficient to support an award of punitive damages is certainly sufficient to uphold an award of liquidated damages under the FMLA.

In the alternative, Nordam seeks a new trial. Nordam first requests a new trial on the grounds that DSS should not have been dismissed as a party. Prior to addressing the merits of this issue, the Court notes as Nordam stated in its reply that the instant claim is not directed to Nordam's indemnification action against DSS. Rather, Nordam seemingly is attempting to masquerade as the plaintiff by asserting that the Title VII and FMLA claims against DSS should not have been dismissed.<sup>6</sup> However, Nordam has no standing to assert such a claim as it cannot show an injury resulting from the Court's decision absolving DSS of Atchley's discrimination claims. Wyoming ex rel. Sullivan v. Lujan, 969 F.2d 877, 880-81 (10th Cir. 1992). Hence, the present claim is dismissed due to Nordam's lack of standing.

In its second request for a new trial, Nordam contends that the testimony of Dianna McCuddy should have been excluded. Nordam asserts that this testimony could only have been used for the purpose of showing a pattern or practice of discrimination at Nordam, or alternatively, that is was

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<sup>6</sup> The Court further notes that the thirty (30) day time frame in which to attack the Judgment has lapsed. F.R.A.P. 4(a)(1). The Judgment was entered on December 10, 1997; and to date, no motions or appeal challenging its validity have been filed by either party with standing: Atchley or DSS. The Judgment is therefore final.

in the nature of inadmissible character evidence designed to show actions in conformity under Rule 404 of the Federal Rules of Evidence. Notwithstanding Nordam's contentions, this simply is not the case. "As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent." Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir. 1990). McCuddy's testimony was certainly relevant as to Nordam's treatment of pregnant employees and particularly the issue of damages. Hence, the Court overrules Nordam's final claim.

As a closing matter, the Court notes that Nordam has directed its motion to Atchley only. Nordam acknowledges this fact and states that "no affirmative relief [is requested] against DSS in its motion." Defendant Nordam's Reply at 1. Rather, Nordam continues to assert that DSS was the proper defendant in this action as a defense to liability. The Court has addressed each of Nordam's claims, which share this common thread, and summarily found each to be wanting for lack of substance. In any event, the Court's full denial of Nordam's present motion renders the issue moot.

In sum, both Nordam's motion for judgment as a matter of law and for a new trial are overruled. The Court finds that the evidence clearly supports an award of punitive damages and liability under Title VII. The Court further finds Nordam's assertion that Atchley failed to prove a claim under the FMLA waived as it was not included in the pretrial order or ever properly before the Court. Additionally, the award of damages for emotional distress will stand as Atchley presented adequate evidence of the maladies attributable to her discharge. Further, Nordam's assertion that the Court lacked subject matter jurisdiction is summarily dismissed as it is completely meritless. Likewise, Nordam's contention that an award of punitive and liquidated damages constitutes impermissible double recovery is dismissed. The Court also finds that the award of liquidated

damages under the FMLA is supported by the evidence. Finally, Nordam's request for a new trial is dismissed as well. Nordam's continued assertion that DSS was the only proper defendant in this case is reminiscent of an old flat tire: it is empty, well worn, and its usefulness has run its course. Further, Nordam's assertion that Dianna McCuddy's testimony should have been excluded is overruled as it was highly relevant which outweighed any prejudicial effect.

Accordingly, Nordam's motion for judgment as a matter of law, or in the alternative, a new trial is hereby DENIED.

IT IS SO ORDERED this 22<sup>nd</sup> day of April, 1998.



H. DALE COOK  
Senior United States District Judge



Pass Through Certificates, Series 1992-15, appears by its attorney Mark J. Peregrin; and the Defendant, Tulsa Development Authority of Tulsa, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, Mary Gay Ezell aka Mary G. Ezell, a widow, executed a Waiver of Service of Summons on February 28, 1996; that the Defendant, Tulsa Development Authority of Tulsa, executed a Waiver of Service of Summons on March 4, 1996; that the Defendant, Bankers Trust Company of California, N.A., As Trustee For RTC Mortgage Pass Through Certificates, Series 1992-15, executed a Waiver of Service of Summons on March 4, 1997.

It appears that Federal Deposit Insurance Corporation as Receiver of the Defendant, State Federal Savings and Loan Association, filed a Disclaimer on June 10, 1996; that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, filed its Answers on March 8, 1996 and February 5, 1997; that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on February 28, 1996; that the Defendant, Bankers Trust Company of California, N.A., As Trustee For RTC Mortgage Pass Through Certificates, Series 1992-15, filed its Motion to Dismiss on April 1, 1997 which motion to dismiss was denied by Order of the Court filed on December 15, 1997 and filed its Answer and Cross-Claim on February 24, 1998 pursuant to an Order of the Court granting leave to do the same filed on February 18, 1998; and that the Defendant, Tulsa Development Authority of Tulsa, has failed to answer and its default has therefore been entered by the Clerk of this Court.

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

Lot Nine (9), Block Seven (7), ROBERTS ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that in Case No. 90-C-571-B, United States District Court for the Northern District of Oklahoma, the United States of America on behalf of the Small Business Administration foreclosed on the business property located at The South One Hundred Fifteen (115) feet of Lots Five (5) and Six (6), Block One (1), ACRE GARDENS ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof. This action is to foreclose on the additional property shown on the mortgages as Lot Nine (9), Block Seven (7), ROBERTS ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that Reece Ezell Jr. and Mary Gay Ezell, husband and wife, became the record owners of the real property involved in this action by virtue of that certain General Warranty Deed dated May 27, 1955, from R. C. Bryant and Curlie B. Bryant, husband and wife, to Reece Ezell Jr. and Mary Gay Ezell, husband and wife, as joint tenants, and not as tenants in common, with the fee simple title in the survivor, the heirs and assigns of the survivor, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining forever, which General Warranty Deed was filed of record on June 3, 1955, in Book 2578, Page 441, in the records of the County Clerk of Tulsa County, Oklahoma.

The Court further finds that on November 3, 1992, Reece Ezell Jr. died in the County of Tulsa, Tulsa, Oklahoma. Upon the death of Reece Ezell Jr., the subject property vested in his surviving joint tenant, Mary Gay Ezell, by operation of law. On December 21, 1992, Mary Gay Ezell executed an Affidavit of Surviving Joint Tenant which was recorded on

December 21, 1992, in Book 5462, Page 2427. This affidavit terminated joint tenancy and vested title to the subject property in Mary Gay Ezell.

The Court further finds that on November 30, 1983, Reece Ezell Jr. (now deceased) and Mary Gay Ezell, husband and wife, executed and delivered to State Federal Savings and Loan Association, a Mortgage and Security Agreement in the amount of \$270,000.00, payable in monthly installments, with fluctuating interest of New York's minimum prime plus 2%, adjusted quarterly, on the unpaid balance. This mortgage and security agreement was recorded on November 30, 1983, in Book 4747, Page 2504, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 6, 1984, State Federal Savings and Loan Association executed a Partial Release of Mortgage. This Partial Release of Mortgage was recorded on November 7, 1984, in Book 4827, Page 789, in the records of Tulsa County, Oklahoma and covered the real property known as Lot Nine (9), Block Seven (7), Roberts Addition to the City of Tulsa, County of Tulsa, State of Oklahoma.

The Court further finds that on November 6, 1984, Reece Ezell, Jr. (now deceased) and Mary Gay Ezell, husband and wife, executed and delivered to State Federal Savings and Loan Association, a promissory note and mortgage in the amount of \$48,000.00 with interest as provided in those instruments. This mortgage was recorded on November 13, 1984 in Book 4828, Page 810, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 5, 1986, State Federal Savings and Loan Association assigned the above-described mortgage and security agreement to the Small Business Administration. This Assignment of Mortgage was recorded on February 24, 1987, in Book 5003, Page 1898, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 5, 1984, Reece Ezell Jr. (now deceased) and Mary Gay Ezell, as partners of Reece's Barbecue, executed and delivered to State Federal Savings and Loan Association an amended note in the amount of \$270,000.00, payable in monthly installments, with fluctuating interest of New York's minimum prime plus 2%, adjusted quarterly, on the unpaid balance.

The Court further finds that as security for the payment of the above-described amended note dated December 5, 1984, Reece Ezell Jr. (now deceased) and Mary Gay Ezell, husband and wife, executed and delivered to State Federal Savings and Loan Association an Amendment to Mortgage dated December 5, 1984, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This Amendment to Mortgage was recorded on December 6, 1984, in Book 4832, Page 1373, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 5, 1986, State Federal Savings and Loan Association assigned the above-described Amendment to Mortgage to the Small Business Administration. This Assignment of Amendment to Mortgage was recorded on February 24, 1987, in Book 5003, Page 1897, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 5, 1987, State Federal Savings and Loan Association executed that certain subordination agreement pursuant to which it subordinated its mortgage dated November 6, 1984 and recorded on November 13, 1984 at Book 4828, Page 810 in the amount of \$48,000.00 to the mortgage and security agreement dated November 30, 1983 and recorded November 30, 1983 in Book 4747, Page 2504 and the amendment to mortgage dated December 5, 1984 and recorded December 6, 1984 in Book 4832, Page 1373 in the amount of \$270,000.00

The Court further finds that Defendant, Mary Gay Ezell aka Mary G. Ezell, a widow, made default under the terms of the aforesaid mortgage and security agreement, note, and amendment to mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the mortgage and security agreement, note, and amendment to mortgage, after full credit for all payments made, the principal sum of \$268,146.41, plus accrued interest in the amount of \$290,315.92 as of September 5, 1995, plus interest accruing thereafter at the rate of 13.25 percent per annum or \$97.34 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, Mary Gay Ezell aka Mary G. Ezell, a widow, made default under the terms of the aforesaid mortgage and note dated November 6, 1984 by reason of her failure to make the monthly installments due thereon, which default has continued and that by reason thereof, Defendant, Bankers Trust Company of California, N.A, alleges that there is now due and owing under the mortgage and note, after full credit for all payments made, the principal sum of \$41,811.88, plus interest accruing from November 1, 1995 at 8% per annum until paid, costs accrued and accruing, abstracting expense, title report costs, property preservation expenses, late charges, insurance and attorneys fees of \$3,500.00.

The Court further finds that the Defendant, Mary Gay Ezell aka Mary G. Ezell, a widow, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, State Federal Savings and Loan Association, through Federal Deposit Insurance Corporation as its Receiver, disclaims all right, title, lien or claim, in or to the premises described in the Complaint.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has liens on the property which is the subject matter of this action in the total amount of ~~\$16,588.86~~ <sup>\$8,294.43</sup>, together with interest and penalty according to law, by virtue of the following tax warrants.

Tax Warrant No.	Amount	Recorded (Tulsa County)	Book/Page
STS8600206001	\$6,292.00	08/29/86	4966/1131
STS8600206000	\$6,292.00	08/29/86	4966/1132
STS8600287401	\$2,002.43	01/26/87	4997/863
STS8600287400	\$2,002.43	01/26/87	4997/864

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendant, Bankers Trust Company of California, N.A., As Trustee For RTC Mortgage Pass Through Certificates, Series 1992-15, has a lien against the property in the principal amount of \$41,811.88 as of November 1, 1995, plus interest accruing thereafter at the rate of 8 percent per annum, plus any additional sums advanced or to be advanced or expended during this foreclosure action for taxes, insurance, abstracting, title work, late charges, sums for the preservation of the subject property, attorney fees, and the costs of this action, by virtue of a being the holder of a mortgage in favor of

State Federal Savings and Loan Association filed November 13, 1984, in Book 4828 at Page 810, in the records of the Tulsa County Clerk's office, Tulsa, Oklahoma.

The Court further finds that the Defendant, Tulsa Development Authority of Tulsa, is in default and therefore has no right, title or interest in the subject property.

The Court further finds that the Internal Revenue Service has liens upon the property by virtue of the following Notices of Federal Tax Liens:

Serial No.	Amount	Recorded (Tulsa County)	Book/Page
74976	\$ 9,389.87	12/22/86	4990/837
82627	\$ 8,009.93	06/09/87	5029/45
83164	\$ 356.98	06/12/87	5030/991
85756	\$15,631.05	08/03/87	5042/3022
738917201	\$12,182.71	12/05/89	5223/1599
739200649	\$ 9,389.87	01/22/92	5375/1197

Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Internal Revenue Service is not made a party hereto; however, the liens should be released at the time of sale should the property fail to yield an amount in excess of the debt to the Small Business Administration.

The Court further finds that the United States of America has liens upon the property by virtue of Abstract of Judgment Notice dated January 23, 1992, and recorded on July 7, 1992 in Book 5418, Page 17 in the records of Tulsa County, Oklahoma; and by virtue of Abstract of Judgment Notice dated August 11, 1992, and recorded on August 14, 1992 in Book 5427, Page 1590 in the records of Tulsa County, Oklahoma. These liens should

be released at the time of sale should the property fail to yield an amount in excess of the debt to the Small Business Administration.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Small Business Administration, have and recover judgment **in rem** against Defendant, Mary Gay Ezell aka Mary G. Ezell, a widow, in the principal sum of \$268,146.41, plus accrued interest in the amount of \$290,315.92 as of September 5, 1995, plus interest accruing thereafter at the rate of 13.25 percent per annum or \$97.34 per day until judgment, plus interest thereafter at the current legal rate of 5.391 percent per annum until fully paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), 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, plus any other advances.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, have and recover **in rem** judgment in the total amount of ~~\$16,588.86~~ <sup># 8294.43</sup>, together with interest and penalty according to law, by virtue of the above-described tax warrants.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, Bankers Trust Company of California, N.A., As Trustee For RTC Mortgage Pass Through Certificates, Series 1992-15, have and recover judgment **in personam** and **in rem** against Mary Gay Ezell aka Mary G. Ezell and **in rem** against all other Defendants for its lien in the principal amount of \$41,811.88 as of November 1, 1995, plus interest accruing thereafter at the rate of 8 percent per annum, plus any additional sums advanced or to be advanced or expended during this foreclosure action for taxes, insurance, abstracting, title

work, late charges, sums for the preservation of the subject property, attorney fees, and the costs of this action, by virtue of a being the holder of a mortgage in favor of State Federal Savings and Loan Association filed November 13, 1984, in Book 4828 at Page 810, in the records of the Tulsa County Clerk's office, Tulsa, Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Mary Gay Ezell aka Mary G. Ezell, a widow; State Federal Savings and Loan Association; Tulsa Development Authority of Tulsa; County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that 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 appraisalment 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 the judgment rendered herein in favor of the Defendant, Bankers Trust Company of California, N.A., As Trustee For RTC Mortgage Pass Through Certificates, Series 1992-15;

**Fourth:**

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission.

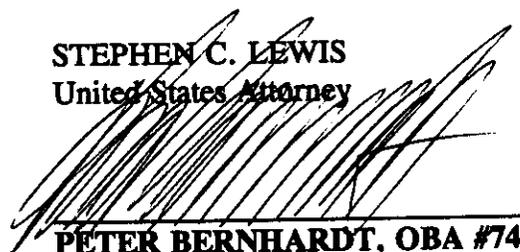
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that 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.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

  
PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

Judgment of Foreclosure  
Case No. 96-C-0115-C (Ezell)

PB:css

*Wilma L Palmer*

**WILMA L. PALMER, OBA #**

1217 East 33rd

Tulsa, Oklahoma 74105

(918) 742-6304

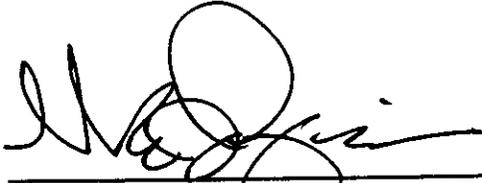
Attorney for Defendant,

Mary Gay Ezell aka Mary G. Ezell, a widow

Judgment of Foreclosure

Case No. 96-C-0115-C (Ezell)

PB:css



**MARK J. PEREGRIN, OBA #12438**

770 Northeast 63rd Street

Oklahoma City, Oklahoma 73105

(405) 848-1819

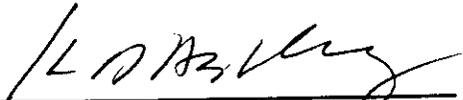
Attorney for Defendant,

Bankers Trust Company of California, N.A.,

As Trustee For RTC Mortgage Pass Through Certificates, Series 1992-15

Judgment of Foreclosure  
Case No. 96-C-0115-C (Ezell)

PB:css



**KIM D. ASHLEY, OBA #14175**

Assistant General Counsel

P.O. Box 53248

Oklahoma City, Oklahoma 73152-3248

(405) 522-5555

Attorney for Defendant,

State of Oklahoma *ex rel.* Oklahoma Tax Commission

Judgment of Foreclosure  
Case No. 96-C-0115-C (Ezell)

PB:css

---

**DICK A. BLAKELEY, OBA #852**

Assistant District Attorney

406 Tulsa County Courthouse

Tulsa, Oklahoma 74103

(918) 596-4841

Attorney for Defendants,

County Treasurer and Board of County Commissioners,

Tulsa County, Oklahoma

Judgment of Foreclosure

Case No. 96-C-0115-C (Ezell)

PB:css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
PATRICK J. DOWNES,  
  
Defendant.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)

ENTERED ON DOCKET

DATE 4-22-98

Civil Action No. 98CV0015H ✓

**FILED**

APR 20 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 17<sup>TH</sup> day of APRIL, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Patrick J. Downes, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Patrick J. Downes, acknowledged receipt of Summons and Complaint on February 1, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has 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.

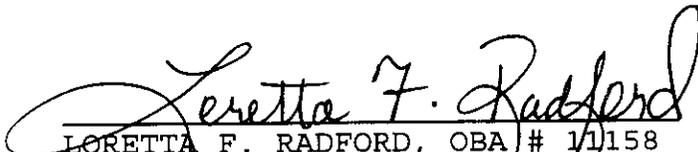
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Patrick J. Downes, for the principal amount of \$5,831.08, plus accrued interest of \$2,998.61, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of

6

\$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

  
LORETTA F. RADFORD, OBA # 11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/jmo

*[Handwritten mark]*

**FILED**

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

APR 21 1998

*[Handwritten signature]*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FOUR-D ENERGY, INC., an )  
Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
UNION PACIFIC RAILROAD )  
COMPANY, a Utah corporation; )  
and RALPH ROSS CONSTRUCTION )  
CO., INC., a purported )  
corporate entity, )  
 )  
Defendants. )

No. 98-CV-0002 H (M)

**ENTERED ON DOCKET**

DATE April 22, 1998

STIPULATION OF PLAINTIFF AND DEFENDANT,  
UNION PACIFIC RAILROAD COMPANY, FOR DISMISSAL AS TO DEFENDANT

Come now the Plaintiff, FOUR-D ENERGY, INC., and the Defendant, UNION PACIFIC RAILROAD COMPANY, and stipulate as follows:

1. Plaintiff and Defendant, UNION PACIFIC RAILROAD COMPANY, jointly request dismissal with prejudice as to said Defendant, pursuant to F.R.C.P. 41(a)(2). UNION PACIFIC RAILROAD COMPANY however reserves and will continue its cross-claim against Defendant, RALPH ROSS CONSTRUCTION CO., INC.

2. Plaintiff and said Defendant, UNION PACIFIC RAILROAD COMPANY, have settled Plaintiff's claim of lien upon property of said Defendant.

3. By separate motion, Plaintiff has requested dismissal of its claim against Defendant, RALPH ROSS CONSTRUCTION CO., INC., so Plaintiff will no longer remain an active party litigant herein.

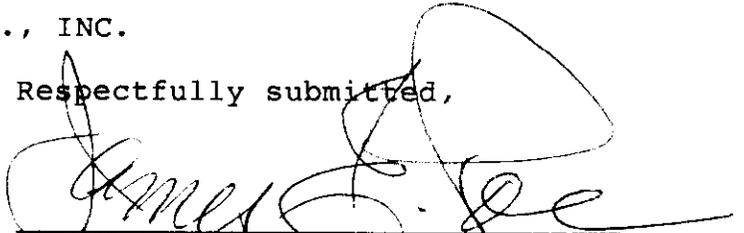
4. A proposed Order of Dismissal of Plaintiff's action against Defendant, UNION PACIFIC RAILROAD COMPANY and Dismissal Without Prejudice of Plaintiff's claim against RALPH ROSS CONSTRUCTION CO., INC., is submitted with this request.

①

015

WHEREFORE, Plaintiff, FOUR-D ENERGY, INC., with agreement of Defendant, UNION PACIFIC RAILROAD COMPANY moves for order of dismissal with prejudice of Plaintiff's action against said Defendant and dismissal without prejudice as to Defendant, RALPH ROSS CONSTRUCTION CO., INC., but reserving UNION PACIFIC's cross-claim against RALPH ROSS CONSTRUCTION CO., INC.

Respectfully submitted,



JAMES E. POE, OBA #7198  
STEPHEN R. CLOUSER, OBA #1737  
Covington & Poe  
111 West 5th Suite 740  
Tulsa, Oklahoma 74103  
(918) 585-5537

Attorneys for Plaintiff



TOM L. ARMSTRONG, OBA #329  
JEANNIE C. HENRY, OBA #12331  
CAREY COBB CALVERT, OBA #15080  
CATHERINE M. DOUD, OBA #16954  
Tom L. Armstrong & Associates  
601 South Boulder, Suite 700  
Tulsa, Oklahoma 74119  
(918) 587-3939

Attorneys for Defendant, UNION  
PACIFIC RAILROAD COMPANY

CERTIFICATE OF MAILING

A true and correct copy of the above and foregoing Stipulation of Plaintiff and Defendant, UNION PACIFIC RAILROAD COMPANY, for Dismissal as to Defendant, has been mailed to Don R. Smithhisler, President of RALPH ROSS CONSTRUCTION CO., INC., 32035 West 327th Street, Paola, Kansas 66071, this 21 day of April, 1998, with proper postage thereon fully prepaid.



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

FILED  
APR 2 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

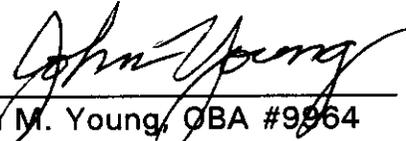
RONNIE ENLOW, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 PATRICK MOORE, )  
 )  
 Defendant. )

Case No. 95-C-1047-K /

ENTERED ON DOCKET  
DATE 4-22-98

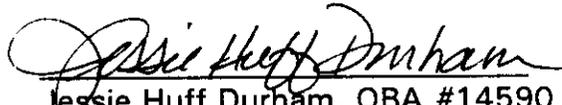
STIPULATION OF  
DISMISSAL WITH PREJUDICE

Comes now the plaintiff Ronnie Enlow and the defendant Patrick E. Moore  
and stipulate to the dismissal of this case with prejudice to refiling.



John M. Young, OBA #9964  
P.O. Box 1364  
Sapulpa, OK 74067  
(918) 224-3131

ATTORNEY FOR PLAINTIFF



Jessie Huff Durham, OBA #14590  
Muscogee (Creek) Nation  
P.O. Box 580  
Okmulgee, OK 74447  
918-756-8700, Ext. 301

ATTORNEY FOR DEFENDANT

31

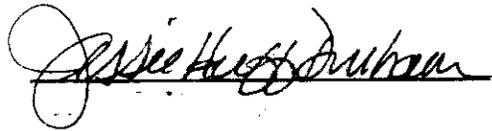
mail  
0/15  
arr H

CERTIFICATE

I hereby certify that on this 17<sup>th</sup> day of April, 1998, a true and correct copy of the above and foregoing instrument was mailed with postage thereon fully paid to the following:

Jessie Huff Durham  
Department of Justice  
Muscogee (Creek) Nation  
P.O. Box 580  
Okmulgee, OK 74447

John M. Young  
P.O. Box 1364  
Sapulpa, OK 74067

A handwritten signature in cursive script, reading "Jessie Huff Durham", written over a horizontal line.

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

FILED BY BOOKER

DATE 4-22-98

CLYDE J. BROWN, )

Plaintiff, )

vs. )

TULSA COUNTY OFFICERS )  
SPITLER, JOHN STATON, )  
T. FOSTER, )

Defendants. )

No. 98-CV-0051-H (M) ✓

**FILED**

APR 20 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Plaintiff, a prisoner appearing *pro se*, has filed a civil rights complaint pursuant to 42 U.S.C. § 1983. On February 9, 1998, the Court granted Plaintiff's motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a), and directed Plaintiff either to pay an initial partial filing fee of \$6.00 or to show cause in writing for failure to pay by March 11, 1998. In addition, the Court directed Plaintiff to provide properly completed Marshal forms. The February 9, 1998 Order also advised Plaintiff that failure to comply with the order could result in the dismissal of this case without prejudice.

To date, although Plaintiff has submitted three properly signed Marshal forms, he has failed to pay the initial partial filing fee or show cause for his failure to pay. Therefore, the Court finds this civil rights action should be dismissed without prejudice.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Plaintiff's civil rights complaint is **dismissed without prejudice** for failure to pay the initial partial filing fee as ordered.

IT IS SO ORDERED.

This 17<sup>TH</sup> day of APRIL, 1998.

  
Sven Erik Holmes  
United States District Judge

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

STEPHEN EDWARD NEWBY, )  
)  
Plaintiff, )  
vs. )  
)  
KENITH WRIGHT, )  
JUDGE ALICIA LITTLEFIELD, )  
)  
Defendants. )

ENTERED ON DOCKET  
DATE 4-22-98  
No. 98-CV-90-H (J)

**FILED**  
APR 20 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

On February 2, 1998, Plaintiff filed a civil rights complaint pursuant to 42 U.S.C. § 1983. By order entered February 10, 1998 (#2),<sup>1</sup> the Court directed Plaintiff to cure several identified deficiencies. Specifically, the Court directed Plaintiff to amend the complaint in order to avoid dismissal for failure to state a claim, directed the court clerk to send Plaintiff a blank civil rights form, labeled "amended," and directed Plaintiff to submit the requisite number of copies of the complaint, summons and marshal forms for each named defendant. Plaintiff was also directed to submit a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a), as amended by the Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996), or submit the \$150.00 filing fee by March 11, 1998. As of the date of this Order, Plaintiff has failed to pay the filing fee or to cure the deficiencies as ordered.

Because Plaintiff has failed to pay the filing fee or show cause in writing for his failure to do so, the Court finds this civil rights action should be dismissed without prejudice.

<sup>1</sup>Reference is to the docket number assigned to the document as filed in the Court record.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Plaintiff's civil rights complaint is  
**dismissed without prejudice** for failure to prosecute.

IT IS SO ORDERED.

This 17<sup>th</sup> day of APRIL, 1998.

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

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

**FILED**

APR 20 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RICHARD A. HOFFMAN,

Plaintiff,

v.

GARY WINNICK, et al.,

Defendant.

Case No. 95-CV-1090-H ✓

ENTERED ON DOCKET

DATE

4-22-98

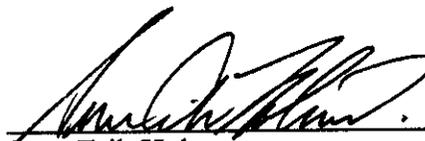
ADMINISTRATIVE CLOSING ORDER

All parties in this matter have been dismissed with the exception of the parties identified as "unknown joint venturers," who have not been served or participated in this case. It is hereby 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 or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are ordered to notify the Court within thirty days of the file date of this order as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that thirty-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 17<sup>th</sup> day of April, 1998.



Sven Erik Holmes  
United States District Judge

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

APR 21 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LAWRENCE ANDERSEN, )  
)  
Plaintiff, )  
)  
v. )  
)  
KENNETH S. APFEL, Commissioner )  
of Social Security, )  
)  
Defendant. )

Case No. 97-CV-633-EA

ENTERED ON DOCKET

DATE April 22, 1998

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ORDERED this 21<sup>st</sup> day of April, 1998.

Claire V Eagan  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

APR 21 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LAWRENCE ANDERSEN, )  
)  
Plaintiff, )  
)  
v. )  
)  
KENNETH S. APFEL, Commissioner of )  
the Social Security Administration, )  
)  
Defendant. )

ENTERED ON DOCKET

DATE April 22, 1998

CASE NO. 97-C-633-EA ✓

**ORDER**

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

DATED this 21<sup>st</sup> day of April, 1998.

Claire Eagan  
CLAIRE EAGAN  
UNITED STATES MAGISTRATE JUDGE

(13)

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

**FILED**  
APR 21 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DAVID DANIELS; TERRY PHILLIPS, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
ADVANCED SPINE FIXATION SYSTEMS, INC., )  
 )  
Defendant. )

96-CV-1006 B

ENTERED ON DOCKET

DATE APR 22 1998

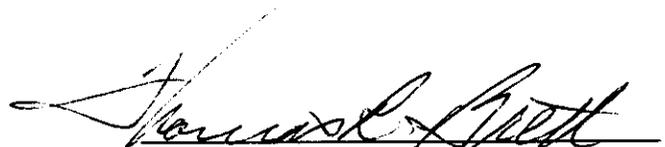
ORDER OF DISMISSAL WITHOUT PREJUDICE

Now on this 21<sup>st</sup> day of April, 1998, this matter comes on for consideration of Defendant Advanced Spine Fixation Systems, Inc.'s, Motion to Stay or Dismiss, and the Court having examined the files and records herein, having considered the legal arguments of and authorities cited by the parties, and being otherwise fully advised in the premises, finds and adjudges as follows:

1. The Plaintiffs David Daniels and Terri Phillips have claims pending in John E. Williams, et. al. v. Advanced Spine Fixation Systems, Inc., Case No. CJ 95-5382, in the District Court of Tulsa County, State of Oklahoma, against this Defendant and others. The state court case encompasses, not only the same issues of fact and law, but additional issues involving additional defendants. The parties agree that the state court litigation will resolve all issues between them and will avoid "piecemeal" litigation. The parties agree that when all factors are considered it is in the best interests of all concerned that the issues between them be litigated in the state court forum.

2. The parties agree and stipulate that this Court should exercise its judicial discretion pursuant to Rule 41 of the Federal Rules of Civil Procedure and dismiss this case without prejudice upon terms and conditions that preserve the Plaintiffs' rights under 12 Okl. St. Ann. Sec. 100. More specifically, the parties agree and stipulate that this dismissal without prejudice shall be deemed not to constitute a dismissal which invokes the operation of 12 Okl. St. Ann. Sec. 100, and this dismissal shall not operate to adversely affect or limit the Plaintiffs' right to file a new action if the aforementioned state court case should fail otherwise than on the merits.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that this action is dismissed without prejudice upon terms and conditions set forth above.



Judge Thomas Brett

approved as to form:



Gary A. Eaton, Eaton & Sparks,  
Attorneys for Plaintiffs



Rodney J. Heggy, Attorney for Defendant

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

ENERGY TITLE CONSULTANTS, INC.)  
Plaintiff, )  
vs. )  
MONEY MAN, INC., )  
Defendant. )

ENTERED ON DOCKET

DATE APR 21 1998

No. 97-C-625-K ✓

FILED

APR 21 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. 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 sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 20 day of April, 1998.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE



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

APR 20 1998

LOY BLEDSAW, )  
)  
Plaintiff, )  
)  
vs. )  
)  
CARPET TRANSPORT, INC./ )  
A & P TRANSPORTATION HEALTH )  
CARE BENEFITS PLAN and )  
CARPET TRANSPORT, INC., )  
)  
Defendants. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97 CV 964 E (M)

ENTERED ON DOCKET  
DATE APR 21 1998

**ORDER OF DEFAULT JUDGMENT**

This matter comes on before the Court on Plaintiff's Motion for Entry of Default Judgment. The Court, having reviewed Plaintiff's Motion for Entry of Default Judgment and Affidavit of Sum Certain; and the Court finding that each Defendant was regularly served with a copy of Plaintiff's Complaint and Summons by certified mail on January 16, 1998; and the Court further finding that each Defendant has failed to appear or answer Plaintiff's Complaint within the time prescribed; and the Court noting that an Entry of Default has been entered by the Clerk of this Court on the 20<sup>th</sup> day of April, 1998; finds that the following Order should be entered at this time:

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Plaintiff be and he hereby is awarded a judgment against the Defendants Carpet Transport, Inc./A & P Transportation Health Care Benefits Plan and Carpet Transport, Inc., jointly and severally, in the sum of \$62,614.60, with interest thereon at the rate of 5.391% per annum, until paid, together with the costs of this action accrued and accruing.

8

Dated this 20<sup>th</sup> day of April, 1998.

  
U.S. District Judge

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

APR 20 1998 *pw*

CHEROKEE NATION OF OKLAHOMA )  
Plaintiff, )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

vs. )

Case No. 96CV 791B ✓

WILMA PEARL MANKILLER; )  
AETNA CASUALTY AND SURETY )  
COMPANY and HARTFORD FIRE )  
INSURANCE COMPANY, )  
Defendants. )

ENTERED ON DOCKET

DATE APR 21 1998

**ORDER**

Granting the Plaintiff's Motion to Dismiss

The plaintiff has moved to dismiss, without prejudice, its complaint against the defendant Mankiller. The court grants the plaintiff's motion.

Accordingly, this case is dismissed without prejudice.

IT IS SO ORDERED this 20<sup>th</sup> day of April, 1998.

  
THOMAS R. BRETT, SENIOR JUDGE  
UNITED STATES DISTRICT JUDGE

*ld*

*Mr. Hickman has no objection per phone call 4-16-98 ho*

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

**FILED**  
APR 20 1998 *ml*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FRED E. WASHINGTON )

Plaintiff, )

vs. )

No. 97-C-100-E (J) )

DAMON CANTRELL and )  
CHAD GREER, )

Defendants. )

ENTERED ON DOCKET

DATE APR 21 1998

**ORDER**

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge filed on June 20, 1997, in this civil rights action brought pursuant to 42 U.S.C. § 1983. The Magistrate Judge recommends that Plaintiff's case be dismissed without prejudice for failure to pay the initial filing fee. None of the parties has filed an objection to the Report.

Having reviewed the Report and the facts of this case, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

**IT IS THEREFORE ORDERED** that the Report and Recommendation of the Magistrate Judge (Docket #6) is **adopted and affirmed**. Plaintiff's complaint is **dismissed without prejudice** for failure to pay the filing fee. Any pending motion is **denied** as moot.

SO ORDERED THIS 20<sup>th</sup> day of April, 1998.

  
JAMES O. ELLISON  
UNITED STATES DISTRICT COURT

1