

**FILED**

**UNITED STATES DISTRICT COURT  
Northern District of Oklahoma**

JUN 29 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA

v.

Case Number 97-CR-176-003-C

**ENTERED ON DOCKET**

ALONZO NOLAN  
Defendant.

DATE 6/29/98

**JUDGMENT IN A CRIMINAL CASE  
(For Offenses Committed On or After November 1, 1987)**

The defendant, ALONZO NOLAN, was represented by Michael Abel.

On motion of the United States the court has dismissed Counts 1, 3-26, 29-31, 33-35, 37, 39 and 40 of the Superseding Indictment.

The defendant pleaded guilty to Counts 32, 36 & 38 of the Superseding Indictment, February 19, 1998. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 USC 924(c)	Possession of a Firearm While in Commission of a Violent Crime	10/29/97	32
18 USC 924(c)	Possession of a Firearm While in Commission of a Violent Crime	10/21/97	36
18 USC 924(c)	Possession of a Firearm While in Commission of a Violent Crime	11/4/97	38

As pronounced on June 22, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 300, for Counts 32, 36 & 38 of the Superseding Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 25 day of June, 1998.

*[Signature]*  
The Honorable H. Dale Cook  
United States District Court

Defendant's SSN: 446-76-4293

Defendant's Date of Birth: 12/22/78

Defendant's residence and mailing address: c/o Tulsa County Jail, 500 S. Denver

United States District Court  
Northern District of Oklahoma } SS  
I hereby certify that the foregoing is a true and correct copy of the original file in this court.

Phil Lombardi, Clerk  
By *[Signature]*  
Deputy

Defendant: ALONZO NOLAN  
Case Number: 97-CR-176-003-C

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 480 months; zero (0) months as to Count 32, 240 months as to Count 36, and 240 months as to Count 38, all said terms to run consecutively, each to the other.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be designated to a facility equipped to provide Comprehensive Substance Abuse Treatment during his period of incarceration.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal

By \_\_\_\_\_  
Deputy Marshal

Defendant: ALONZO NOLAN  
Case Number: 97-CR-176-003-C

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years, as to each count, said terms to run concurrently, each with the other.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. The defendant shall successfully participate in a program of testing and treatment (to include inpatient) for drug and alcohol abuse, as directed by the Probation Officer, until such time as released from the program by the Probation Officer.
5. The defendant shall participate in a program of mental health treatment (to include inpatient), as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Officer.
6. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.

### STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: ALONZO NOLAN  
Case Number: 97-CR-176-003-C

**RESTITUTION AND FORFEITURE****RESTITUTION**

The defendant shall make restitution in the total amount of \$12,455.02. The interest on restitution is waived by the Court.

The defendant shall make restitution jointly and severally with Marcus Gill and Tony Baker to the following persons in the following amounts:

<u>Name of Payee</u>			<u>Amount of Restitution</u>
Jamil's Steak House Attn: Tyrone Elias 2833 E. 51st Street Tulsa, OK 74105	\$800.00	Papa John's Pizza 2802 E. 11th Street Tulsa, OK 74104	981.48
Farmer's Insurance Group Kansas City Com'l Claims Claim#: P.O. Box 25941 Shawnee Mission, KS 66225	1,425.00	Diamond Jack's 3609 E. 51st Street Tulsa, OK 74135	750.00
Ricardo's Attn: Richard Hunt 5629 E. 41st Street Tulsa, OK 74135	246.40	Sarah Pickett 7915 S. Yale, Apt. D Tulsa, OK 74136	189.00
Subway Attn: Julia Kern 4603 E. 60th Street Tulsa, OK 74135	158.88	Pizza Hut 1907 S. Harvard Tulsa, OK 74112	1,050.00
Braum's Ice Cream and Dairy Stores, Attn: Bill Pendergraft P.O. Box 25429 Oklahoma City, OK 73125	723.88	Eggroll Express 5015 S. Sheridan Tulsa, OK 74145	98.84
Taco Mayo 2819 S. Harvard Tulsa, OK 74135	203.59	Domino's Pizza Attn: Scott Driver 2604 S. Harvard Tulsa, OK 74135	1,272.25
Subway 11607 E. 31st Street Tulsa, OK 74146	199.00	Grandy's 997 Grandy's Lane Lewisville, TX 75067	1,392.00

Defendant: ALONZO NOLAN  
Case Number: 97-CR-176-003-C

**RESTITUTION AND FORFEITURE****RESTITUTION CON'T**

Payless Shoe Stores 2157 S. Sheridan Road Tulsa, OK 74114	1,047.54	Blimpie Sandwich Shops 8222 S. Lewis Ave Tulsa, OK 74137	236.00
Bill & Ruth's Sandwich Shop Attn: Zouhir A. Hamed 1322 E. 41st Street Tulsa, OK 74104	525.00	Dustyn W. Bell 11211 S. Erie Tulsa, OK 74133	200.00
Farmer's Insurance Group Kansas City Com'l Claims Claim#:CS013426 P.O. Box 25941 Shawnee Mission, KS 66225	946.16		

Payments of restitution are to be made to the Clerk of the Court for the Northern District of Oklahoma for transfer to the payee(s).

Restitution shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid as a condition of supervised release, except that no further payment shall be required after the sum of the amounts actually paid by all defendants, Marcus Gill, Tony Baker and Alonzo Nolan has fully covered the compensable injury.

If a victim has received compensation from insurance or any other source with respect to a loss, any restitution ordered shall be paid to the person who is a victim before any restitution is paid to any such provider of compensation.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

Defendant: ALONZO NOLAN  
Case Number: 97-CR-176-003-C

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	n/a	
Criminal History Category:	III	
Imprisonment Range:	60 months	Ct. 32
	240 months	Ct. 36
	240 months	Ct. 38
Supervised Release Range:	2 to 3 years	Cts. 32, 36 & 38
Fine Range:	\$ 0 to \$ 250,00	Cts. 32, 36 & 38
Restitution:	\$ 12,445.02	

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence departs from the guideline range upon motion of the government, as a result of the defendant's substantial assistance.

BJS

UNITED STATES DISTRICT COURT  
Northern District of Oklahoma

ENTERED ON DOCKET

UNITED STATES OF AMERICA

DATE 6/24/98

v.

Case Number 98-CR-063-001-K

**FILED**

SANDRA PENA ROSALES  
Defendant.

JUN 24 1998

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

The defendant, SANDRA PENA ROSALES, was represented by Martin Hart.

The defendant pleaded guilty to Count 1 of the Indictment, June 10, 1998. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

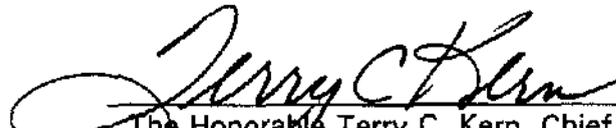
<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
42 USC 408 (a)(7)(B)	Use of False Social Security Number	3/17/97	1

As pronounced on June 23, 1998, the defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 100, for Count 1 of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 23 day of June, 1998.

  
The Honorable Terry C. Kern, Chief  
United States District Judge

Defendant's SSN: None

Defendant's Date of Birth: 5/10/77

Defendant's residence and mailing address: Tulsa County Jail, 500 S. Denver, Tulsa OK 74103

Defendant: SANDRA PENA ROSALES  
Case Number: 98-CR-063-001-K

### PROBATION

The defendant is hereby placed on probation for a term of three (3) years.

While on probation, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If this judgment imposes a fine, special assessment, costs or restitution obligation, it shall be a condition of probation that the defendant pay any such fine, assessment, costs and restitution.
2. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
3. You shall follow all INS instructions regarding deportation, and shall comply with any and all conditions of bond release that may be ordered by the INS. If released on bond by the INS, you shall report to the U.S. Probation Office in this district within 48 hours of your release. If you are deported, and subsequently reenter the United States within three (3) years of this date, you shall report to the nearest U.S. Probation Office within 48 hours of reentering the United States.
4. You are prohibited from accepting any employment until such time as you are able to provide proof of status as a legal alien.
5. It is recommended to the Immigration and Naturalization Service that you be granted bond pending any hearings in your deportation case.
6. The Court suspends the requirements for mandatory urine screening as dictated by 18 USC § 3608, but specifically retains the probation officer's authority to administer such tests for cause as permitted by the standard conditions of supervision.

### STANDARD CONDITIONS OF PROBATION

While the defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: SANDRA PENA ROSALES  
Case Number: 98-CR-063-001-K

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	4
Criminal History Category:	1
Imprisonment Range:	0 months to 6 months
Supervised Release Range:	2 to 3 years
Fine Range:	\$ 250 to \$ 5,000
Restitution:	\$ n/a

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

IT IS RECOMMENDED TO THE IMMIGRATION AND NATURALIZATION SERVICE THAT ROSALES BE GRANTED BOND PENDING ANY HEARINGS IN HER DEPORTATION CASE.

BTJ

*cu*

UNITED STATES DISTRICT COURT  
Northern District of Oklahoma

ENTERED ON DOCKET

DATE 6-22-98

UNITED STATES OF AMERICA

v.

Case Number 98-CR-23-H

**FILED**

JUN 22 1998 *pm*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CAROLE ANNE MILLIGAN ROZAK  
Defendant.

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, CAROLE ANNE MILLIGAN ROZAK, was represented by Jack Schisler.

The defendant pleaded guilty to Count 1 of the Indictment, March 12, 1998. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 USC 1014	False Statement to Financial Institution	9/30/96	1

As pronounced on June 12, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 100, for Count 1 of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 19<sup>TH</sup> day of JUNE, 1998.

United States District Court  
Northern District of Oklahoma ) SS  
I hereby certify that the foregoing  
is a true copy of the original on file  
in this court. Phil Lombardi, Clerk

By R. Miller  
Deputy

  
The Honorable Sven Erik Holmes  
United States District Judge

Defendant's SSN: 445-85-7626(Canadian)  
Defendant's Date of Birth: 6/19/53  
Defendant's residence and mailing address: Tulsa County Jail, 500 S. Denver, Tulsa OK 74103

Defendant: CAROLE ANNE MILLIGAN ROZAK  
Case Number: 98-CR-23-H

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 16 months, as to Count 1, said term to run concurrently with terms imposed in 98-CR-22-H and 97-CR-180-H.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be designated to a facility equipped to provide mental health treatment during her period of incarceration.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal

By \_\_\_\_\_  
Deputy Marshal

Defendant: CAROLE ANNE MILLIGAN ROZAK  
Case Number: 98-CR-23-H

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years, as to Count 1, said term to run concurrently with the terms imposed in 98-CR-22-H and 97-CR-180-H.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. The defendant shall participate in a program of mental health treatment (to include inpatient), as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Officer.
5. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.
6. The defendant shall abide by the "Special Financial Conditions" enumerated in Miscellaneous Order Number M-128, filed with the Clerk of the Court on March 18, 1992.
7. As a condition of supervised release, upon completion of your term of imprisonment, if an Immigration and Naturalization Service detainer is lodged, you are to be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Naturalization Act, 8 USC §§ 1101-1524. It is a further condition of supervised release, if ordered deported, you shall remain outside the United States until termination of the term of supervised release.

### STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: CAROLE ANNE MILLIGAN ROZAK  
Case Number: 98-CR-23-H

**RESTITUTION AND FORFEITURE**

**RESTITUTION**

The defendant shall make restitution in the total amount of \$4,958.55. Interest on restitution is waived by the Court.

The defendant shall make restitution to the following persons in the following amounts:

<b><u>Name of Payee</u></b>	<b><u>Amount of Restitution</u></b>
General Motors Acceptance Corp. Box 105270 Atlanta, Georgia 30348-5270 Attn: Connie Nadell	\$4,958.55

Payments of restitution are to be made to the Clerk of the Court for the Northern District of Oklahoma for transfer to the payee(s).

Restitution shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid as a condition of supervised release.

If a victim has received compensation from insurance or any other source with respect to a loss, any restitution ordered shall be paid to the person who is a victim before any restitution is paid to any such provider of compensation.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

Defendant: CAROLE ANNE MILLIGAN ROZAK  
Case Number: 98-CR-23-H

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	12
Criminal History Category:	I
Imprisonment Range:	10 months to 16 months
Supervised Release Range:	3 to 5 years
Fine Range:	\$ 3,000 to \$ 30,000
Restitution:	\$ 4,958.55

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines..

CU

UNITED STATES DISTRICT COURT  
Northern District of Oklahoma

ENTERED ON DOCKET

DATE 6-22-98

UNITED STATES OF AMERICA

v.

Case Number 98-CR-22-H

CAROLE ANNE MILLIGAN ROZAK  
Defendant.

**FILED**

JUN 22 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, CAROLE ANN MILLIGAN ROZAK, was represented by Jack Schisler.

On motion of the United States the court has dismissed Counts 2 through 7 of the Indictment.

The defendant pleaded guilty to Count 1 of the Indictment, March 12, 1998. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 USC 1344	Bank Fraud	11/2/95	1

As pronounced on June 12, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 50, for Count 1 of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 19<sup>TH</sup> day of JUNE, 1998.

United States District Court  
Northern District of Oklahoma ) SS  
I hereby certify that the foregoing  
is a true copy of the original on file  
in this court. Phil Lombardi, Clerk

  
The Honorable Sven Erik Holmes  
United States District Judge

By   
Deputy

Defendant's SSN: 445-85-7626(Canadian)

Defendant's Date of Birth: 6/19/53

Defendant's residence and mailing address: Tulsa County Jail, 500 S. Denver, Tulsa OK 74103

Defendant: CAROLE ANNE MILLIGAN ROZAK  
Case Number: 98-CR-22-H

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 16 months, as to Count 1, said term to run concurrently with terms imposed in 97-CR-180-H and 98-CR-23-H.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be designated to a Bureau of Prisons Facility equipped to provide mental health treatment during her period of incarceration.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

at Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal

By \_\_\_\_\_  
Deputy Marshal

Defendant: CAROLE ANNE MILLIGAN ROZAK  
Case Number: 98-CR-22-H

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years, as to Count 1, said term to run concurrently with terms imposed in 97-CR-180-H and 98-CR-23-H.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. The defendant shall participate in a program of mental health treatment (to include inpatient), as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Officer.
5. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.
6. The defendant shall abide by the "Special Financial Conditions" enumerated in Miscellaneous Order Number M-128, filed with the Clerk of the Court on March 18, 1992.
7. As a condition of supervised release, upon completion of your term of imprisonment, if an Immigration and Naturalization Service detainer is lodged, you are to be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Naturalization Act, 8 USC §§ 1101-1524. It is a further condition of supervised release, of ordered deported, you shall remain outside the United States until termination of the term of supervised release.

### STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: CAROLE ANNE MILLIGAN ROZAK  
Case Number: 98-CR-22-H

**RESTITUTION AND FORFEITURE**

**RESTITUTION**

The defendant shall make restitution in the total amount of \$27,155.33. Interest on restitution is waived by the Court.

The defendant shall make restitution to the following persons in the following amounts:

<b><u>Name of Payee</u></b>	<b><u>Amount of Restitution</u></b>
Wachovia Bank 1628 Browning Road, Room 146 Columbia, South Carolina 29226-8853 Attn: Danny Conyers	\$16,155.33
Thrifty Car Rental 15845 JFK Blvd. Houston, Texas Attn: Sonny Adams	\$11,000.00

Payments of restitution are to be made to the Clerk of the Court for the Northern District of Oklahoma for transfer to the payee(s).

Restitution shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid as a condition of supervised release.

If a victim has received compensation from insurance or any other source with respect to a loss, any restitution ordered shall be paid to the person who is a victim before any restitution is paid to any such provider of compensation.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

Defendant: CAROLE ANNE MILLIGAN ROZAK  
Case Number: 98-CR-22-H

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	12
Criminal History Category:	I
Imprisonment Range:	10 months to 16 months
Supervised Release Range:	3 to 5 years
Fine Range:	\$ 3,000 to \$ 30,000
Restitution:	\$ 27,155.33

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

UNITED STATES DISTRICT COURT  
Northern District of Oklahoma

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

UNITED STATES OF AMERICA

v.

Case Number 97-CR-180-H

CAROLE ANNE MILLIGAN ROZAK  
Defendant.

ENTERED ON DOCKET  
DATE 6-22-98

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, CAROLE ANNE MILLIGAN ROZAK, was represented by Jack Schisler.

The defendant pleaded guilty to Count 1 of the Indictment, March 12, 1998. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 USC 2314 & 2(b)	Interstate Transportation of Stolen Property and Causing a Criminal Act	9/1/97	1

As pronounced on June 12, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 100, for Count 1 of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 19<sup>TH</sup> day of JUNE, 1998.

United States District Court )  
Northern District of Oklahoma ) SS  
I hereby certify that the foregoing )  
is a true copy of the original on file )  
in this court. Phil Lombardi, Clerk

  
The Honorable Sven Erik Holmes  
United States District Judge

By   
Deputy

Defendant's SSN: 445-85-7626(Canadian)  
Defendant's Date of Birth: 6/19/53  
Defendant's residence and mailing address: Tulsa County Jail, 500 S. Denver, Tulsa OK 74103

Defendant: CAROLE ANNE MILLIGAN ROZAK  
Case Number: 97-CR-180-H

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 16 months, as to Count 1, said term to run concurrently with sentence imposed in 98-CR-22-H and 98-CR-23-H.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be designated to a Bureau of Prisons Facility that is equipped to provide mental health treatment during her period of incarceration.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal  
By \_\_\_\_\_  
Deputy Marshal

Defendant: CAROLE ANNE MILLIGAN ROZAK  
Case Number: 97-CR-180-H

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years, as to Count 1, said term to run concurrently with the terms imposed in 98-CR-22-H and 98-CR-23-H.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. The defendant shall participate in a program of mental health treatment (to include inpatient), as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Officer.
5. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.
6. The defendant shall abide by the "Special Financial Conditions" enumerated in Miscellaneous Order Number M-128, filed with the Clerk of the Court on March 18, 1992.
7. As a condition of supervised release, upon completion of your term of imprisonment, if an Immigration and Naturalization Service detainer is lodged, you are to be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Naturalization Act, 8 USC §§ 1101-1524. It is a further condition of supervised release, if ordered deported, you shall remain outside the United States until termination of the term of supervised release.

### STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: CAROLE ANNE MILLIGAN ROZAK  
Case Number: 97-CR-180-H

**RESTITUTION AND FORFEITURE**

**RESTITUTION**

The defendant shall make restitution in the total amount of \$7,856.22. Interest on restitution is waived by the Court.

The defendant shall make restitution to the following persons in the following amounts:

<b><u>Name of Payee</u></b>	<b><u>Amount of Restitution</u></b>
Bank One Recovery Department 1000 North Market Street Milwaukee, Wisconsin 53202 Attn: Molly Byrne	\$7,856.22

Payments of restitution are to be made to the Clerk of the Court for the Northern District of Oklahoma for transfer to the payee(s).

Restitution shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid as a condition of supervised release.

If a victim has received compensation from insurance or any other source with respect to a loss, any restitution ordered shall be paid to the person who is a victim before any restitution is paid to any such provider of compensation.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

Defendant: CAROLE ANNE MILLIGAN ROZAK  
Case Number: 97-CR-180-H

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	12
Criminal History Category:	I
Imprisonment Range:	10 months to 16 months
Supervised Release Range:	2 to 3 years
Fine Range:	\$ 3,000 to \$ 30,000
Restitution:	\$ 7,856.22

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

UNITED STATES DISTRICT COURT  
Northern District of Oklahoma

ENTERED ON DOCKET  
DATE 6-22-98

UNITED STATES OF AMERICA

v.

Case Number 97-CR-136-001-H

TONY CAHUE  
Defendant.

**AMENDED JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)  
Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

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

The defendant, TONY CAHUE, was represented by Stephen J. Knorr.

On motion of the United States the court has dismissed count 1 of the Indictment.

The defendant pleaded guilty on February 18, 1998, to count 2 of the Indictment. Accordingly, the defendant is adjudged guilty of such count, involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 1952(a)(3)	Interstate Travel in Aid of Racketeering	3-8-97	2
18 USC 2	Aiding and Abetting	3-8-97	2

As pronounced on May 28, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

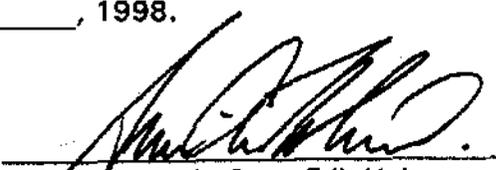
It is ordered that the defendant shall pay to the United States a special assessment of \$ 100, for count(s) 2 of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 19<sup>TH</sup> day of JUNE, 1998.

United States District Court  
Northern District of Oklahoma ) SS  
I hereby certify that the foregoing  
is a true copy of the original on file  
in this court. Phil Lombardi, Clerk

By R. Muller  
Deputy

  
The Honorable Sven Erik Holmes  
United States District Judge

Defendant's SSN: 459-50-2155  
Defendant's Date of Birth: 07-05-30  
Defendant's residence and mailing address: Tulsa City/County Jail, c/o U.S. Marshal's Office, 500 S  
Denver, Tulsa, OK 74103

Defendant: TONY CAHUE  
Case Number: 97-CR-136-001-H

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 18 months.

The Court makes the following recommendations to the Bureau of Prisons: Defendant be placed in a Bureau of Prison's Medical Facility. The Court further orders the defendant's medical records be attached to the presentence report and that placement in a medical facility be expedited.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal  
By \_\_\_\_\_  
Deputy Marshal

Defendant: TONY CAHUE  
Case Number: 97-CR-136-001-H

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. The defendant shall successfully participate in a program of testing and treatment (to include inpatient) for drug and alcohol abuse, as directed by the Probation Officer, until such time as released from the program by the Probation Officer.
5. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.

### STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: TONY CAHUE  
Case Number: 97-CR-136-001-H

**RESTITUTION AND FORFEITURE**

**RESTITUTION**

The defendant shall make restitution in the total amount of \$3,486.

The defendant shall make restitution to the following persons in the following amounts:

The Court orders the defendant to immediately pay restitution in the amount of \$3,486. Upon forfeiture of \$1,120.50, which is in the custody of authorities, a restitution balance of \$2,607 will remain outstanding. Payments may be forwarded to Lady Luck Casino, 316 Beach Boulevard, Biloxi, Mississippi 39530, reference case number LL-03-97-034. \$986.50 of the restitution amount shall be paid jointly and severally with codefendant Wilbur Garst. The remaining \$1,379.00 shall be paid by this defendant. Any restitution amount not paid immediately shall be paid during the period of incarceration, with any remaining unpaid balance to be paid during the term of supervised release. Considering the defendant's earning ability and his limited financial resources, the Court does not impose any fine, cost of incarceration or supervision, and waives interest accrual on the restitution.

Payments of restitution are to be made to the Clerk of the Court for the Northern District of Oklahoma for transfer to the payee(s).

Restitution shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid as a condition of supervised release.

If a victim has received compensation from insurance or any other source with respect to a loss, any restitution ordered shall be paid to the person who is a victim before any restitution is paid to any such provider of compensation.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

Defendant: TONY CAHUE  
Case Number: 97-CR-136-001-H

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	7	
Criminal History Category:	v	
Imprisonment Range:	12 months to 18 months	Count 2
Supervised Release Range:	2 to 3 years	Count 2
Fine Range:	\$ 500 to \$ 5000	Count 2
Restitution:	\$ 3,486	

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

BJ

*cu*

UNITED STATES DISTRICT COURT  
Northern District of Oklahoma

**FILED**

JUN 22 1998

UNITED STATES OF AMERICA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

v.

Case Number 98-CR-008-001-C

Clyde R. McShan  
Defendant.

ENTERED ON DOCKET  
DATE 6-22-98

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, Clyde R. McShan, was represented by Stephen J. Knorr.

On motion of the United States the court has dismissed Counts 1 through 4 of the Indictment.

The defendant pleaded guilty to Counts 1 & 2 of the Information, March 17, 1998. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
8 USC 924(c)&2	Possession of a Firearm During a Crime of Violence and Aiding and Abetting	11/17/97	1
18 USC 924(c)&2	Possession of a Firearm During a Crime of Violence and Aiding and Abetting	11/28/97	2

As pronounced on June 17, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 200, for Counts 1 & 2 of the Information, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 22<sup>nd</sup> day of June, 1998.

United States District Court  
Northern District of Oklahoma  
I hereby certify that the foregoing  
is a true copy of the original on file  
in this court.

Phil Lombardi, Clerk

The Honorable H. Dale Cook  
United States District Judge

By

Defendant's SSN: 442-76-3569  
Defendant's Date of Birth: 4/8/79

Defendant's residence and mailing address: Tulsa County Jail, 500 S. Denver, Tulsa OK 74103

Defendant: Clyde R. McShan  
Case Number: 98-CR-008-001-C

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 241 months. This term consists of 1 month as to Count 1 and 240 months, mandatory, as to Count 2, to run consecutively to the term imposed in Count 1. These terms of imprisonment shall run consecutively to the defendant's current period of incarceration in the Oklahoma Department of Corrections in Case CRF-97-6055.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be incarcerated at a facility specializing in Comprehensive Drug Treatment; and also that the defendant be incarcerated at a facility near his father's home in Houston, Texas.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal

By \_\_\_\_\_  
Deputy Marshal

Defendant: Clyde R. McShan  
Case Number: 98-CR-008-001-C

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years, as to each of Counts 1 & 2, said terms shall run concurrently, each with the other.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. The defendant shall successfully participate in a program of testing and treatment (to include inpatient) for drug and alcohol abuse, as directed by the Probation Officer, until such time as released from the program by the Probation Officer.
5. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.
6. The defendant shall abide by the "Special Financial Conditions" enumerated in Miscellaneous Order Number M-128, filed with the Clerk of the Court on March 18, 1992.

### STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: Clyde R. McShan  
Case Number: 98-CR-008-001-C

**RESTITUTION AND FORFEITURE**

**RESTITUTION**

The defendant shall make restitution in the total amount of \$3,492.83. The interest on restitution is waived by the Court.

The defendant shall make restitution to the following persons in the following amounts:

<b><u>Name of Payee</u></b>	<b><u>Amount of Restitution</u></b>
Cinema World Video 6105 S. Mingo Road Tulsa OK 74133	\$774
Michael Durbin 6760 E. 26th Place Tulsa OK 74124	\$30
Fairfield Inn Attn: Restitution 9020 E. 71 Street Tulsa OK 74133	\$480
Little Caesar's Pizza 7104 S. Sheridan Tulsa OK 74136	\$1,501.86
Commercial Union Insurance Attn: Restitution 9229 LBJ Freeway, Suite 200 Dallas TX 75243	\$706.97

Payments of restitution are to be made to the Clerk of the Court for the Northern District of Oklahoma for transfer to the payee(s).

Restitution shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid as a condition of supervised release.

If a victim has received compensation from insurance or any other source with respect to a loss, any restitution ordered shall be paid to the person who is a victim before any restitution is paid to any such provider of compensation.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

Defendant: Clyde R. McShan  
 Case Number: 98-CR-008-001-C

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	n/a	
Criminal History Category:	n/a	
Imprisonment Range:	60 months	Ct. 1
	240 months	Ct. 2
Supervised Release Range:	2 to 3 years	Ct. 1
	2 to 3 years	Ct. 2
Fine Range:	\$ 0 to \$ 250,000	Cts. 1 & 2
Restitution:	\$ 3,492.83	

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence for Count 2 is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.

The sentence for Count 1 departs from the guideline range upon motion of the government, as a result of the defendant's assistance, pursuant to 18 USC §3553(e).

**FILED**

**UNITED STATES DISTRICT COURT  
Northern District of Oklahoma**

JUN 22 1998 *NE*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA

v.

Case Number 97-CR-149-001-C ✓

JUAN JOSE MARINES  
Defendant.

ENTERED ON DOCKET

DATE 6-22-98

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, JUAN JOSE MARINES, was represented by Jack Schisler.

On motion of the United States the court has dismissed Counts 1, 3-13, 15-20 of the Superseding Indictment.

The defendant pleaded guilty to Counts 2 & 14 of the Superseding Indictment, January 9, 1998. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 1014	False Statement to a Financial Institution	9/9/97	2
18 USC 511(a)(1) and 2(b)	Altering or Removing Motor Vehicle Identification Numbers	10/6/97	14

As pronounced on June 18, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 200, for Counts 2 & 14 of the Superseding Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 22<sup>nd</sup> day of June, 1998.

United States District Court  
Northern District of Oklahoma  
I hereby certify that the foregoing  
is a true copy of the original on file  
in this court.

By Phil Lombardi, Clerk  
Deputy

H. Dale Cook  
The Honorable H. Dale Cook  
United States District Judge

Defendant's SSN: 459-35-9746

Defendant's Date of Birth: 10/25/71

Defendant's residence and mailing address: 2499 Katy Hockley, Katy TX 74193

Defendant: JUAN JOSE MARINES  
Case Number: 97-CR-149-001-C

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 8 months, 11 days. The defendant has been detained since October 6, 1997 for his involvement in the instant offense. Based on the defendant's credit for pretrial detention toward the service of his term, he is ordered released from federal custody with credit for time served. The Court notes for the record that the defendant has outstanding felony warrants from Harris County, Texas, District Court case numbers 609155, 717080, and 717081.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal

By \_\_\_\_\_  
Deputy Marshal

Defendant: JUAN JOSE MARINES  
Case Number: 97-CR-149-001-C

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years as to Count 2, and three (3) years as to Count 14, said terms to run concurrently, each with the other.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.
5. The defendant shall abide by the "Special Financial Conditions" enumerated in Miscellaneous Order Number M-128, filed with the Clerk of the Court on March 18, 1992.
6. The Court suspends the requirements for mandatory urine screening as dictated by 18 USC § 3608, but specifically retains the probation officer's authority to administer such tests for cause as permitted by the standard conditions of supervision.

### STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: JUAN JOSE MARINES

Case Number: 97-CR-149-001-C

**RESTITUTION AND FORFEITURE**  
**RESTITUTION**

The defendant shall make restitution in the total amount of \$22,876.43.

The defendant shall make restitution to the following persons in the following amounts:

<b><u>Name of Payee</u></b>	<b><u>Amount of Restitution</u></b>
Gordon's Jewelers 190 Woodland Hills Mall Tulsa, Oklahoma 74133	\$3,299.94
JC Penney Attn: Fraud Dept. PO Box 947 Minneapolis, Minnesota 55440	\$405.84
Ultimate Electronics Inc. Attn: Fraud Loss Dept. PO Box 105981 Atlanta, Georgia 30353-5981	\$2,042.24
Dillard National Bank Attn: Fraud Dept. PO Box 52079 Phoenix, Arizona 85072-9374	\$3,430.18
Riverside Chevrolet/Chrysler Corporation c/o 707 W. 51 Street Tulsa, Oklahoma 74107	\$9,700
Eldorado Motors Attn: Rick Beck 3900 S. Memorial Tulsa, Oklahoma 74145	\$1,500
Zales Attn: Fraud Manager 2035 W. 4th Street Tempe, Arizona 85281	\$2,498.23

Payments of restitution are to be made to the Clerk of the Court for the Northern District of Oklahoma for transfer to the payee(s).

Restitution shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid as a condition of supervised release.

If a victim has received compensation from insurance or any other source with respect to a loss, any restitution ordered shall be paid to the person who is a victim before any restitution is paid to any such provider of compensation.

Any payment shall be divided proportionately among the payees named unless otherwise specified here. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid as a condition of supervised release.

Defendant: JUAN JOSE MARINES  
Case Number: 97-CR-149-001-C

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	9	
Criminal History Category:	II	
Imprisonment Range:	6 months to 12 months	Cts. 2 & 14
Supervised Release Range:	3 to 5 years	Ct. 2
	2 to 3 years	Ct. 14
Fine Range:	\$ 3,000 to \$ 1,250,000	Cts. 2 & 14
Restitution:	\$ 22,876.43	

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

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

**FILED**

JUN 17 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
KENNETH N. POWELL, )  
)  
Defendant. )

No. 91-CR-9-E ✓  
(97-CV-249-E)

ENTERED ON DOCKET

DATE 6-19-98

**ORDER**

Before the Court is the *pro se* Defendant Kenneth N. Powell's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket #256). The Plaintiff United States of America has filed its response brief (#262), and Defendant has filed a reply to that response (#263). After reviewing the entire record in this case, the Court has determined that an evidentiary hearing is not necessary and that the motion lacks merit and should be denied.

***BACKGROUND***

Defendant was found guilty of conspiracy to distribute marijuana in violation of 21 U.S.C. § 846 following a multi-defendant trial. An earlier trial had ended in mistrial. After a sentencing hearing, Defendant was sentenced to 292 months imprisonment to be followed by a five year term of supervised release. Defendant appealed, arguing that:

1. The second trial violated double jeopardy
2. There was a fatal variance between the indictment and the proof at trial;
3. He should not have been sentenced under the Sentencing Guidelines; and

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4. The applicable amount of marijuana was computed incorrectly in applying the Sentencing Guidelines.

Defendant's conviction and sentence were affirmed on appeal. United States v. Powell, 982 F.2d 1422 (10<sup>th</sup> Cir. 1992). The facts of this case were recounted by the Tenth Circuit in its opinion and are briefly summarized here. In 1986, Defendant and co-defendant Andrew J. Whitmore formed a partnership to import large quantities of marijuana from Texas to Oklahoma. The marijuana was transported by other individuals in shipments of 300-500 pounds, and it was repackaged and sold by Defendant, Whitmore and others in bags of 20-50 pounds to other individuals, who then resold the marijuana in smaller quantities.

Defendant and Whitmore ended their partnership in 1987, but continued distributing marijuana individually. Defendant was arrested in March 1989 and had in his possession \$32,000 in cash and a list of names and phone numbers. In all, approximately 100 loads of marijuana were transported from Texas to Oklahoma from 1986 to 1991, when the indictment was filed which led to Defendant's conviction.

Defendant now has filed this motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, raising two grounds for relief:

1. Ineffective assistance of counsel for failure to properly argue the quantity amounts before the sentencing court and on appeal; and
2. The court erred in adopting the Presentence Report ("PSR")'s quantity of drugs.

The government in its response asserts that defense counsel did object at sentencing to the quantity of drugs calculated in the PSR. Furthermore, the government adds, on appeal the Tenth Circuit affirmed this Court's determination of the quantity of drugs attributable to Defendant.

Defendant filed a reply brief repeating his claim that his attorney did not properly argue that the drug quantity was not supported by the evidence at trial.

### *ANALYSIS*

#### **A. Ineffective assistance of counsel claim is without merit.**

Defendant asserts that his trial counsel erred in failing to object that the Probation Officer double counted 30 loads of marijuana in computing the drug quantities which were used to compute Defendant's base offense level under the Sentencing Guidelines.

To establish ineffective assistance of counsel a defendant must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland, 466 U.S. at 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). A defendant 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. To establish the second prong, a defendant 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. See also Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Strickland, 466 U.S. at 688. In making this determination, 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." Id., at 690. 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.

The record reveals that at the sentencing hearing Defendant's trial counsel, Curtis Biram, argued at great length that the amount of drugs attributed to Defendant in the PSR was legally and factually excessive. (Tr. of Sent. Hr'g at 19-58). Counsel also put on Defendant to testify, and successfully argued that the two-point enhancement for possession of a weapon was not justified by the facts. The Court accepted defense counsel's argument with respect to the enhancement, reducing Defendant's sentence from 360 months to 292 months. (Tr. of Sent. Hr'g at 125). Far from being ineffective, defense counsel was successful in reducing Defendant's sentence with respect to this enhancement. In view of defense counsel's overall zealous and thorough representation of Defendant, the Court finds that counsel acted well within the level expected from a reasonably competent attorney in criminal cases. See Strickland, 466 U.S. at 687-88. Counsel need not argue every possible objection, and the Court is not persuaded that counsel's failure in this instance to argue the alleged "double-counting" of 30 loads constituted deficient performance.

**B. Defendant's claim regarding quantity of drugs has been previously adjudicated.**

Defendant argues that the quantity of drugs calculated by the Probation Officer and adopted by the Court for sentencing purposes does not have the necessary indicia of reliability and is not supported by the testimony at trial. He again alleges that some of the loads of marijuana were double-counted by the Probation Officer in arriving at the total amount.

On appeal, Defendant disputed the amount of marijuana attributed to him. In affirming Defendant's sentence and the amount of drugs attributed to him, the Tenth Circuit refused to disturb this Court's adoption of the probation officer's estimation of quantity, which was based on the average amount of marijuana distributed over two years of the conspiracy. Powell, 982 F.2d at 1435.

The Tenth Circuit referenced this Court's comment "that the amount could have been much greater considering that the evidence showed the conspiracy continued for a total of five years." Id.

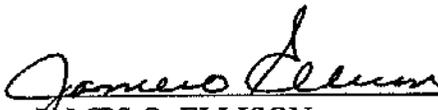
Absent an intervening change in the law of this circuit, a defendant may not raise in a § 2255 motion issues that have already been adjudicated on direct appeal. United States v. Cox, 83 F.3d 336, 342 (10th Cir. 1996); United States v. Warner, 23 F.3d 287, 291 (10th Cir. 1994). Defendant's argument that the court erred in determining the quantity of drugs attributed to him was fairly encompassed by the ruling on direct appeal, and there has been no intervening change of law in the circuit. Therefore, this issue may not be considered in the instant § 2255 proceeding.

#### **CONCLUSION**

Defendant's claim of ineffective assistance of counsel is without merit. His claim that the Court erred in computing the amount of drugs attributed to him is barred as already adjudicated.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (docket #256) is **denied**.

SO ORDERED THIS 17<sup>th</sup> day of June, 1998.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

FILED

JUN 17 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

KENNETH N. POWELL, )

Defendant. )

Case No. 91-CR-9-E ✓  
(97-C-249-E)

ENTERED ON DOCKET

DATE 6-19-98

JUDGMENT

This matter came before the Court upon Defendant's motion to vacate set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 17<sup>th</sup> day of June, 1998.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

FILED  
JUN 17 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

ANDREW J. WHITMORE, II, )

Defendant. )

No. 91-CR-9-E ✓  
(97-CV-51-E)

ENTERED ON DOCKET

DATE 6-19-98

**ORDER**

Before the Court is the *pro se* Defendant Andrew J. Whitmore's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket #253). The Plaintiff United States of America has filed its response brief (#255), and Defendant has filed a reply to that response (#257). After reviewing the entire record in this case, the Court has determined that an evidentiary hearing is not necessary and that the motion lacks merit and should be denied.

***BACKGROUND***

Defendant was found guilty of conspiracy to distribute marijuana in violation of 21 U.S.C. § 846 following a multi-defendant trial. An earlier trial had ended in mistrial. After a sentencing hearing, Defendant was sentenced to 360 months imprisonment to be followed by a five year term of supervised release. Defendant appealed, arguing that:

1. The second trial violated double jeopardy;
2. The evidence was insufficient to convict him of conspiracy;
3. There was a fatal variance between the indictment and the proof at trial;
4. The government's trial tactics denied his due process;

5. He should not have been sentenced under the Sentencing Guidelines; and
6. The applicable amount of marijuana was computed incorrectly in applying the Sentencing Guidelines.

Defendant's conviction and sentence were affirmed on appeal. United States v. Powell, 982 F.2d 1422 (10<sup>th</sup> Cir. 1992). The facts of this case were recounted by the Tenth Circuit in its opinion and are briefly summarized here. In 1986, Defendant and co-defendant Kenneth Powell formed a partnership to import large quantities of marijuana from Texas to Oklahoma. The marijuana was transported by other individuals in shipments of 300-500 pounds, and it was repackaged and sold by Defendant, Powell and others in bags of 20-50 pounds to other individuals, who then resold the marijuana in smaller quantities.

Defendant and Powell ended their partnership in 1987, but continued distributing marijuana individually. In all, approximately 100 loads of marijuana were transported from Texas to Oklahoma from 1986 to 1991, when the indictment was filed which led to Defendant's conviction.

Defendant now has filed this motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, raising three grounds for relief:

1. Ineffective assistance of counsel for failure to object to improper jury instructions;
2. The court erred in determining the quantity of drugs; and
3. The court erred in applying the two-point enhancement for possession of a firearm.

The government in its response asserts that: Defendant's first claim is without merit; his second claim was previously adjudicated on appeal; and his third claim was improperly raised because it should have been brought on appeal.

Defendant filed a reply brief repeating his claims and adding that his trial counsel was ineffective for failing to object to the two-point enhancement for possession of a firearm.

### *ANALYSIS*

#### **A. Ineffective assistance of counsel claim is without merit.**

Defendant asserts that his trial counsel erred in failing to object to the jury instructions which allegedly were improper because they did include an essential element of conspiracy, the "interdependency" of the co-conspirators.

The government responds that, although the instructions do not contain the word "interdependency," they do accurately describe the elements of a conspiracy. In addition, the government asserts, Defendant was not prejudiced by counsel's failure to object even if erroneous, because the Tenth Circuit held on appeal that there was more than sufficient evidence to connect Defendant to the conspiracy. Therefore, the government concludes, Defendant does not demonstrate ineffective assistance of counsel according to the test in Strickland v. Washington, 446 U.S. 668 (1984).

To establish ineffective assistance of counsel a defendant must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland, 466 U.S. at 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). A defendant 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. To establish the second prong, a defendant 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. A reasonable probability is a probability sufficient to undermine

confidence in the outcome." Id. at 694. See also Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Strickland, 466 U.S. at 688. In making this determination, 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." Id., at 690. 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.

The Court's review of the jury instructions with respect to the definition of a conspiracy reveals that they accurately state the essential elements of a conspiracy. Further, it is clear that Defendant was not prejudiced by counsel's failure, if error, to object to the jury instructions, as the Tenth Circuit found on appeal that "[t]he evidence is more than sufficient to connect Mr. Whitmore to the conspiracy." Powell, 982 F.2d at 1430. Thus, Defendant has not established that the alleged error by trial counsel prejudiced him, and his claim of ineffective assistance of counsel must fail.

**B. Defendant's claim regarding quantity of drugs has been previously adjudicated.**

Defendant argues that the quantity of drugs calculated by the Probation Officer and adopted by the Court for sentencing purposes does not have the necessary indicia of reliability and is not supported by the testimony at trial.

On appeal, Defendant disputed the amount of marijuana attributed to him. In affirming Defendant's sentence and the amount of drugs attributed to him, the Tenth Circuit refused to disturb this Court's adoption of the probation officer's estimation of quantity, which was based on the average amount of marijuana distributed over two years of the conspiracy. Powell, 982 F.2d at 1435.

The Tenth Circuit referenced this Court's comment "that the amount could have been much greater considering that the evidence showed the conspiracy continued for a total of five years." Id.

Absent an intervening change in the law of this circuit, a defendant may not raise in a § 2255 motion issues that have already been adjudicated on direct appeal. United States v. Cox, 83 F.3d 336, 342 (10th Cir. 1996); United States v. Warner, 23 F.3d 287, 291 (10th Cir. 1994). Defendant's argument that the court erred in determining the quantity of drugs attributed to him was fairly encompassed by the ruling on direct appeal, and there has been no intervening change of law in the circuit. Therefore, this issue may not be considered in the instant § 2255 proceeding.

**C. Claim of improper enhancement due to possession of a firearm is procedurally barred.**

Defendant asserts that the evidence does not support the enhancement for possession of a firearm. The government states that no objection was made to the PSR recommending this adjustment, and that this claim should have been raised on appeal. Defendant asserts that his counsel was ineffective for failing to appeal this issue.

While the record does not reflect that defense counsel filed written objections to the PSR, he did object to the firearm enhancement at the sentencing hearing held October 29, 1991. (Tr. of Sent. Hr'g at 12-13). The Court specifically found that the testimony from more than one witness supported Defendant's use of a gun in connection with a crime. (Tr. of Sent. Hr'g at 126). Defendant's appellate counsel did not raise this issue on appeal, however.

It is well settled that "[s]ection 2255 motions are not available to test the legality of matters which should have been raised on direct appeal." United States v. Warner, 23 F.3d 287, 291 (10th Cir. 1994) (citation omitted). Consequently, a defendant may not assert issues which were not raised in his direct appeal unless he establishes cause for his default and prejudice resulting therefrom, or

can show that a fundamental miscarriage of justice will occur if his claims are not addressed. United States v. Cook, 45 F.3d 388, 392 (10th Cir.1995). The procedural default rules developed in the context of habeas corpus cases apply with equal force in § 2255 cases. United States v. Frady, 456 U.S. 152, 166-69 n. 15 (1982).

The "cause" standard requires a defendant to show that some objective factor external to the defense impeded his ability to raise an issue on direct appeal. See Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence or a change in the law. Id. Ineffective assistance of counsel is another example of an external factor that may constitute "cause" excusing a procedural default. Cook, 45 F.3d at 392. As for prejudice, a defendant must show "'actual prejudice' resulting from the errors of which he complains." Frady, 456 U.S. at 168 (1982). The "fundamental miscarriage of justice" exception 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).

Defendant claims that his failure to raise these issues on direct appeal resulted from ineffective assistance of counsel. As noted before, to establish ineffective assistance of counsel a defendant must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is applied in assessing the ineffectiveness of appellate counsel. Cook, 45 F.3d at 392.

In this instance, appellate counsel's failure to appeal the firearms enhancement issue, even if error, did not prejudice Defendant because the record reflects ample uncontradicted testimony as to

Defendant's possession of a gun on numerous occasions in connection with his drug business by Linda Hubanks and Linda England, witnesses whom the Court found credible on this point.

The only other avenue by which Defendant can have this claim reviewed is by showing that a "fundamental miscarriage of justice" will result if the procedural bar is invoked. This exception applies "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986). Here, Defendant does not allege that he is actually innocent of the crime of which he was convicted.

Accordingly, because Defendant has not shown cause for his failure to raise this issue on direct appeal or prejudice resulting therefrom, or that a miscarriage of justice would result if this issue is not reached on its merits, the Court is procedurally barred from reaching this claim.

#### CONCLUSION

Defendant's claim of ineffective assistance of counsel is without merit. His claim that the Court erred in computing the amount of drugs attributed to him is barred as already adjudicated. Defendant's remaining claim regarding the enhancement for possession of a firearm is procedurally barred.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (docket #253) is **denied**.

SO ORDERED THIS 17<sup>th</sup> day of June, 1998.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 17 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANDREW J. WHITMORE, II,

Defendant.

Case No. 91-CR-9-E  
(97-C-51-E)

ENTERED ON DOCKET

DATE 6-19-98

JUDGMENT

This matter came before the Court upon Defendant's motion to vacate set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 17<sup>th</sup> day of June, 1998.

James O. Ellison  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

**FILED**  
JUN 17 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MELVIN L. GANN,

Defendant.

No. 91-CR-9-E  
(96-CV-982-E)

ENTERED ON DOCKET

DATE 6-19-98

**ORDER**

Before the Court is Defendant Melvin L. Gann's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket ##248 and 250). The Plaintiff United States of America has filed its response brief (#251). After reviewing the entire record in this case, the Court has determined that an evidentiary hearing is not necessary and that the motion lacks merit and should be denied.

**BACKGROUND**

Defendant was found guilty of conspiracy to distribute marijuana in violation of 21 U.S.C. § 846 following a multi-defendant trial. An earlier trial had ended in mistrial. After a sentencing hearing, Defendant was sentenced to 188 months imprisonment, a five year term of supervised release, and fined \$15,000. Defendant appealed, arguing that:

1. The second trial violated double jeopardy;
2. The evidence was insufficient to convict him of conspiracy;
3. There was a fatal variance between the indictment and the proof at trial;
4. The district court should have granted a severance;

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5. The government's trial tactics denied his due process; and
6. The applicable amount of marijuana was computed incorrectly in applying the Sentencing Guidelines.

Defendant's conviction and sentence were affirmed on appeal. United States v. Powell, 982 F.2d 1422 (10<sup>th</sup> Cir. 1992). The facts of this case were recounted by the Tenth Circuit in its opinion and are briefly summarized here. In 1986, co-defendants Andrew J. Whitmore and Kenneth Powell formed a partnership to import large quantities of marijuana from Texas to Oklahoma. The marijuana was transported by other individuals in shipments of 300-500 pounds, and it was repackaged and sold by Whitmore, Powell and others in bags of 20-50 pounds to Defendant and others, who then resold the marijuana in smaller quantities.

Whitmore and Powell ended their partnership in 1987, but continued distributing marijuana individually. Defendant continued to buy from both Whitmore and Powell. In all, approximately 100 loads of marijuana were transported from Texas to Oklahoma from 1986 to 1991, when the indictment was filed which led to Defendant's conviction.

Defendant, represented by counsel, now has filed this motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, raising these grounds for relief:

1. The court erred in determining the amount of drugs attributable to Defendant, because "relevant conduct" for sentencing purposes should be calculated only from the time Defendant joined the conspiracy;
2. The court failed to make individualized findings concerning the scope of Defendant's criminal activity;

3. The court failed to make specific factual findings regarding controverted findings of the Presentence Report ("PSR"), in violation of Rule 32, Fed. R. Crim P.;
4. The court improperly shifted the burden of proof to the Defendant to rebut findings of the PSR; and
5. The court denied Defendant the right of allocution at sentencing, in violation of Rule 32(c), Fed. R. Crim. P.

The government in its response asserts that Defendant's first claim as to the amount of drugs attributable to Defendant was adjudicated previously on appeal and so is barred. The government contends that Defendant's remaining claims are procedurally barred because they were not raised on direct appeal and Defendant has not shown "cause and prejudice" for such failure.

Defendant did not file a reply brief addressing the issue of his alleged procedural default. However, in his motion Defendant states that "[n]one of these grounds were previously presented either due to ineffective assistance of counsel and/or amendments to the sentencing guidelines which created new law that is to be retroactively applied." (#250 at 8).

#### *ANALYSIS*

**A. Defendant's claim regarding quantity of drugs has been previously adjudicated.**

Defendant argues that "relevant conduct" for purposes of computing the quantity of drugs attributed to Defendant must be calculated only prospectively from the time Defendant joined the conspiracy, in late 1988. Defendant supports this position primarily by reliance on United States v. Carreon, 11 F.3d 1225 (5<sup>th</sup> Cir. 1994).

On appeal, Defendant disputed the amount of marijuana attributed to him, contending that his sentence was based on a greater amount of drugs than was reasonably foreseeable. At sentencing

and on appeal, Defendant had argued that the conspiracy he was convicted of being involved in ended in 1987 when Powell "withdrew" from the conspiracy; therefore, Defendant claimed that he should not be attributed any of the drugs involved after 1987. In affirming Defendant's sentence and the amount of drugs attributed to him, the Tenth Circuit first noted that a defendant is accountable for the quantity of drugs within the scope of the conspiracy and reasonably foreseeable, and refused to disturb this court's adoption of the probation officer's estimation of quantity, which was based on the average amount of marijuana distributed over two years of the conspiracy. Powell, 982 F.2d at 1435.

Absent an intervening change in the law of this circuit, a defendant may not raise in a § 2255 motion issues that have already been adjudicated on direct appeal. United States v. Cox, 83 F.3d 336, 342 (10th Cir. 1996); United States v. Warner, 23 F.3d 287, 291 (10th Cir. 1994). Defendant's argument that the court erred in determining the quantity of drugs attributed to him was fairly encompassed by the ruling on direct appeal and there has been no intervening change of law in the circuit. Therefore, this issue may not be considered in the instant § 2255 proceeding.

**B. Defendant's remaining four claims are procedurally barred.**

Defendant raises his remaining claims for the first time in this § 2255 motion. It is well settled that "[s]ection 2255 motions are not available to test the legality of matters which should have been raised on direct appeal." United States v. Warner, 23 F.3d 287, 291 (10th Cir. 1994) (citation omitted). Consequently, a defendant may not assert issues which were not raised in his direct appeal unless he establishes cause for his default and prejudice resulting therefrom, or can show that a fundamental miscarriage of justice will occur if his claims are not addressed. United States v. Cook, 45 F.3d 388, 392 (10th Cir. 1995). The procedural default rules developed in the context of habeas

corpus cases apply with equal force in § 2255 cases. United States v. Frady, 456 U.S. 152, 166-69 n. 15 (1982).

The "cause" standard requires a defendant to show that some objective factor external to the defense impeded his ability to raise an issue on direct appeal. See Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence or a change in the law. Id. Ineffective assistance of counsel is another example of an external factor that may constitute "cause" excusing a procedural default. Cook, 45 F.3d at 392. As for prejudice, a defendant must show "'actual prejudice' resulting from the errors of which he complains." Frady, 456 U.S. at 168 (1982). The "fundamental miscarriage of justice" exception 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).

Defendant claims generally that his failure to raise these issues on direct appeal resulted from ineffective assistance of counsel. Although Defendant does not explain his alternate contention that retroactive amendments to the sentencing guidelines excuses any default, this ground seems to relate solely to his claim concerning drug quantities which the Court has determined to be barred as already adjudicated.

To establish ineffective assistance of counsel a defendant must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is applied in assessing the ineffectiveness of appellate counsel. Cook, 45 F.3d at 392.

Because the procedural bar is imposed due to Defendant's failure to raise his claims on direct appeal, the Court must examine the merits of the issues omitted upon appeal. *Id.* If the omitted issues are without merit, counsel's failure to raise them does not amount to constitutionally ineffective assistance of counsel. *Id.* at 393.

*I. Failure to make individualized findings concerning the scope of Defendant's criminal activity, in violation of Rule 32(c), Fed. R. Crim. P*

Defendant contends that the Court did not make specific findings as to the amount of drugs attributable to each defendant before sentencing them. Instead, Defendant claims, the Court merely applied to each defendant the 11,000 kilograms of marijuana quantity calculated by the Probation Office in the several defendants' Presentence Reports ("PSR"s). However, the record demonstrates that the Court did implicitly find that this amount of drugs was attributable to Defendant when it rejected Defendant's objection that the conspiracy had ended in 1987. (Tr. of Sent. Hr'g at 122).

Further, any failure to make individualized findings as to the scope of Defendant's criminal activity is harmless error at best, because the Tenth Circuit expressly determined that the evidence was sufficient to convict Defendant of conspiracy, stating that: "[w]e consider Mr. Gann to have been a 'major buyer,' and he is 'joined together' with the other conspirators by his knowledge of the essential features and broad scope of the conspiracy and by joining in the common goal." *Powell*, 982 F.2d 1422, 1431. Also, as previously discussed, the appellate court affirmed this Court's calculation of the quantity of drugs attributable to Defendant. *Id.* at 1435.

Accordingly, this claim is without merit, and Defendant's appellate counsel did not provide ineffective assistance in failing to raise it on appeal.

The only other avenue by which Defendant can have this claim reviewed is by showing that a "fundamental miscarriage of justice" will result if the procedural bar is invoked. This exception applies "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. at 496 (1986). Defendant does not claim that he is actually innocent of the charge of which he was convicted. Therefore, this claim is procedurally barred.

2. *Failure to make specific factual findings regarding controverted findings of the PSR, in violation of Rule 32, Fed. R. Crim P.*

Prior to sentencing, Defendant filed objections to the factual allegations contained in the PSR. Defendant's objections mainly centered on his contention that the conspiracy of which he was convicted ended before November 1, 1987, the effective date of the sentencing guidelines; therefore, Defendant asserted that he should be sentenced under pre-guidelines law. Defendant also objected to the quantity of drugs "reasonably foreseeable" and thus attributable to Defendant for sentencing purposes. (#164). At the sentencing hearing, defense counsel argued these issues at length. (Tr. of Sent. Hr'g at 81-92). Defendant now contends that the Court did not make any specific findings with respect to Defendant's objections to the PSR, in violation of Rule 32.

However, the record reveals that the Court did make specific factual findings regarding the controverted allegations of the PSR. The Court specifically found that although the Whitmore-Powell partnership dissolved in Spring 1987, the conspiracy continued through early 1991; thus the sentencing guidelines were applicable. (Tr. of Sent. Hr'g at 122-123). The Court also found that the 11,000 figure (kilograms of marijuana) was applicable to all defendants except James Bradley. (Tr. of Sent. Hr'g at 123). Thus, the Court specifically made findings regarding the objections raised by

Defendant to the PSR, and this claim is without merit. Defendant's appellate counsel did not err in failing to raise it on appeal, and it is procedurally barred.

3. *Improper shifting of the burden of proof to Defendant to rebut findings of the PSR*

Defendant claims that the Court impermissibly placed the burden on him at the sentencing hearing to disprove the factual allegations in the PSR. Defendant contends that the following statement made by the Court during the hearing demonstrates that the burden of proof was put on Defendant:

I'm saying when I address credibility, the credibility of a witness who takes the witness stand in front of a jury and gives testimony subject to cross-examination, obviously has more value to a court or to a probation officer than a convicted defendant coming forward trying to get out from under the guidelines –

(Tr. of Sent. Hr'g at 48).

At the time it made this statement, the Court was engaged in discussion with defense counsel for co-defendant Powell about the relative value of Powell's testifying at the sentencing hearing about his drug activities and whether or not he carried a gun in relation with those activities. (Powell did subsequently testify at the hearing). This discussion pertained to the enhancements recommended with respect to Powell's sentence, and the Court's statement quoted above has no relevance to Defendant's sentencing or burden or proof.

With respect to sentence enhancements and reductions, it is well-settled in this circuit that the government bears the burden of proof for sentence increases and the defendant bears the burden of proof for sentence decreases. United States v. Yarnell, 129 F.3d 1127 (10<sup>th</sup> Cir. 1997); United States

v. Rice, 52 F.3d 843, 848 (10<sup>th</sup> Cir. 1995); United States v. Kirk, 894 F.2d 1162, 1164 (10<sup>th</sup> Cir. 1990). However, the PSR in Defendant's case did not recommend any upward or downward enhancements, and Defendant did not claim he was entitled to any decreases. Instead, defense counsel's objections to the PSR centered around the quantity of drugs attributed to Defendant and the applicability of the sentencing guidelines to Defendant's case in the first instance. (#164; Tr. of Sent. Hr'g at 81-92).

Defendant's argument that the burden of proof was impermissibly moved to him is unpersuasive, and the Court accordingly concludes that appellate counsel did not err in failing to raise this issue on appeal. Thus, Defendant has failed to show "cause and prejudice" sufficient to overcome the procedural bar with respect to this issue.

4. *Denial of the right of allocution at sentencing, in violation of Rule 32(c), Fed. R. Crim. P.*

Defendant requests resentencing because "[a] reading of the Sentencing Transcript shows that there was no determination that the Defendant wanted to speak nor was any opportunity given for him to speak." (#248 at 29).

At the sentencing proceedings for Defendant and four of his co-defendants, counsel for each defendant presented objections to the PSRs. The Court then made its factual findings and sentenced each defendant in turn. Defendant was the fourth to be sentenced, and Defendant's attorney, Larry Oliver, made several comments on Defendant's behalf at this time. Although the record does not reflect that the Court addressed Defendant by name, on two occasions during Defendant's sentencing the Court did ask, "Anything further?" (Tr. of Sent. Hr'g at 133-134). During the colloquy between

the Court and the other defendants during their separate sentencings, the other defendants either said "No," when asked by the Court if they had anything to say or else made a brief comment.

Rule 32(a)(1)(C), *Federal Rules of Criminal Procedure (1991)*,<sup>1</sup> provided in relevant part:

Before imposing sentence, the court shall also—

(C) address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence.

In this instance, Defendant was not addressed by name, although he was addressed by the Court generally together with his attorney. Defendant was present in court during the sentencing of the preceding three co-defendants, who were personally asked if they wished to add anything, so it is not unreasonable to infer that Defendant was aware of his right to speak out if he had anything to say. Defendant does not claim that he was denied an opportunity to speak, nor does he allege that he wanted to say anything in mitigation or that he would have made any statement whatsoever if personally addressed by the Court. Defendant has failed to allege that he was prejudiced in any way by the Court's failure to personally address him and determine if he wished to make a statement. Instead, Defendant claims that the technical violation of Rule 32(a) in itself requires resentencing.

However, even assuming a formal violation of Rule 32(a)(1)(C), Defendant would not be entitled to relief pursuant to § 2255. The Supreme Court has addressed this very issue and held that "[t]he failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is

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<sup>1</sup>Effective December 1, 1994, this provision was moved to Fed. R. Crim. P. 32(c)(3)(C).

not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'"

Hill v. United States, 368 U.S. 424, 428 (1962) (citation omitted); Byrd v. United States, 129 F.3d 1127, 1136 (10<sup>th</sup> Cir. 1965).

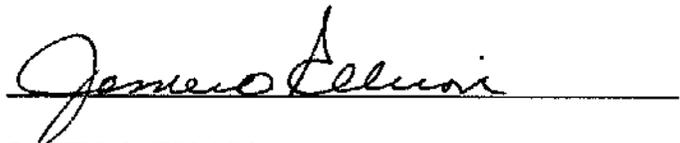
Accordingly, the Court concludes that any technical violation of Rule 32(a)'s allocution provision was harmless error which did not prejudice Defendant, and Defendant's appellate counsel therefore did not err in failing to raise this issue on direct appeal. Thus, Defendant has failed to show cause sufficient to overcome the procedural bar with respect to this issue.

#### CONCLUSION

Defendant's claim that the Court erred in computing the amount of drugs attributed to him is barred as already adjudicated. Defendant's remaining claims are procedurally barred.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (docket ##248 and 250) is **denied**.

SO ORDERED THIS 17<sup>th</sup> day of June, 1998.



JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

FILED  
JUN 17 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MELVIN L. GANN, )  
 )  
 Defendant. )

Case No. 91-CR-9-E  
(96-C-982-E)

ENTERED ON DC.

DATE 6-19-98

JUDGMENT

This matter came before the Court upon Defendant's motion to vacate set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 17<sup>th</sup> day of June, 1998.

James O. Ellison  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
-vs- )  
)  
)  
KENT GARRISON, )  
)  
Defendant. )

ENTERED ON DOCKET

DATE 6-19-98

No. 97-CR-183-H

**FILED**

JUN 18 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Now on this 18<sup>TH</sup> day of JUNE, 1998, this cause comes on to be heard in the matter of the plaintiff's Motion for Leave to Dismiss, without prejudice, the Superseding Indictment and the Information filed against defendant Kent Garrison in the above styled cause. The Court finds that said request ought to be granted and the Superseding Indictment and the Information filed against defendant Kent Garrison is dismissed, without prejudice.

IT IS SO ORDERED.



SVEN ERIK HOLMES  
United States District Judge

UNITED STATES DISTRICT COURT  
Northern District of Oklahoma

**FILED**

UNITED STATES OF AMERICA

v.

Case Number 97-CR-127-002-K

*JUN 18 1998*  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

EVEN SANTANA-CORRAL  
Defendant.

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, EVEN SANTANA-CORRAL, was represented by ROBERT G. BOREN.

The defendant pleaded guilty on March 12, 1998, to Count One of the Indictment. Accordingly, the defendant is adjudged guilty of such count, involving the following offense(s):

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
21 USC 846 USC 841(b)(1)(B)(vii)	CONSPIRACY TO POSSESS A CONTROLLED DANGEROUS SUBSTANCE WITH INTENT TO DISTRIBUTE	01/28/97	One

As pronounced on June 11, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 100, for count(s) Count One of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 17 day of June, 1998.

*Terry C. Kern*  
The Honorable Terry C. Kern, Chief  
United States District Judge

Defendant's SSN: NONE  
Defendant's Date of Birth: CALLE TERAN #119 SUR, CIUDAD MIER, TAMAULIPAS, MEXICO  
Defendant's mailing address: TULSA COUNTY JAIL, TULSA, OKLAHOMA  
Defendant's residence address: TULSA COUNTY JAIL

Defendant: EVEN SANTANA-CORRAL  
Case Number: 97-CR-127-002-K

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months.

The Court makes the following recommendations to the Bureau of Prisons: The Court recommends that the defendant be placed at a facility that can provide comprehensive substance abuse treatment during service of this sentence. The Court recommends that the defendant be designated to FCI Three Rivers, Texas.

The defendant is remanded to the custody of the United States Marshal.

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal

By \_\_\_\_\_  
Deputy Marshal

Defendant: EVEN SANTANA-CORRAL  
 Case Number: 97-CR-127-002-K

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of four (4) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. Upon completion of the term of imprisonment, the defendant is to be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Naturalization Act, 8 U.S.C. §§ 1101 - 1524. It is further a condition of supervised release, if ordered deported, that the defendant shall remain outside the United States until termination of the term of supervised release.
5. The defendant shall successfully participate in a program of testing and treatment (to include inpatient) for drug and alcohol abuse, as directed by the Probation Officer, until such time as released from the program by the Probation Officer.
6. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.

### STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: EVEN SANTANA-CORRAL  
Case Number: 97-CR-127-002-K

**FINE**

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

The defendant shall pay a fine of \$ 10,000. This fine shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid during the term of supervised release.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: EVEN SANTANA-CORRAL  
Case Number: 97-CR-127-002-K

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	25	
Criminal History Category:	I	
Imprisonment Range:	60 months to 71 months	Count One
Supervised Release Range:	4 to 5 years	Count One
Fine Range:	\$ 10,000 to \$ 2,000,000	Count One
Restitution:	\$ n/a	

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

*OW*

UNITED STATES DISTRICT COURT  
Northern District of Oklahoma

ENTERED ON DOCKET  
DATE 6-18-98

UNITED STATES OF AMERICA

v.

Case Number 97-CR-181-02-K

**FILED**

CHRISTOPHER J. WIELAND  
Defendant.

JUN 18 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, CHRISTOPHER J. WIELAND, was represented by KURT GLASSCO.

The defendant pleaded guilty ON MARCH 11, 1998, to Count One of the Indictment. Accordingly, the defendant is adjudged guilty of such count, involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 371	Conspiracy to Obstruct Correspondence and Steal Mail Matter	06/13/97	1

As pronounced on June 11, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 100, for Count One of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 17 day of June, 1998.

  
The Honorable Terry C. Kern, Chief  
United States District Judge

Defendant's SSN: 441-82-6181  
Defendant's Date of Birth: 11-10-66  
Defendant's mailing address: 1427 S. 122ND EAST AVE, TULSA, OK 74128  
Defendant's residence address: TULSA COUNTY JAIL, TULSA, OKLAHOMA

Defendant: CHRISTOPHER J. WIELAND  
Case Number: 97-CR-181-02-K

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of nine (9) months, as to Count 1, said term to run consecutively to the sentence imposed in Tulsa County Case # CF97-4597.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal

By \_\_\_\_\_  
Deputy Marshal

Defendant: CHRISTOPHER J. WIELAND

Case Number: 97-CR-181-02-K

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of thirty-six (36) months.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. The defendant shall successfully participate in a program of testing and treatment (to include inpatient) for drug and alcohol abuse, as directed by the Probation Officer, until such time as released from the program by the Probation Officer.
5. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.
6. The defendant shall abide by the "Special Financial Conditions" enumerated in Miscellaneous Order Number M-128, filed with the Clerk of the Court on March 18, 1992.

**STANDARD CONDITIONS OF SUPERVISION**

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: CHRISTOPHER J. WIELAND  
Case Number: 97-CR-181-02-K

**RESTITUTION AND FORFEITURE****RESTITUTION**

The defendant shall make restitution in the total amount of \$4,646.56.

The defendant shall make restitution to the following persons in the following amounts:

<b><u>Name of Payee</u></b>	<b><u>Amount of Restitution</u></b>
Wal Mart 7777 East 42nd Place, South Tulsa, Oklahoma 74145 Attention: Cash Office	\$ 50.66
Service Merchandise 8219 East 68th Street Tulsa, Oklahoma 74133 Attention: Floyd Margason	\$ 310.77
Circuit City 9954 Mayland Drive Richmond, Virginia 23233	\$ 442.44
Bowdens 101 North Wilson Sand Springs, Oklahoma 74063	\$ 17.60
Git-n-Go through MasterCheck P.O. Box 637 Stillwater, Oklahoma 74076	\$ 41.37
Quick Trip P.O. Box 2828 Tulsa, Oklahoma 74101 Attention: Collections, Account No. 356156	\$ 42.79
K-Mart RSO P.O. Box 8130 Moline, Illinois 60078-8130 Attention: Legal Department Control No. 3088423	\$ 657.53

Mervyns through Dayton Hudson Corporation c/o Check Administration P.O. Box 960 Minneapolis, Minnesota 55440 Customer Account No. 480722190	\$ 227.88
Zales through Jewelers Financial Services P.O. Box 152753 Irving, Texas 75015-2753 Attention: Rhonda Blevins	\$ 42.09
Horner Foods dba Price Mart #5 9136 East 31st Street Tulsa, Oklahoma 74145 Attention: Bruce Scott	\$ 57.54
Med-X Corporation dba Drug Mart P.O. Box 700870 Tulsa, Oklahoma 74170	\$ 34.14
Kirlins 532 Main Street P.O. Box 3097 Quincy, Illinois 62305 Attention: Mary Lock	\$ 13.98
Homeland Stores, Incorporated P.O. Box 25008 Oklahoma City, Oklahoma 73125 Attention: Craig Nelson	\$ 145.03
Buds #11 2710 South Harvard Tulsa, Oklahoma 74114	\$ 79.73
Mardels #3 7727 South West 44th Street Oklahoma City, Oklahoma 73179	\$ 57.83
Braums Ice Cream Store Box 25429 Oklahoma City, Oklahoma 73125 Attention: Bill Pendergraft	\$ 23.44
Drysdale's 3220 South Memorial Drive Tulsa, Oklahoma 74145	\$ 304.26
Horner Foods dba Price Mart #3 9136 East 31st Street Tulsa, Oklahoma 74145	\$ 84.89

Albertson's P.O. Box 20 Boise, ID 83726 Attention: Department R	\$ 88.36
Sutherlands - Broken Arrow 1800 North Elm Place Broken Arrow, Oklahoma 74012 Attention: Scott Sottilo	\$ 156.46
Sutherlands - East 9503 East 21st Street Tulsa, Oklahoma 74129 Attention: Ricky Payne	\$ 13.88
K-Bar B 6414 North Peoria Tulsa, Oklahoma 74126	\$1,269.72
American Check Cashers 5051 South Yale Tulsa, Oklahoma 74135 Attention: Brian Sipes	\$ 375.00
J.C. Penny Company, Inc. P.O. Box 10001 Dallas, Texas 75301-0046 Attention: Steve Frank	\$ 53.94
Warehouse Market 2121 South Garnett Road Tulsa, Oklahoma 74129	\$ 55.23

Payments of restitution are to be made to the Clerk of the Court for the Northern District of Oklahoma for transfer to the payee(s).

Restitution shall be paid jointly and severally with Marla Kathleen Pinkston-Wieland except that no further payment shall be required after the sum of the amounts actually paid by all defendants has fully covered the compensable injury. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid as a condition of supervised release.

If a victim has received compensation from insurance or any other source with respect to a loss, any restitution ordered shall be paid to the person who is a victim before any restitution is paid to any such provider of compensation.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

Defendant: CHRISTOPHER J. WIELAND  
Case Number: 97-CR-181-02-K

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	7	
Criminal History Category:	III	
Imprisonment Range:	4 months to 10 months	Count One
Supervised Release Range:	2 to 3 years	Count One
Fine Range:	\$ 500 to \$ 5,000	Count One
Restitution:	\$ 4,646.56	Count One

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

ENTERED ON DOCKET

DATE 6-18-98

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

**F I L E D**

JUN 17 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
ROBERTO ORTIZ HERNANDEZ, )  
)  
Defendant. )

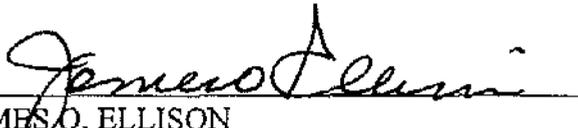
Case No. 91-CR-4-E  
(97-CV-303-E)

**JUDGMENT**

This matter came before the Court upon Defendant's motion to vacate set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 16<sup>th</sup> day of June, 1998.

  
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JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

JUN 17 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
BENNIE WREN BOLTON, a/k/a RAY )  
WILSON, )  
)  
Defendant. )

Case No. 88-CR-1-E  
(97-C-401-E)

ENTERED ON DOCKET

DATE 6-18-98

**Judgment**

This matter came before the Court upon the Motion pursuant to 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket # 90) of the Defendant Bennie Wren Bolton, a/k/a Ray Wilson. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for plaintiff, United States, and against Defendant, Bennie Wren Bolton, a/k/a Ray Wilson.

IT IS SO ORDERED THIS 17TH DAY OF JUNE, 1998.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA **F I L E D**

JUN 17 1998

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
BENNIE WREN BOLTON, a/k/a RAY )  
WILSON, )  
 )  
Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 88-CR-1-E  
(97-C-401-E)

ENTERED ON DOCKET

DATE 6-18-98

ORDER

Now before the Court is the Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket #90) of the Defendant, Bennie Wren Bolton.

On April 19, 1988, Bolton was found guilty on charges of receiving and possessing a firearm after being convicted of a felony and possessing a firearm not registered in the National Firearms Registration and Transfer Record. He was sentenced to forty-years imprisonment on the first charge, and ten years imprisonment, to run concurrently, on the second charge. Bolton filed both a Motion in Error and a Motion for New Trial, asserting nineteen allegations of error. After a hearing in which both Bolton and his counsel were allowed to present argument, the Motion in Error and Motion for New Trial were denied. Bolton appealed his sentence and conviction on six grounds: 1) the trial court erred in refusing to disqualify the assistant prosecutor who had earlier represented him, 2) his trial violated the Speedy Trial Act, 3) he was entitled to a jury instruction on the term "firearm," 4) there was insufficient evidence that he possessed the firearm, 5) his sentence was improperly enhanced, and 6) he was prejudiced by the ineffective assistance of counsel. By Judgment entered

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May 30, 1990, Bolton's conviction and sentence were affirmed on appeal.

Bolton now argues that he had ineffective assistance of counsel on appeal because appellate counsel 1) failed to make an argument concerning constructive amendment of the indictment, or a variance in the indictment; 2) failed to make an argument regarding the improper introduction of a record of prior conviction for robbery with a firearm; and 3) failed to make a proper argument regarding ineffective assistance of counsel at trial. The Court notes that the issue of ineffective assistance of counsel at trial was addressed and rejected on appeal, United States V. Bolton, 905 F.2d 319 (10th Cir. 1990).

The ineffective assistance of counsel claims must be evaluated under the Strickland test: 1) whether defendant's attorney's performance was not reasonably effective and 2) whether defendant's defense was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, the Court must presume that counsel's performance was reasonably effective and "the burden rests on the accused to demonstrate a constitutional violation." U.S. v. Cronin, 104 S.Ct. 2039, 2046 (1984). Under the Strickland rule the presumption of effective representation is a strong one. Indeed, "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, 104 S.Ct. at 2065. The Court must "presume that the challenged action might be considered sound trial strategy." Hatch v. State of Oklahoma, 58 F.3rd 1447, 1459 (10th Cir. 1995).

With respect to the failure to appeal the constructive amendment of the indictment, the Court must conclude that Bolton does not and cannot demonstrate that he was prejudiced by this decision. Bolton was indicted for possessing a firearm after former conviction of a felony and for possessing a firearm that was not registered in the National Firearms registration and Transfer Record. With

respect to both counts in the indictment, the firearm was described as "a Savage, 20 gauge weapon made from a shotgun, Serial Number 0580846, having a barrel length of 5 5/16 inches and an overall length of 12 7/8 inches." The shotgun that was introduced into evidence, however, had a serial number of C580646, but fit the description in the indictment in all other respects. The court granted an oral motion to amend the indictment to reflect the true and correct serial number as being C580646. (Tr. Trial April 19, 1988, p. 144).

A variance in the indictment arises when the evidence at trial establishes facts different from those alleged in the indictment. United States v. Ailsworth, 138 F.3d 843, 849 (10th cir. 1998). When a variance exists, a conviction is reversed only on a showing of substantial prejudice. Id. "A variance is not fatal unless the defendant could not have anticipated from the indictment what evidence would be presented at trial or unless the conviction based on an indictment would not bar a subsequent prosecution." Id. Likewise, an amendment to an indictment is acceptable if it is in form only and does not prejudice the defendant. United States v. Cook, 745 F.2d 1311, 1316 (10th Cir. 1984). "An amendment of form and not of substance occurs when the defendant is not misled in any sense, is not subjected to any added burdens, and is not otherwise prejudiced." Id.

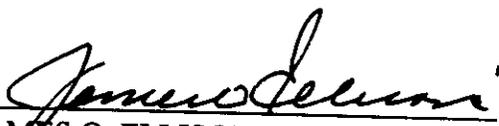
The evidence at trial is that a sawed off shotgun fell out of the car that Bolton was in when he opened the door (Tr. Trial April 18, 1988, p. 28), and that Bolton became aware of a shotgun in the car after he was already in the car (Tr. Trial April 19, 1988, p. 111). Moreover, Officer Raska, a firearm and tool mark examiner with the Tulsa Police Department testified that he examined the shotgun at issue in this case, that the serial number was initially covered with a layer of paint making it difficult to read, and that the serial number used in the indictment was an error resulting from the painted-over number. (Tr. Trial April 19, 1988, p. 101). There is no evidence introduced either at

trial or in Bolton's §2255 motion that more than one gun was in the car or found by police officers at the time of his arrest. Thus, in reviewing the evidence at trial, the Court must conclude that Bolton was not prejudiced either by the variance or the amendment. He was clearly aware of what he was charged with and what evidence would be presented at trial, and was able to present a defense to those charges. There is no prejudice in the variance or the amendment, and therefore no prejudice in appellate counsel's failure to make an argument regarding the amendment or variance on appeal.

Bolton's remaining argument pertains to appellate counsel's failure to argue the allegedly improper introduction of Bolton's prior convictions. Bolton, relying on Old Chief v. United States, S.Ct. (1997), argues that he was prejudiced by the statement that he had been "convicted of armed robbery, robberies with firearms." In Old Chief, the Court held that it was error to allow evidence of a prior conviction when the defendant had offered to stipulate to that element of the crime for which he was currently charged. The present case is distinguishable. Bolton specifically refused to enter into any stipulation regarding his previous convictions. (Tr. Pretrial Conf. April 12, 1988, p. 8). Therefore, Bolton is unable to demonstrate any prejudice in failing to raise this issue on appeal.

Bolton's Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket #90) is Denied.

SO ORDERED this 17<sup>th</sup> day of June, 1998.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

**F I L E D**  
JUN 17 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ROBERTO ORTIZ HERNANDEZ, )  
 )  
 Defendant. )

ENTERED ON DOCKET

DATE 6-18-98

No. 91-CR-4-E  
(97-CV-303-E)

**ORDER**

Before the Court is the *pro se* Defendant Robert Ortiz Hernandez's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket #49). The Plaintiff United States of America has filed its response brief (#50) and Defendant has filed a reply to that response (#52). Defendant also has filed a supplemental memorandum in support of pending 2255 (#54). After reviewing the entire record in this case, the Court has determined that an evidentiary hearing is not necessary and that the motion lacks merit and should be denied.

**BACKGROUND**

On December 13, 1990, an Oklahoma Highway Patrol Trooper stopped a rental truck driven by Defendant because the truck was weaving across the yellow lines of a state highway. The truck's rental agreement was in the name of co-defendant Emilio Barrera Sanchez, who was a passenger in the truck when it was stopped. A subsequent search of the rental truck revealed in excess of fifty (50) kilograms of cocaine hidden under a mattress in the cargo compartment. The facts as later developed revealed that Defendant recruited Sanchez to rent the truck in a Chicago suburb and drive with him

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to Arizona, where the truck was loaded with the cocaine. The two men were headed back to Chicago when they were stopped and arrested in Oklahoma.

On January 10, 1991, Defendant and Sanchez were indicted for possession with intent to distribute of approximately fifty (50) kilograms of cocaine. Defendant pled guilty in accordance with a plea agreement which included his promise to testify, if needed, at Sanchez's trial. The government agreed in return: not to object if Defendant received a two-point reduction in offense level for acceptance of responsibility or if the Court sentenced Defendant at the lower end of the guideline range; and to advise the Court of the nature and extent of Defendant's cooperation, if any. The maximum sentence as stated in the plea agreement was life imprisonment and a fine of up to \$4 million. Defendant ultimately did not testify for the government at Sanchez's trial, although he was called as a defense witness. Sanchez was convicted of the lesser included offense of simple possession of cocaine and sentenced to one year imprisonment.

Prior to Defendant's sentencing, the Probation Office prepared a Presentence Report ("PSR"). Defense counsel objected to the PSR on three grounds: 1) its recommendation that Defendant be given a two-point increase for being a manager or supervisor pursuant to § 3B1.1(c) of the United States Sentencing Committee, Guidelines Manual (Nov. 1990) ("U.S.S.G." or "guidelines"); 2) for not recommending a two-point reduction pursuant to U.S.S.G. § 3B1.2 for being a minor participant in the distribution of the cocaine; and 3) the PSR's statement that there were not any factors justifying departure from the guidelines, when Defendant believed he was entitled to a downward departure for providing substantial assistance to the government, pursuant to U.S.S.G. § 5K1.1. (#44).

The Court held a sentencing hearing on May 13, 1991, at which defense counsel repeated his objections to the PSR and requested an in-camera hearing to further advise the Court of the extent

of Defendant's cooperation with the government. The Court first made findings in open court that the Defendant had recruited Sanchez as a driver of the truck and was a major player, not a minor participant, in the distribution scheme. (Tr. of Sent. Hr'g at 7). The Court then conducted an in-camera hearing on the issue of the extent of Defendant's cooperation with the government, and thereafter denied Defendant's request for a downward departure on this ground. However, the Court did note that if Defendant later provided substantial information that could be of true value to the government, that matter could be addressed by the government in a future motion to reduce sentence pursuant to Rule 35, Fed. R. Crim. P. (Tr. of Sent. Hr'g at 19).

At the conclusion of the hearing, the Court adopted the recommendations of the PSR and found Defendant to have a total offense level of 36 and criminal history of one, calling for a guideline range of 188 to 235 months imprisonment and a fine of \$20,000 to \$4 million. The Court sentenced Defendant at the lowest end of the guideline range, to 188 months followed by 5 years supervised release. (#47).

Defendant did not appeal. Almost six years after his sentencing, Defendant filed this motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, raising these grounds for relief (the fourth issue is not listed in his motion but is included in his accompanying memorandum):

1. The upward enhancement based on Defendant's role as a manager was erroneous in light of new law.
2. Defense counsel failed to file an appeal after Defendant requested him to do so.
3. The failure to make a downward adjustment for Defendant's role as a minor participant was erroneous.

4. The Court's failure to advise Defendant regarding his right on appeal to proceed in forma pauperis and to have appointed counsel was a denial of due process and requires his sentence be vacated and he be resentenced.

In its response, the government addressed only Defendant's claim that he was not notified by the Court of his appellate rights. The government concedes that appellate rights were not mentioned at Defendant's sentencing hearing, notes that the Tenth Circuit has not addressed the significance to be given that failure, and suggests that Defendant be granted additional time in which to file an appeal rather than proceeding through another, duplicative, sentencing. (#52 at 3).

Further, although the government stated that Defendant's three remaining claims were moot in light of the appellate rights issue, it attached the affidavit of Richard Couch, Defendant's trial counsel, dated June 30, 1997, to rebut Defendant's claim that his counsel failed to file a direct appeal in contravention of Defendant's wishes. In his affidavit, Couch states that he reviewed his case notes to refresh his memory, and that immediately following sentencing on May 13, 1991, he advised Defendant that if he wished to appeal he would have to do so within ten days of the judgment, and Defendant told him he would call him the next day. On May 22, 1991, Defendant called Couch and asked whether he could appeal the "role in the offense" adjustment and the "failure to depart downward from the sentencing guidelines" issues. After Couch advised Defendant that he could appeal those issues and after discussing the merits of those issues, Defendant told Couch that he did not wish to file an appeal but would cooperate further with the government in an effort to receive a Rule 35(b) motion from the government to reduce his sentence.

In his reply brief to the government's response, Defendant does not specifically dispute the factual allegations contained in Couch's affidavit as to Couch's conversations with Defendant

regarding an appeal, nor does he add any specific information to his statement that he asked counsel to appeal. Defendant again requests that his sentence be vacated and resentencing proceedings held, or alternatively that an evidentiary hearing be held and that he be appointed counsel.

On March 23, 1998, Defendant filed a "Supplemental Memorandum in Support of Pending 2255" (#54) in which he raises additional claims: ineffective assistance of counsel for failing to ask for an independent weighing of the cocaine, pursue a motion to suppress, and request a downward departure pursuant to U.S.S.G. §§ 3B1.2, 5H and 5K2.0; the Court's failure to reduce to writing its findings of fact and conclusions of law as required by Rule 32(c), Fed. R. Crim. P; and, finally, that he is entitled to resentencing based on subsequent changes in the sentencing guidelines providing for additional adjustments.

#### *ANALYSIS*

##### **A. Rule 32(a)(2) Violation.**

Defendant claims that the Court's failure following sentencing to notify him of his appeal rights requires the per se vacatur of his sentence followed by resentencing. The government concedes that some relief is necessary but suggests that reinstatement of Defendant's appeal rights would suffice rather than requiring complete and duplicative resentencing proceedings.

A review of the transcript of the sentencing hearing on May 13, 1991 reveals that the Court neglected to specifically advise Defendant of his right to appeal his sentence, as required by Rule

32(a)(2), *Federal Rules of Criminal Procedure (1991)*.<sup>1</sup> This rule provided as of the date of Defendant's sentencing:

**Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant. (emphasis added)

Clearly, this rule does not require the court to advise a defendant who has pled guilty of his rights to proceed in forma pauperis and to appointed counsel on appeal; thus, to the extent Defendant charges error due to the lack of such notification, his claim is without merit. In addition, the language underlined above which provides that the court need only "advise the defendant [who has pled guilty] of *any* right to appeal his sentence" (emphasis added), arguably suggests that the sentencing court need not advise a defendant who has pled guilty of his right to appeal in every case, but merely in those cases where a defendant has preserved some ground for appeal. Cf. United States v. DeSantiago-Martinez, 38 F.3d 394, 395-96 (9th Cir.1992) (Rule 32(a)(2) admonishments are unnecessary when the defendant expressly waives his sentencing appeal rights in the plea agreement);

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<sup>1</sup>Effective December 1, 1994, this provision was amended and recodified at Fed. R. Crim. P. 32(c)(5). The Advisory Committee explained, however, that they intended no substantive change in practice by this amendment.

McCumber v. United States, 30 F.3d 78, 80 (8th Cir.1994) (violation of Rule 32(a)(2) was harmless in light of defendant's failure to raise any objections to the presentence investigation report).

However, in this instance, the government apparently concedes, and the Court agrees, that defense counsel objected at sentencing and thus preserved Defendant's right to appeal the "role in the offense" and "minor participant" sentencing issues. Accordingly, the Court's failure to advise Defendant of his right to appeal his sentence technically violated Rule 32(a)(2).

In light of the violation of Rule 32(a)(2), the next question is whether such a violation should be treated as automatically affording Defendant a remedy. As discussed below, while the Circuits are split and the Tenth Circuit has not spoken on this precise issue, the Court concludes that the decisions allowing for a harmless error review provide the better rationale, and, under the circumstances of the instant case where Defendant admittedly knew of his appeal rights, the technical violation of Rule 32(a)(2) is harmless error which should not require resentencing or other relief.

Generally, violations of statutory or rule-governed criminal procedures will not sustain a motion for § 2255 relief. See, e.g., United States v. Timmreck, 441 U.S. 780, 783-84 (1979) (violation of Fed. R. Crim. P. 11 plea procedures); Hill v. United States, 368 U.S. 424 (1962) (failure of court to ask a defendant represented by counsel if he wants to make a statement on his own behalf before sentencing, in violation of former Rule 32(a)) ; United States v. Prichard, 875 F.2d 789, 790 (10th Cir.1989) (lack of written waiver of jury trial, as required by Fed. R. Crim. P. 23(a)).

In Timmreck, the court failed during the change of plea proceedings to describe the mandatory special parole term of three years required by statute. The defendant did not allege that he was unaware of the special parole term or that, if he had been properly advised by the court, he would not have pleaded guilty. His only claim was a technical violation of Rule 11. Timmreck, 441

U.S. at 783-84. In addressing whether such a technical violation of the federal rules required relief under § 2255, the Supreme Court concluded that the error was neither constitutional nor jurisdictional, and did not result in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." Id. Thus, the Supreme Court determined, collateral relief under § 2255 was not available when all that was shown was a failure to comply with the formal requirement of the rule governing plea inquiries. Id. at 785.

Consistent with this reasoning, several Circuits apply a harmless error analysis and deny relief where a defendant is not prejudiced by the technical violation of the appeal rights notification requirements of former Rule 32(a)(2). See, Tress v. United States, 87 F.3d 188, 190 (7th Cir. 1996) (rejected per se rule requiring resentencing, and remanded for consideration of whether violation was harmless); McCumber v. United States, 30 F.3d 78 (8th Cir. 1994) (violation was harmless where Defendant had nothing to appeal); United States v. Chang, -- F.3d -- (1998 WL 271262, No. 97-4844) (11th Cir. May 28, 1998) (violation was harmless when defendant actually perfected a timely appeal). Significantly, the Eighth Circuit applied a harmless error analysis to deny relief where the Rule 32(a)(2) violation followed a jury conviction, in a case where the government showed by clear and convincing evidence that the defendant knew of the right to appeal. Drummond v. United States, 903 F.2d 1171, 1174 (8th Cir. 1990).

Although some Circuits impose a per se rule that any technical violation of Rule 32(a)(2) requires relief such as resentencing, see, e.g., United States v. Sanchez, 88 F.3d 1243 (D.C. Cir. 1996); Paige v. United States, 443 F.2d 781 (4th Cir. 1991), this Court concludes that the better-reasoned approach is to apply the harmless error rationale articulated by the Supreme Court in

Timmreck and applied by the Seventh and Eighth Circuits to similar technical violations of Rule 32(a)(2).

Applying a harmless error analysis to the facts of this case, the Court determines that any formal violation of Rule 32(a)(2) was harmless in that Defendant clearly knew at the time of sentencing that he could appeal his sentence. Defendant does not allege that he was unaware of his appeal rights at the time of sentencing or that he was prejudiced in any way by the Court's failure to strictly follow the notification procedure. Indeed, as discussed in detail below in connection with his claim of ineffective assistance of counsel, Defendant alleges that he told his attorney immediately after sentencing that he wanted to appeal, thus admitting he knew of his right to appeal. The record clearly demonstrates that Defendant was not prejudiced by the technical violation of Rule 32(a)(2). Accordingly, the Court holds that the failure to advise Defendant of his appellate rights as required by Rule 32(a)(2) was harmless error which does not entitle Defendant to relief pursuant to § 2255.

**B. Ineffective assistance of counsel claim for failing to appeal.**

Defendant claims that he requested his attorney to file an appeal after sentencing; however, no appeal was ever filed on his behalf. The record confirms that no direct appeal was filed, timely or otherwise. The record is also devoid of any evidence that Defendant tried to contact his lawyer to determine why no appeal was filed or that he contacted the court to learn the status of an appeal. Defendant's allegations that his lawyer disregarded his wishes to appeal are totally conclusory, as is illustrated by this statement in his original motion:

One of the principal [sic] claims in this action surrounds the failure of trial and sentence counsel to perfect, after promises which prompted a guilty plea by counsel, and express promises to the defendant, that at the time of the imposition of sentence, that the counsel file a notice of appeal so as to seek review of the sentencing. (#49 at 4).

Defense counsel, through his affidavit, states that he advised Defendant on May 13, 1991 that any appeal must be filed within ten days of the entry of a judgment, and that when Defendant called him nine days later (but only one day after entry of judgment on May 20, 1991), Defendant advised that he did not want to appeal but would continue to pursue a reduction of sentence through a Rule 35(b) motion from the government for substantial assistance. Defendant does not specifically dispute these conversations, nor, indeed does he even address them in his reply. Rather, he repeats his conclusory allegation that he told his attorney to appeal and continues to urge that he is entitled to an evidentiary hearing with appointed counsel.

A defendant's right to effective assistance of counsel applies not just at trial but also on direct appeal. Evitts v. Lucey, 469 U.S. 387, 396 (1985) ("A first appeal as of right ... is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."); United States v. Davis, 929 F.2d 554, 557 (10th Cir.1991). A defendant is denied effective assistance of counsel if he asks his lawyer to perfect an appeal and the lawyer fails to do so by failing to file a brief, see Rodriguez v. United States, 395 U.S. 327, 329 (1969), a statement of appeal, see Evitts, 469 U.S. at 389, or otherwise. Abels v. Kaiser, 913 F.2d 821, 822-23 (10th Cir. 1990). A defendant need not show prejudice once it is established that defendant wanted to appeal but his counsel failed to file or perfect the appeal. Id. at 823. "However, if counsel reasonably believes that there are no meritorious grounds for an appeal, advises a defendant not to appeal on that basis, further advises him that he has a right to appeal regardless, and then acts in accordance with defendant's decision to waive an appeal, his performance cannot be considered deficient." United States v. Lopez, 100 F.3d 113, 119 (10th Cir. 1996).

No evidentiary hearing is required on a motion pursuant to § 2255 where the motion, files and records of the case conclusively show that the prisoner is entitled to no relief. 28 U.S.C. §2255; United States v. Marr, 856 F.2d 1471, 1472 (10th Cir. 1988). To be entitled to a hearing on his claim that counsel provided ineffective assistance by ignoring his directive to appeal, Defendant must make credible allegations that he told counsel he wanted to appeal and that his counsel directly disregarded his wishes. See, Lasiter v. Thomas, 89 F.3d 699, 702-03 (10th Cir.), cert. denied, 117 S.Ct. 493 (1996).

Here, Defendant's allegations that he asked his lawyer to appeal are totally conclusory and are not credible in light of the entire case record. His trial counsel claims in an affidavit that Defendant told him he had decided not to appeal. Defendant does not specifically contradict counsel's statements that these conversations took place, nor does he allege that he wrote, called or tried to contact his attorney or the court to determine why no appeal was filed. Defendant also does not explain his bald assertion that his guilty plea (entered two months before sentencing) was somehow premised on his attorney's promise to appeal the sentence. Indeed, not only is that statement nonsensical but it is also contradicted by the plea agreement letter of March 4, 1991, signed by Defendant, which states that there are no agreements other than those set forth in the letter.

Further, it defies logic to believe that Defendant actually directed his lawyer to appeal in May, 1991, then took no action at all to determine why an appeal was not filed until almost six years later when he filed this § 2255 motion claiming that his counsel never filed an appeal. Defendant's total and prolonged inaction is, however, entirely consistent with defense counsel's statement that Defendant decided not to appeal, after discussing with counsel the merits of the various sentencing issues. This case has no similarity to those cited by Defendant in which the sentencing proceedings

or the defendant's own vigilance demonstrated a desire to appeal. See, e.g., Rodriguez v. United States, 395 U.S. 327 (1969) (within 40 days of sentencing, prisoner attempted to file notice of appeal pro se after attorney failed to timely appeal). The Seventh Circuit case repeatedly cited by Defendant, Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994), merely restates the established principle that a prisoner need not show "prejudice" to be entitled to reinstatement of appeal rights where it is established that counsel failed to file a requested appeal.

Accordingly, after careful consideration of the entire record, the Court concludes that Defendant's claim that he told his attorney to appeal is "wholly incredible," Lasiter, 89 F.3d at 703, and that no evidentiary hearing is necessary on this issue.

**C. Sentencing issues.**

As noted previously, Defendant did not file a direct appeal. It is well settled that "[section 2255 motions are not available to test the legality of matters which should have been raised on direct appeal." United States v. Warner, 23 F.3d 287, 291 (10th Cir. 1994) (citation omitted). Consequently, a defendant may not assert issues which were not raised in his direct appeal unless he establishes cause for his default and prejudice resulting therefrom, or can show that a fundamental miscarriage of justice will occur if his claims are not addressed. United States v. Cook, 45 F.3d 388, 392 (10th Cir. 1995). The procedural default rules developed in the context of habeas corpus cases apply with equal force in § 2255 cases. United States v. Frady, 456 U.S. 152, 166-69 n. 15 (1982).

The "cause" standard requires a defendant to show that some objective factor external to the defense impeded his ability to raise an issue on direct appeal. See Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence or a change in the law. Id. Ineffective assistance of counsel is another example of an external factor that may

constitute "cause" excusing a procedural default. Cook, 45 F.3d at 392. As for prejudice, a defendant must show "actual prejudice" resulting from the errors of which he complains." Frady, 456 U.S. at 168 (1982). The "fundamental miscarriage of justice" exception 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).

Because Defendant's claims relating to alleged errors in application of the sentencing guidelines were not raised on appeal, he is procedurally barred from now raising them unless he shows "cause and prejudice" or that a fundamental miscarriage of justice will occur if his claims are not addressed. Defendant claims generally that his failure to raise the sentencing issues on direct appeal resulted from ineffective assistance of counsel in failing to appeal. However, as discussed previously, the Court concludes that Defendant was not denied effective assistance of counsel on appeal; therefore, that ground cannot serve as "cause" sufficient to overcome the procedural bar.

Defendant also claims in ground one of his § 2255 motion that intervening amendments to the sentencing guidelines make erroneous the two-point enhancement for Defendant's role as a manager or supervisor under U.S.S.G. § 3B1.1. Construing Defendant's *pro se* motion liberally as required by Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court interprets this claim as alleging that this amendment constitutes a change in the law which serves as "cause" for his failure to appeal this issue. Defendant cites the Seventh Circuit case of United States v. Fones, 51 F.3d 663 (7th Cir. 1995) in support of his claim that his sentence was incorrectly enhanced.

In calculating Defendant's sentence pursuant to the guidelines, the PSR recommended an enhancement to the base offense level under U.S.S.G. § 3B1.1(c), which provides for a two-point increase if "the defendant was an organizer, leader, manager, or supervisor in any criminal activity

other than that described in (a) or (b)." The Commentary lists factors which the court should consider in making this determination, including the nature and scope of the criminal activity, the exercise of decision making authority, and the recruitment of accomplices. At Defendant's sentencing hearing, the Court determined that Defendant had recruited his co-defendant Sanchez, and overruled defense counsel's objection to this enhancement. Defendant now claims that he is entitled to relief based upon a 1993 amendment to the commentary which provides that a defendant's control over property of the criminal activity alone does not support an enhancement under § 3B1.1.

Under 18 U.S.C. § 3553(a)(4), a sentencing court is generally required to apply the guidelines in effect at the time of sentencing, unless to do so would run afoul of the Ex Post Facto Clause. United States v. Gerber, 24 F.3d 93, 95 (10th Cir. 1994). The amendment to the commentary under § 3B1.1 has no relevance to the Court's finding that Defendant was a manager or supervisor, because the Court found that Defendant recruited Sanchez to accompany him on the drug transport activity. Further, the enhancement is clearly supported by the evidence of the large amount of cocaine seized, as well as Defendant's own decision-making authority in directing the transport activity. The amendment to the commentary does not constitute a "change in law" excusing Defendant's failure to appeal this issue.

The only other avenue by which Defendant can have this claim reviewed is by showing that a "fundamental miscarriage of justice" will result if the procedural bar is invoked. This exception applies "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. at 496 (1986). Defendant does not claim that he is actually innocent of the charges to which he pled guilty. Therefore, this claim is procedurally barred.

**D. Supplemental issues.**

As noted above, Defendant filed a supplemental memorandum (#54) some eleven months after he filed his initial motion pursuant to § 2255. In this two-page document he attempts to raise for the first time additional claims. While the proper method of adding new claims is to seek leave of court to amend the original § 2255 motion, the Court in the interest of justice will construe Defendant's supplemental memorandum to set forth the listed new claims and will consider them at this time.

Defendant now alleges ineffective assistance of counsel on three grounds: 1) for failing to ask for an independent weighing of the cocaine, which Defendant says "borderlined on 50 kilos in weight and 50 kilos is a threshold sentencing level in the Guidelines" (#54 at 1); 2) for failing to pursue a motion to suppress; and 3) for failing to request a downward departure pursuant to U.S.S.G. §§ 3B1.2, 5H and 5K2.0.

Each of these claims is without merit. First, Defendant pled guilty to possessing, with intent to distribute, 50 kilograms of cocaine. In light of Defendant's admission of guilt, defense counsel had no reason to ask that the cocaine be weighed. Second, as part of Defendant's plea agreement, Defendant agreed to drop his motion to suppress. Defense counsel could not pursue such a motion without jeopardizing the plea agreement, and indeed in light of Defendant's decision to plead guilty and waive jury trial no reason remained to pursue such a motion. Third, defense counsel did request a downward departure pursuant to U.S.S.G. §§ 3B1.2 (role as a minor participant) and 5K2.0 (substantial assistance to authorities). (Defendant's objections to the PSR, ##44 and 46). Section 5.H relates to "Specific Offender Characteristics" such as age, education and vocational skills, mental and emotional condition, physical condition, and previous employment. Defendant does not explain how this section applies to his case, and in the absence of specific facts the Court will not find that

counsel erred in failing to raise an objection based upon this section. Accordingly, Defendant has failed to persuade the Court that his counsel's performance was outside the realm of a reasonably competent criminal attorney. Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

Lastly, Defendant claims he is entitled to relief due to the Court's failure to reduce to writing its findings of fact and conclusions of law as required by Rule 32(c), Fed. R. Crim. P; and, finally, that he is entitled to resentencing based on subsequent changes in the sentencing guidelines providing for additional adjustments. As discussed previously, claims not presented on appeal are procedurally barred absent a showing of "cause and prejudice." Defendant does not allege any cause for his failure to appeal these issues; accordingly, he is barred from now asserting them.

#### CONCLUSION

Defendant's claim that he was not notified of his appellate rights does not entitle him to relief pursuant to § 2255 because the technical violation of Rule 32(a)(2) constituted harmless error. Defendant's claims of ineffective assistance of counsel because his attorney allegedly failed to file an appeal and due to the grounds contained in his supplemental memorandum (#54) also are without merit. Defendant's remaining claims are procedurally barred.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (docket #49) is **denied**.

SO ORDERED THIS 16<sup>th</sup> day of June, 1998.



JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

FILED  
JUN 10 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JAMES MAHAN, )  
 )  
 Defendant. )

Case No. 90-CR-131-E ✓  
97-C-402-E

ENTERED ON DOCKET  
DATE 6-12-98

ORDER

Now before the Court is the Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody of the Defendant James Edward Mahan (Mahan) (Docket # 30).

Mahan was indicted on one count of Conspiracy to Possess with Intent to Distribute a Controlled Substance (Cocaine Based) from October 1, 1989 until November 6, 1989, in violation of 21 U.S.C. §846. On December 18, 1990, Mahan was found guilty by a jury of this charge. Subsequently, he was sentenced to 360 months imprisonment to be followed by a five year term of supervised release. He appealed his conviction and sentence, arguing 1) that the trial court erred in enhancing his sentence under the guidelines for possession of a firearm during commission of an offense involving drugs, obstruction of justice, and being an organizer-leader; 2) that there was insufficient evidence to support the conviction; and 3) his procedural due process rights were violated when law enforcement officials referred his case for federal rather than state prosecution. Mahan's conviction and sentence were affirmed by the Court of Appeals on March 31, 1992.

The charge of the government at trial in this somewhat unusual case is that Mahan was a drug

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dealer and that he arranged for his co-conspirators to pose as police officers and rob a drug courier of one kilogram of cocaine base. He would then attempt to obtain a second kilogram of cocaine base from the supplier in California pretending that the first kilogram of cocaine base had never arrived.

Mahan testified at trial and admitted that he had knowledge of the robbery scheme, but denied that he was a drug dealer, or that he had any involvement whatsoever in the scheme. Mahan now argues in his §2255 motion that he received ineffective assistance at trial and on appeal because his counsel failed to investigate or present a valid theory of defense, that the enhancement provisions for cocaine base are unconstitutional, and that he is entitled to a hearing on these issues.

#### Ineffective Assistance of Counsel

The government first argues that Mahan is procedurally barred from raising these issues because they were not first raised on appeal. The government argues, correctly, that "A defendant's failure to raise an issue on direct appeal will bar review unless the defendant can show cause and actual prejudice resulting from the alleged errors, or can show a fundamental miscarriage of justice will occur if his complaint is not addressed. United States v. Allen, 16 F.3d 377 (10th Cir. 1994).

Mahan attempts to meet the cause and prejudice, or fundamental miscarriage of justice standards by arguing that his counsel was ineffective for not investigating or presenting a theory of defense that there was no conspiracy because the cooperating witnesses had a completely different objective from Mahan's. Mahan argues that the purpose of the conspiracy, "to have twice as much cocaine to distribute," would have only been his purpose, and that the cooperating witness' purpose was to make money by committing a robbery. These ineffective assistance of counsel claims must be evaluated under the Strickland test: 1) whether defendant's attorney's performance was not reasonably effective and 2) whether defendant's defense was prejudiced thereby. Strickland v.

Washington, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, the Court must presume that counsel's performance was reasonably effective and "the burden rests on the accused to demonstrate a constitutional violation." U.S. v. Cronin, 104 S.Ct. 2039, 2046 (1984). Under the Strickland rule the presumption of effective representation is a strong one. Indeed, "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, 104 S.Ct. at 2065. The Court must "presume that the challenged action might be considered sound trial strategy." Hatch v. State of Oklahoma, 58 F.3rd 1447, 1459 (10th Cir. 1995).

In applying these principles to the facts of this case, the Court first rejects Mahan's conclusory assertion that "Counsel's total concession to the government's case in chief caused a constructive denial of counsel," which would result in the requirement of prejudice being presumed. A review of the record does not support these assertions. There is no "total concession to the government's case in chief." In fact, counsel does present a defense through the testimony of Mahan himself, who denies the key elements of the government's case. (Tr. of Jury Trial at 185-189). Although, in certain circumstances, such as complete denial of counsel, or failure to subject the prosecution's case to meaningful adversarial testing, prejudice can be presumed, Cronin, 104 S.Ct. at 2047, the circumstances here do not justify such a presumption.

It is, therefore, up to Mahan to provide evidence to satisfy the two-prong test of Strickland. Mahan argues that counsel's performance fell below an objective standard of reasonableness because counsel failed to investigate and develop a defense based on the argument that there was no "meeting of the minds" between Mahan and the alleged co-conspirators regarding the object of the conspiracy. Mahan argues that his counsel should have asserted the defense that the intent of the cooperating witnesses and co-conspirators was to commit robbery, not to possess cocaine to distribute. In

examining counsel's conduct in its entirety, and the line of defense used at trial, which was to deny any involvement in the alleged conspiracy, the court does not find that failure to argue that there was no meeting of the minds required for a conspiracy falls outside an objective standard of reasonableness. This is particularly true in light of the testimony of Richard Fleming that the reason for the robbery was so that Mahan could get his cocaine, and then get some more for free because it had been taken by the police. (Tr. of Jury Trial at 50).

Moreover, defendant has not demonstrated that he was prejudiced by counsel's failure to make the exact argument defendant outlines. Under the Strickland test, prejudice requires a demonstration that, but for the errors of counsel, the result of the trial would have been different. 104 S.Ct. At 2068. In reviewing the testimony of the alleged co-conspirators, in particular their understanding of the aim of the conspiracy, as well as the jury instruction on conspiracy and the requirement of a "common understanding," the Court concludes that no prejudice resulted from the alleged error of defendant's counsel. The question of whether there was a meeting of the minds was one for the jury, and the evidence was sufficient to support the determination of the jury on this issue.

#### Constitutionality of Sentencing Provisions

Defendant also argues that the enhancement provisions for crack cocaine or cocaine base are unconstitutional because they are irrational, and are not based on any "valid medical, scientific, legal theories or data." In making this argument, defendant relies on United States v. Davis, 864 F.Supp 1303 (N.D. Ga. 1994) wherein the court refused to enhance defendant's sentence pursuant to 21 U.S.C. §841(b)(1)(B)(iii) because the heightened penalty provision is based on a "scientifically meaningless distinction between cocaine and cocaine base." This authority has not, however, been accepted by this circuit, which has specifically held, in United States v. Thurmond, 7 F.3d 947, 953,

(10th Cir. 1993) that there are legitimate reasons for distinguishing between cocaine and cocaine base for sentencing purposes. See also United States v. Turner, 928 F.2d 956, 958 (10th Cir. 1991).

The Court rejects Mahan's assertion that the provision under which he was sentenced is unconstitutional.

Because the issues raised by Mahan can be resolved on the record now before the Court, Mahan's request for an evidentiary hearing is denied. Further, Mahan's Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody (Docket #30) is denied.

SO ORDERED this 9<sup>th</sup> day of June, 1998.

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

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

**F I L E D**

JUN 10 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JAMES MAHAN, )  
 )  
 Defendant. )

Case No. 90-CR-131-E

ENTERED ON DOCKET

DATE 6-12-98

JUDGMENT

This matter came before the Court upon the Motion Pursuant to 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket #30) of the Defendant, James Mahan. The Court duly considered the issues and rendered a decision herein.

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

IT IS SO ORDERED THIS 9<sup>th</sup> DAY OF JUNE, 1998.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT  
Northern District of Oklahoma

ENTERED ON DOCKET  
DATE 6/12/98

UNITED STATES OF AMERICA

v.

Case Number 97-CR-175-001-K

STANLEY LEE WOOD  
Defendant.

**FILED**

JUN 11 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, STANLEY LEE WOOD, was represented by J. Richard Johnson.

On motion of the United States the court has dismissed Count 1 of the Indictment.

The defendant pleaded guilty to Count 2 of the Indictment, February 12, 1998. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

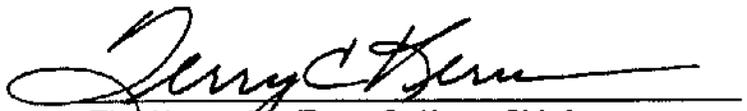
Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 922(g)(8) & 924(a)(2)	Possession of a Firearm in Violation of a Protective Order	5/12/97	2

As pronounced on June 2, 1998, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 100, for Count 2 of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 10 day of June, 1998.

  
The Honorable Terry C. Kern, Chief  
United States District Judge

Defendant's SSN: 447-54-1380

Defendant's Date of Birth: 8/11/52

Defendant's residence and mailing address: Tulsa County Jail, 500 S. Denver, Tulsa OK 74103

Defendant: STANLEY LEE WOOD  
Case Number: 97-CR-175-001-K

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 18 months.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be placed in a Bureau of Prisons facility in or as near Ft. Worth, Texas, as possible.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal

By \_\_\_\_\_  
Deputy Marshal

Defendant: STANLEY LEE WOOD

Case Number: 97-CR-175-001-K

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of 36 months.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. The defendant shall successfully participate in a program of testing and treatment (to include inpatient) for drug and alcohol abuse, as directed by the Probation Officer, until such time as released from the program by the Probation Officer.
5. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency. The defendant shall abide by the "Special Financial Conditions" enumerated in Miscellaneous Order Number M-128, filed with the Clerk of the Court on March 18, 1992.
7. The defendant shall successfully participate in a program of domestic violence counseling, as directed by the Probation Office, until such time as released from the program by the Probation Office.

**STANDARD CONDITIONS OF SUPERVISION**

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: STANLEY LEE WOOD  
Case Number: 97-CR-175-001-K

**FINE**

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

The defendant shall pay a fine of \$ 5,000, as to Count 2. This fine shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid during the term of supervised release.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: STANLEY LEE WOOD  
Case Number: 97-CR-175-001-K

**RESTITUTION AND FORFEITURE**

**RESTITUTION**

The defendant shall make restitution in the total amount of \$375.

The defendant shall make restitution to the following persons in the following amounts:

<b><u>Name of Payee</u></b>	<b><u>Amount of Restitution</u></b>
Katherine Wood c/o F.L.U., U.S. Attorney's Office Northern District of Oklahoma	\$375

Payments of restitution are to be made to the Clerk of the Court for the Northern District of Oklahoma for transfer to the payee(s).

Restitution shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid as a condition of supervised release.

If a victim has received compensation from insurance or any other source with respect to a loss, any restitution ordered shall be paid to the person who is a victim before any restitution is paid to any such provider of compensation.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

Defendant: STANLEY LEE WOOD  
Case Number: 97-CR-175-001-K

### STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	12
Criminal History Category:	I
Imprisonment Range:	10 months to 16 months
Supervised Release Range:	2 to 3 years
Fine Range:	\$ 3,000 to \$ 30,000
Restitution:	\$ 375

The sentence departs from the guideline range for the following reason(s): Inadequacy of Criminal History Category based on prior similar criminal conduct not resulting in criminal conviction, pursuant to USSG §4A1.3(d). The Court takes into consideration the defendant's uncontroverted history of spousal abuse and assaultive conduct on others that did not result in criminal history points. Based on this conduct, the Court adds one criminal history point, resulting in a Criminal History Category of II as opposed to I, providing for a departure of sentencing range of 12-18 months.

**UNITED STATES DISTRICT COURT**  
 Northern District of Oklahoma

ENTERED ON DOCKET  
 DATE 6/12/98

UNITED STATES OF AMERICA

v.

Case Number 97-CR-173-003-K

MAULDIN ALEXANDER RAY JR.  
 Defendant.

**FILED**  
 JUN 11 1998  
 Phil Lombardi, Clerk  
 U.S. DISTRICT COURT

**JUDGMENT IN A CRIMINAL CASE**  
 (For Offenses Committed On or After November 1, 1987)

The defendant, MAULDIN ALEXANDER RAY JR., was represented by William E. Hughes.

On motion of the United States the court has dismissed Counts 2 & 3 of the Indictment.

The defendant pleaded guilty to Count 1 of the Indictment, January 28, 1998. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

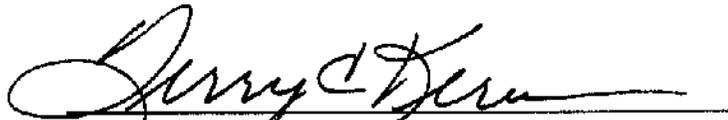
<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 USC 371	Conspiracy to Travel Interstate to Aid in a Racketeering Enterprise	6/1/97	1

As pronounced on June 4, 1998, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 100, for Count 1 of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 10 day of June, 1998.

  
 The Honorable Terry C. Kern, Chief  
 United States District Judge

Defendant's SSN: 441-58-9674  
 Defendant's Date of Birth: 8/10/52  
 Defendant's mailing address: 119 W. 3rd Street, #3, Okmulgee OK 74447  
 Defendant's residence address: 12 & 12 Halfway House

Defendant: MAULDIN ALEXANDER RAY JR.  
Case Number: 97-CR-173-003-K

### PROBATION

The defendant is hereby placed on probation for a term of three (3) years.

While on probation, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If this judgment imposes a fine, special assessment, costs or restitution obligation, it shall be a condition of probation that the defendant pay any such fine, assessment, costs and restitution.
2. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
3. The defendant shall successfully participate in a program of testing and treatment (to include inpatient) for drug and alcohol abuse, as directed by the Probation Officer, until such time as released from the program by the Probation Officer.
4. The defendant shall be placed on home detention to include electronic monitoring at the discretion of the U. S. Probation Office for a period of 6 months, to commence within 72 hours of release from inpatient treatment. During this time, the defendant shall remain at place of residence except for employment and other activities approved in advance by the probation office. The defendant shall maintain a telephone at place of residence without any special services, modems, answering machines, or cordless telephones for the above period. The defendant shall wear an electronic device and shall observe the rules specified by the Probation Office. The entire cost of this program shall be paid by the defendant.
5. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.
6. The defendant shall perform 100 hours of community service, as directed by the Probation Office.

### STANDARD CONDITIONS OF PROBATION

While the defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: MAULDIN ALEXANDER RAY JR.  
Case Number: 97-CR-173-003-K

**FINE**

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

The defendant shall pay a fine of \$ 500, as to Count 1. This fine shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid during the term of supervised release.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: MAULDIN ALEXANDER RAY JR.  
Case Number: 97-CR-173-003-K

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	10
Criminal History Category:	I
Imprisonment Range:	6 months to 12 months
Supervised Release Range:	2 to 3 years
Fine Range:	\$ 2,000 to \$ 20,000
Restitution:	\$ n/a

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.

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

**FILED**  
JUN - 2 1998

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
JAMES DAVID THORNBRUGH, )  
)  
Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 89-CR-67-B  
(97-CV-417-B)

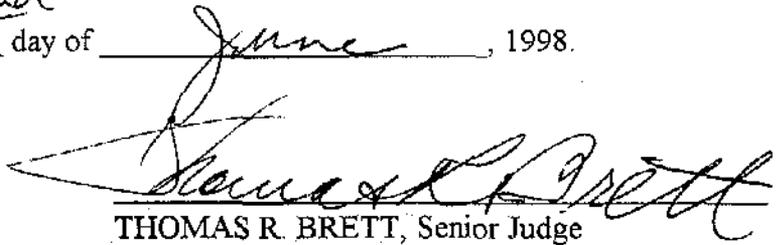
ENTERED ON DOCKET  
DATE JUN 08 1998

JUDGMENT

This matter came before the Court upon Defendant's motion to vacate set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 2nd day of June, 1998.



THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

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

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

JAMES DAVID THORNBRUGH, )

Defendant. )

**F I L E D**

JUN - 2 1998

No. 89-CR-67-B  
97-CV-417-B

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUN 08 1998

**ORDER**

Before the Court is the *pro se* Defendant James David Thornbrugh's amended motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket #113 and 114). Plaintiff United States of America has filed its response brief (#120) and Defendant has filed a rebuttal to that response (#121). Also before the Court is Defendant's "Petition for Remission of Assessment" (#112), which the Court construes as setting forth an additional claim under 28 U.S.C. § 2255. Defendant has also filed a "Motion Pursuant to Rule 8(d)" (#122) asserting that Plaintiff failed to deny the allegations of the § 2255 motion; thus, Defendant argues, such allegations should be deemed admitted.

After reviewing the entire record in this case, the Court has determined that an evidentiary hearing is not necessary and that the motion pursuant to §2255, including the claim set forth in Defendant's Petition for Remission of Assessment, lacks merit and should be denied. Defendant's motion pursuant to Rule 8(d) should also be denied.

***BACKGROUND***

In an indictment filed on May 3, 1989, Defendant was charged with three counts of armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d) and three counts of using and carrying a

firearm during or in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). These charges arose out of the armed robberies of three Tulsa financial institutions: the Local America Savings & Loan on January 6, 1989, the Continental Federal Savings & Loan Association on January 24, 1989, and the Village South National Bank on March 11, 1989.

The government's key witness at trial was Gary Sewell, who testified that he was Defendant's accomplice in the robberies. Sewell was a carpenter who worked for Defendant, a construction foreman, on homebuilding projects in south Tulsa. Sewell pled guilty to two of the robberies pursuant to a plea agreement which included his obligation to testify at Defendant's trial. Sewell testified that at each robbery he stood by the bank's front door and Defendant ran around or jumped over the teller counter and emptied the bank's registers. He also testified that he and Defendant wore brown gloves and masks made from dark pantyhose and carried loaded guns at each robbery.

Sewell's testimony and other evidence at trial revealed that on January 6, 1989, Defendant and Sewell parked Defendant's Chevrolet pickup a few blocks away from the Local America Savings & Loan. After robbing the bank in less than three minutes, they ran to the pickup, passing a mail carrier. As they drove away Defendant pointed his gun at the mail carrier, who had begun following them.

Defendant and Sewell drove in Sewell's silver Camero to the Continental Federal Savings & Loan on January 24, 1989. Again, they were in the bank for less than three minutes, and drove away in the Camero to Defendant's pickup, which they had previously parked in a nearby parking lot. Defendant then left in his truck, taking the money, guns, and masks. Sewell drove the Camero to an apartment complex, where he was to meet Defendant to split the money. A police officer questioned Sewell at the apartments, and upon searching the Camero he found Defendant's boots, belt, wallet

and driver's license. Sewell was not arrested at that time.

On March 11, 1989, Defendant and Sewell drove to the Village South National Bank in an orange or brown Ford Pinto that Sewell bought to use in the robbery. They robbed the bank as before, then Defendant drove the Pinto to a Ford LTD which they had parked in the same neighborhood prior to the robbery. A Secret Service Agent, Thomas McDade, had been present with friends in an office in the bank during the robbery. After the robbers left the bank, McDade and Larry Choate, president of Village South National Bank, pursued the robbers at a distance in McDade's car. The robbers drove to the LTD and Sewell put the money, guns and masks in the trunk of the LTD and then drove to the pickup and dropped off Defendant. Both McDade and Choate observed the license tag on the truck which Defendant drove off, and they recalled the tag as Kansas number CU\_151. Both witnesses testified that a trailer hitch obscured their view of the middle character on the tag, but that the other characters were easily legible. McDade and Choate chose to follow Sewell in the LTD, and he was subsequently arrested by local police. The police recovered a number of items from the Ford LTD, including a loaded Browning .380 automatic, a loaded Don Wesson .357 revolver, extra ammunition, two black nylon stocking masks, two pairs of brown gloves, two baseball caps and \$1,647 in cash. When Defendant was arrested a few days later at his home, FBI Agent Jo Deatherage observed a Chevrolet pickup parked in the driveway with Kansas tag CUI-151.

Several eyewitnesses to the robberies testified and described the robber who took the cash as between five-ten and six-two. Defendant is about six-two. No eyewitness except Sewell placed Defendant at the scene of any of the robberies. Defendant offered several alibi witnesses, including his father, wife, co-workers and employees, employer, and his employer's wife, who confirmed his alibis for each of the robberies.

Defendant was convicted on all counts. On the three robbery counts, the Court sentenced Defendant according to the Sentencing Guidelines as a career offender with a total offense level of 34 and a criminal history level of IV, resulting in an imprisonment range of 262 to 327 months. With respect to the gun charges, the Court construed § 924(c) to require a mandatory sentence of five years on the first count and enhanced sentences of twenty years for each of the subsequent convictions. Thus, Defendant received an additional forty-five years (540 months) on the § 924(c) gun charges. When added to the guideline range for the robberies, this produced a possible sentence range of 802 to 867 months. However, the Court departed downward to a total of 543 months based on its conclusion that the Sentencing Commission did not adequately consider the effect of the cumulative sentence of 45 years mandatory imprisonment as it related to the minimum guidelines range required on the robbery counts.

On appeal, Defendant raised several challenges to his conviction and also argued that his sentence was improperly enhanced under § 924(c). The government cross-appealed alleging error in the downward departure. The U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit") ordered rehearing en banc in this case and in United States v. Abreau limited to consideration of the proper interpretation of the enhancement provision in § 924(c). In a separate opinion, the Tenth Circuit addressed Defendant's claims relating to his conviction:

- (1) The prosecutor's remarks during closing arguments violated his due process rights;
- (2) Newly discovered evidence merited a new trial;
- (3) The government wrongly withheld exculpatory evidence;
- (4) The prosecution improperly alluded to his prior bank robbery convictions; and
- (5) The cumulative errors at trial required reversal.

The Tenth Circuit addressed each of these issues and affirmed Defendant's conviction. United States v. Thornbrugh, 962 F.2d 1438 (10th Cir. 1992).

Upon its consideration of the § 924(c) enhancement issue on rehearing en banc, the Tenth Circuit concluded that a defendant may not receive an enhanced sentence under § 924(c) for a second or subsequent conviction unless the offense underlying this conviction took place after a judgment of conviction had been entered on the prior offense. United States v. Abreu, 962 F.2d 1447, 1453 (10th Cir. 1992) (en banc). The Tenth Circuit therefore reversed Defendant's enhanced sentence and remanded his case for resentencing. Because of the remand, the Court did not address the government's cross-appeal challenging the downward departure. Thornbrugh, 962 F.2d at 1441 n.1.

The United States Supreme Court vacated the judgments in the consolidated cases and remanded them to the Tenth Circuit for further consideration in light of Deal v. United States, 508 U.S. 129 (1993). United States v. Abreau, 508 U.S. 935 (1993). In Deal, the Supreme Court held that a second conviction for purposes of § 924(c) could occur when two offenses were charged in the same indictment and the defendant was convicted of both offenses in the same trial. On remand, the Tenth Circuit found no meaningful basis to distinguish the facts in Deal from those in Defendant's and Abreau's cases. Thus, the Tenth Circuit vacated its earlier decisions and affirmed the enhanced sentences given to Defendant; the separate decision disposing of the other issues challenging Defendant's conviction remained unaffected. United States v. Abreu, 997 F.2d 825, 826 (10th Cir. 1993) (en banc).

On July 7, 1992, after the Tenth Circuit's remand for resentencing in April 1992 but before the Supreme Court's reversal in May, 1993, this Court resented Defendant to 262 months on the bank robbery counts plus consecutive sixty months sentences on each of the three § 924(c)

convictions, for a total of 442 months. Defendant appealed and also moved for clarification of the en banc order affirming the initial sentence. The Tenth Circuit vacated the second sentence entered in July, 1992, United States v. Thornbrugh, No. 92-5145, 1993 WL 413668 (10th Cir. Oct. 18, 1993), and also addressed the government's cross-appeal regarding the downward departure with respect to the first sentence. United States v. Thornbrugh, 7 F.3d 1471, 1472 n.1 (10th Cir. 1993).

The Tenth Circuit reversed the first sentence and held that this Court's downward departure on the robbery charges by 259 months from the minimum guideline range was an incorrect application of the guidelines. The Tenth Circuit concluded that Defendant's life expectancy and the cumulative effect of the mandatory 540 month sentences on the § 924(c) charges when added to the robbery sentences were not factors justifying departure from the guidelines in this case. Id. at 1474.

On remand, this Court found a base offense level of 25 and criminal history of III, which gave a guideline range of 70-84 months for each robbery count. The Court sentenced Defendant to 70 months on each of the three robbery charges to run concurrently, plus the mandatory 540 months on the § 924(c) charges, for a total of 610 months. In arriving at the sentence, the Court increased Defendant's base offense level for each of the three robbery counts pursuant to U.S.S.G. § 3B1.1(c), which provides for a two-level increase if the defendant was "an organizer, leader, manager, or supervisor" of the offense. Defendant appealed, challenging this enhancement as unsupported by the evidence. The Tenth Circuit affirmed the sentence, finding that the evidence provided "ample support for the district court's finding that Thornbrugh exercised the requisite control to be considered an organizer, leader, manager, or supervisor." United States v. Thornbrugh, No. 94-5118, 1995 WL 216924 at \*2 (10th Cir. April 12, 1995).

Defendant has now moved to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. In his amended motion, Defendant challenges his conviction and sentence on the following grounds:

- (1) Gross governmental misconduct, based on eight listed grounds;
- (2) Ineffective assistance of counsel at trial, based on seven listed grounds;
- (3) Ineffective assistance of appellate counsel;
- (4) Ineffective assistance of counsel on his last direct appeal, when Defendant wanted to proceed *pro se*; and
- (5) The Court lacked authority to resentence Defendant after appeal because his sentence was not stayed by request of the government (this ground is not enumerated in the original motion but was included in Defendant's motion to amend, #114).

In addition, the Court construes Defendant's "Petition for Remission of Assessment," filed on March 10, 1997, to set out a sixth claim: that his obligation to pay restitution has expired and it may no longer be collected.

The government responds that Defendant is procedurally barred from raising his first ground (governmental conduct) because he failed to raise it on appeal. As to the remaining grounds, the government contends that they are without merit.

#### *ANALYSIS*

##### **A. Defendant's "Motion Pursuant to Rule 8(d)."**

The Court first addresses Defendant's Motion Pursuant to Rule 8(d) in which he contends that the government's response to his § 2255 motion did not address all of his arguments and, therefore, the Court should consider those matters admitted under Rule 8(d) of the Federal Rules of Civil

Procedure. The Court's review of the government's response, however, indicates that the government adequately addressed Defendant's arguments. Further, the Court concludes that Rule 8(d) applies to factual averments, not legal argument. See United States v. Krueger, No. 97-6262, 1998 WL 161070, at \*2 (10th Cir. April 1, 1998). Thus, the Court finds this motion to be without merit.

**B. Claim 1: Gross Governmental Misconduct**

*1. Claims 1(b) and (e) are barred as already adjudicated.*

Defendant lists eight grounds under the heading "gross governmental misconduct" alleging in summary that the prosecution made prejudicial pre-trial statements to the media, withheld exculpatory evidence, and knowingly put on witnesses who lied (Sewell and FBI agent Deatherage). Plaintiff raises the issue of procedural bar with respect to these claims.

The Court initially notes that several of Defendant's grounds of governmental misconduct were, in fact, raised and disposed of on direct appeal. In his claim 1(b), Defendant contends that the government intentionally failed to provide the defense with the correct location of the car switch during the March 11 chase and failed to provide the names of two witnesses to the car switch, who allegedly would have testified that the persons involved did not meet Defendant's description. Defense counsel raised this precise issue in a motion for new trial, which was denied by this Court because the testimony as to identification would have been cumulative and, in light of the record at trial, would not have created a reasonable probability of a different outcome. (#58 at 8). The Tenth Circuit affirmed this conclusion. Thornbrugh, 962 F.2d at 1445. Defendant may not raise in a § 2255 motion issues that have already been adjudicated on direct appeal. United States v. Cox, 83 F.3d 336, 342 (10th Cir. 1996); United States v. Warner, 23 F.3d 287, 291 (10th Cir. 1994).

Accordingly, Defendant is barred from now raising this issue.

Defendant also alleges that FBI Agent Deatherage changed her description of the pickup used in the robberies in two separate affidavits she made (claim 1(e)). In an affidavit dated March 13, 1989, Agent Deatherage described the truck identified by Agent McDade as used in the switch following the March 11 robbery as a "white GMC pickup with a Kansas tag." In an affidavit dated April 12, 1989, Agent Deatherage stated that McDade observed a "tan and white Chevrolet pickup with a Kansas tag CU- 151." Defense counsel raised this issue in the motion for new trial, which this Court denied, noting that ample evidence at trial established the similarity of the two General Motors brands and concluding that Agent Deatherage's second affidavit merely enlarged on her earlier statement. On direct appeal, the Tenth Circuit affirmed that decision. Thornbrugh, 962 F.2d 1438 at 1444-45. Defendant is therefore barred from again raising this claim.

2. *Claims 1(a), (c), (d), (f)-(h) are procedurally barred.*

Defendant's remaining six claims of "gross governmental misconduct" are as follows:

- 1(a). The U.S. Attorney was reported in the newspaper prior to trial as saying that Defendant was a suspect in other states' bank robberies, and he released Defendant's prior convictions to the media;
- 1(c). The government's star witness (Sewell) lied about his deal with the government;
- 1(d). The government knew that Sewell committed perjury at trial;
- 1(f). The government withheld the second page of a police report referring to Sewell's changing car tags after the January 24th robbery;
- 1(g). The government withheld the police reports on the March 11th robbery from defense;
- 1(h). Agent Deatherage lied about the condition of the pickup's license tag.

Defendant did not raise these issues on direct appeal, and the government asserts that he is procedurally barred from now presenting them on a motion for collateral relief. It is well settled that "[s]ection 2255 motions are not available to test the legality of matters which should have been raised on direct appeal." United States v. Warner, 23 F.3d 287, 291 (10th Cir. 1994) (citation omitted). Consequently, a defendant may not assert issues which were not raised in his direct appeal unless he establishes cause for his default and prejudice resulting therefrom, or can show that a fundamental miscarriage of justice will occur if his claim is not addressed. United States v. Cook, 45 F.3d 388, 392 (10th Cir.1995). The procedural default rules developed in the context of habeas corpus cases apply with equal force in § 2255 cases. United States v. Frady, 456 U.S. 152, 166-69 n. 15 (1982).

The "cause" standard requires a defendant to show that some objective factor external to the defense impeded his ability to raise an issue on direct appeal. See Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence or a change in the law. Id. Ineffective assistance of counsel is another example of an external factor that may constitute "cause" excusing a procedural default. Cook, 45 F.3d at 392. As for prejudice, a defendant must show "'actual prejudice' resulting from the errors of which he complains." Frady, 456 U.S. at 168 (1982). The "fundamental miscarriage of justice" exception requires a defendant 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 rebuttal to the government's response raising the procedural bar, Defendant alleges ineffective assistance of appellate counsel. Therefore, the Court examines whether Defendant's allegations of ineffective assistance of counsel constitute "cause" sufficient to overcome the procedural bar as to his claims of gross governmental misconduct.

To establish ineffective assistance of counsel a defendant must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is applied in assessing the ineffectiveness of appellate counsel. Cook, 45 F.3d at 392.

Because the procedural bar is imposed due to Defendant's failure to raise his claims on direct appeal, the Court must examine the merits of the issues omitted upon appeal. Id. If the omitted issues are without merit, counsel's failure to raise them does not amount to constitutionally ineffective assistance of counsel. Id. at 393.

*a. Claim 1(a): Assistant U.S. Attorney's statements to media.*

Defendant maintains that the government intentionally prejudiced the jury against him by releasing information about his criminal background to the media. He cites as proof an article in the Tulsa World on March 16, 1989, the day following Defendant's arrest, which quotes Assistant U.S. Attorney Ben Baker as saying that Defendant was a convicted bank robber. The paper also reported that "[i]nvestigators said they consider Sewell and Thornbrugh suspects in several recent bank robberies." Defendant alleges that the government's actions prejudiced the jury against him, as evidenced during voir dire because several jurors reported reading about the case in the newspaper.

While the Constitution guarantees a defendant "a fair trial by a panel of impartial, 'indifferent' jurors", Irvin v. Dowd, 366 U.S. 717, 723 (1961), some pre-trial publicity in local criminal cases is inevitable. The publicity impacts defendant's rights only when it "dictates the community's opinion as to guilt or innocence." United States v. Abello-Silva, 948 F.2d 1168, 1176 (10th Cir. 1991).

Whether a jury harbors prejudice related to pretrial publicity is best determined during voir dire examination. *Id.* at 1177. During voir dire in this case, the Court conducted a thorough inquiry into whether any prospective juror had been exposed to pretrial publicity. Out of the seven jurors on the panel who responded that they had learned of the robberies through the media, only two served on the jury hearing Defendant's case. Further, those two had assured the Court that their prior exposure to the newspapers would not prevent them from serving as fair and impartial jurors and deciding the case based on the evidence presented at trial. Certainly, the newspaper report to which Defendant cites falls far short of demonstrating the pervasive media influence that requires a change of venue. *Cf. e.g., Sheppard v. Maxwell*, 384 U.S. 333 (1966) (pre-trial publicity filled 5 volumes of news clippings in a six month period); *Estes v. Texas*, 381 U.S. 532 (1965) (massive pre-trial publicity totaled 11 volumes of press clippings); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (defendant's confession to the sheriff was filmed and televised on the local news). Thus, Defendant's claim that the government's pretrial statements unfairly prejudiced his trial is without merit and his appellate counsel did not err in failing to raise it.

*b. Claims 1(c) and (d): Sewell lied at trial with governmental knowledge.*

Defendant alleges that Sewell, the "government's star witness" (#114, at 4), lied about the deal he had with the government, and the prosecution did not adequately explain to the jury the terms of Sewell's plea agreement. Further, Defendant alleges that Sewell was "caught in several lies on the stand" (#114, at 5), and was the only person to place Defendant at the scene of the crimes.

The Court concludes that these claims of governmental misconduct are without merit. Defense counsel subjected Sewell to lengthy and vigorous cross-examination which exposed several inconsistencies in his testimony. Defense counsel also questioned Sewell specifically about his plea

agreement (Tr. of Jury Trial at 452-55). While no witnesses to the robbery identified Defendant as one of the robbers because of the black pantyhose mask he wore, Sewell's testimony that Defendant was the other robber was corroborated by other evidence, such as the items of Defendant found in the getaway cars and the car tag leading authorities to the pickup Defendant drove. On appeal, the Tenth Circuit confirmed this Court's conclusion that "there was more than sufficient evidence for the jury to return a guilty verdict." Thornbrugh, 962 F.2d at 1446. Thus, counsel did not err in failing to raise these issues and Defendant has failed to show cause sufficient to overcome the procedural bar.

*c. Claims 1(f) and (g): Suppression of police reports.*

Defendant alleges that the government withheld the second page of the police report on the January 24th robbery dealing with Sewell's changing car tags, and withheld police reports on the March 11th robbery. Defendant contends that "crucial information" could have been contained in those reports. (#114, at 8).

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." United States v. Page, 828 F.2d 1476, 1479 (10th Cir. 1987) (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)). Suppressed evidence is deemed material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Id.

Defendant's conclusory statements that these reports may have contained "crucial information" wholly fails to convince the Court that such evidence would be material. The police officers who arrested Sewell and who investigated the March 11th robbery testified at trial. Defense

counsel also was provided with the statements given to police by the witnesses to that robbery, as evidenced by counsel's use of those statements in cross-examination of those witnesses (see, e.g., Tr. of Jury Trial at 215-17; 225-229; 254). In addition, defense counsel was provided with the tape of Secret Service Agent McDade's conversation with the highway patrol as he and the bank president pursued the robbers after the March 11th robbery, and counsel used this in cross-examination. Further, any information about Sewell changing his license tag after the second robbery would be merely cumulative, as Sewell himself testified that he changed license tags on his Camero (used as the getaway car) before and after the March 11th robbery. (Tr. of Jury Trial at 363-64).

Accordingly, the Court concludes that Defendant's claims that the government suppressed material exculpatory evidence are without merit, and appellate counsel's performance was not deficient in failing to raise these issues. Because Defendant has failed to establish cause for the default, these claims are procedurally barred.

*d. Claim 1(h): Agent Deatherage lied about the condition of the pickup's tag.*

Exhibit E of Defendant's amended 2255 motion purports to be a series of affidavits from individuals who state that the license tag on Defendant's pickup was battered and almost impossible to read prior to March 15, 1989, when Agent Deatherage noted the tag number at the time of Defendant's arrest. She testified that the characters on the tag were distinct and clear, although they were somewhat scratched in the middle. (Tr. of Jury Trial at 641). Defense counsel cross-examined Agent Deatherage as to her recollection of the tag's condition, and presented other evidence relating to the allegedly battered condition of the tag, including the license tag itself. The veracity of a witness' testimony is a matter solely for the jury to decide, and the Court concludes that counsel did not err in failing to raise this claim on appeal. Therefore, this claim is procedurally barred.

The only other avenue by which Defendant can have these claims reviewed is by showing that a "fundamental miscarriage of justice" will result if the procedural bar is invoked. This exception applies "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. at 496 (1986). To meet this exception, a defendant must show that the government has convicted the wrong person of the crime such that "it is evident that the law has made a mistake." Sawyer v. Whitley, 505 U.S. 333 (1992). Application of this exception is "rare" and limited to the "extraordinary case." See Schlup v. Delo, 513 U.S. 298, 323-32 (1995).

Defendant does allege that he is actually innocent of the crimes and claims an alibi for each robbery. Therefore, the Court must examine whether this is one of those "extraordinary" cases in which a fundamental miscarriage of justice will occur if the procedural bar is invoked.

"This inquiry involves three prongs: (1) a constitutional violation; (2) a probable effect on the jury's determination; and (3) the conviction of an innocent man." Parks v. Reynolds, 958 F.2d 989, 995 (10th Cir. 1992). "[W]here the defendant shows no cause for failing to raise these claims earlier, the defendant must show—at the threshold—both a constitutional violation and a colorable showing of factual innocence. Factual innocence must mean at least sufficient claims and facts that—had the jury considered them—probably would have convinced the jury that the defendant was factually innocent." Id.

As discussed above, the Court determined that none of Defendant's allegations of constitutional violation had merit. Thus, Defendant fails to meet the first prong of the inquiry—establishment of a constitutional error—and there is no need to determine whether the allegedly suppressed police reports or a lack of pretrial publicity would have probably convinced the

jury that Defendant was factually innocent. Accordingly, the Court concludes that this is not one of those "rare and extraordinary" cases where the fundamental miscarriage of justice exception applies, and Defendant remains procedurally barred from having these claims heard on his § 2255 motion.

**C. Claim 2: Ineffective assistance of counsel at trial.**

Defendant lists seven grounds to support his claim that trial counsel rendered ineffective service:

- 2.(a)-(c). Failure to investigate alibi witnesses for the January 24th robbery.
- 2.(d). Failure to call witnesses requested by Defendant.
- 2.(e). Failure to investigate Sewell's cellmates who would impeach Sewell's testimony.
- 2.(f). Failure to investigate March 11th chase route and present two witnesses to the switch.
- 2.(g). Failure to call witnesses to disprove Sewell's and Deatherage's testimony.

As previously noted, to establish ineffective assistance of counsel a defendant must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). A defendant 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. To establish the second prong, a defendant 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. See also Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Strickland, 466 U.S. at 688. In making this determination, 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." Id., at 690. 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.

Defendant's allegations of ineffective assistance of trial counsel all relate to alleged failures of counsel to investigate or present additional defense witnesses. While counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. Strickland, 466 U.S. at 690. Likewise, whether to call a particular witness is a tactical decision and thus a matter of discretion for trial counsel. United States v. Janoe, 720 F.2d 1156, 1162 (10th Cir. 1983) (citing United States v. Miller, 643 F.2d 713, 714 (10th Cir. 1981)). An attorney's decision not to interview witnesses and to rely on other sources of information, if made in the exercise of professional judgment, is not ineffective counsel. United States v. Glick, 710 F.2d 639, 644 (10th Cir. 1983).

The Court's review of the trial proceedings establishes that the performance of Defendant's attorney was well within the wide range of professionally competent assistance. Defense counsel called sixteen witnesses to support Defendant's alibis for the three robberies. Defendant now contends that his counsel's performance was constitutionally deficient because he failed to investigate or call three additional witnesses who would have supported Defendant's alibi that he was in Coffeyville, Kansas looking for a truck on January 24 (claims 2(a)-(c)). Defendant asserts that these

witnesses would have placed Defendant at two car dealerships and a liquor store in Coffeyville and Sycamore, Kansas on January 24. Defendant states that his attorney said that the salespersons did not remember Defendant (§ 2255 Brief at 8).

Defendant's father did testify that Defendant was with him on that day in Kansas and that they together went to shop for a new truck around 1:00 p.m. On cross-examination, however, Defendant's father admitted that Coffeyville was only about a 1 ½ hour drive from Tulsa. Defendant was accused of robbing the Continental Federal Savings & Loan around 11:30 a.m. Thus, it is entirely reasonable for defense counsel to have determined that even had those additional Kansas witnesses remembered Defendant, their testimony might not have been probative as to whether Defendant was not in Tulsa at 11:30 a.m. that day.

Defendant also asserts that he asked counsel to call several additional witnesses, but that counsel declined to call them because their testimony would have been repetitious or the cost of obtaining their testimony was too great (claim 2(d)). Defendant contends that Steve Thomas should have been brought from Hawaii to testify, but he does not explain the significance of Thomas' anticipated testimony. Other witnesses Defendant wanted were Allen Sewell and Sonny Mowry, relatives of Sewell and "one of [whom]... was believed to have been the second robber" (§ 2255 Brief at 10), and Sherry, Sewell's girlfriend. Defendant also contends that the boss of a construction project talked to him during the time of the March 11th robbery but was not called to testify.

As noted earlier, defense counsel called numerous witnesses to provide alibis for the times of the robberies. At least five witnesses testified that they saw Defendant at the construction site during the relevant time on March 11. The testimony of additional alibi witnesses for this robbery may quite well have been viewed by defense counsel as cumulative.

Another witness called by defense counsel was a prisoner, Harold Henry Murray, who testified that Gary Sewell told him he was falsely implicating Defendant in the robberies. Defendant contends that his attorney was ineffective for failing to investigate other prisoners who might have refuted Sewell's testimony (claim 2(e)). However, the Court views as entirely reasonable counsel's alleged failure to investigate Sewell's cellmates, whose testimony would have been merely cumulative in refuting his account that Defendant participated in the robberies.

Moreover, in denying Defendant's motion for new trial (filed by trial counsel), this Court previously determined that the testimony of two witnesses along the escape route was cumulative and probably would not have created a reasonable probability of a different outcome. The Tenth Circuit affirmed that ruling. Thornbrugh, 962 F.2d at 1445. Thus, trial counsel did not err in failing to investigate or present these witnesses (claim 2(f)).

Lastly, Defendant includes a blanket allegation that "[t]here were other witnesses who should have been there at trial, but counsel decided that they were not needed... Also petitioner wanted questions asked that never did get asked." Defendant contends that these witnesses and questions would have disproved Sewell's testimony and Agent Deatherage's testimony about the condition of the license tag (claim 2(g)).

From a review of the record, it is apparent that defense counsel went to great lengths to advocate zealously Defendant's innocence, even obtaining the testimony of an independent hair expert to analyze hairs found in one of the stocking masks to attempt to show the possibility that a third suspect might have worn it. It is clear that Defendant's attorney was acting in an adversarial mode throughout the trial, and the Court will not now second-guess defense counsel's strategic decision to not investigate or call additional witnesses or to not ask certain questions.

Accordingly, Defendant has failed to persuade the Court that his trial counsel's performance was outside the realm of a reasonably competent criminal attorney. Strickland, 466 U.S. at 687-88.

**D. Claim 3: Ineffective assistance of counsel on appeal.**

Defendant does not provide any basis for this claim. As previously discussed, the Court determined that appellate counsel did not err in failing to raise Defendant's claims of governmental misconduct. Further, the Court's review of the record demonstrates that appellate counsel was successful in initially obtaining reversal of Defendant's enhanced sentence on the firearms counts, even though the Supreme Court subsequently announced a contrary interpretation. Defendant has not alleged any specific grounds showing that his appellate counsel's performance was deficient or that any deficient performance was prejudicial. Accordingly, this claim is without merit. Strickland, 466 U.S. at 687 (1984); Cook, 45 F.3d at 392.

**E. Claim 4: Ineffective assistance of counsel on most recent appeal.**

Defendant contends that he made it clear that he wanted to proceed pro se on his latest appeal (after his resentencing on remand) and he filed a list of issues he wanted to be considered on appeal. However, the Tenth Circuit denied Defendant's motion to dismiss appointed counsel. See, Thornbrugh, 1995 WL 216924 at \*1. Defendant claims that appointed counsel refused to raise the issues Defendant wanted raised on appeal. Defendant attaches a letter he wrote to appellate counsel containing a list of new witnesses and alleged governmental and counsel errors, many of which he raised in this proceeding. (§ 2255 motion, Ex. 1F-4F). Defendant also apparently wanted to raise a jurisdictional issue which appellate counsel believed to have no merit. (§ 2255 motion, Ex. 5F-7F).

After reviewing the issues that Defendant wanted raised on appeal, the Court is unconvinced that appellate counsel performed below the level expected from a reasonably competent attorney.

Strickland, 466 U.S. at 687-88. Moreover, Defendant has not established any prejudice resulting from appellate counsel's failure to raise his desired issues, to the extent "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993). On the contrary, this Court concludes that there is little, if any, chance that the Tenth Circuit would have reversed Defendant's convictions based upon the issues Defendant wanted to raise.

Defendant's allegations, construed liberally as required by Haines v. Kerner, 404 U.S. 519, 520 (1972), also may be read as a challenge to the Tenth Circuit's denial of his motion to dismiss counsel. While a defendant has a constitutional and statutory right to waive his right to counsel, Faretta v. California, 422 U.S. 806 (1975) (right found in the Sixth Amendment) and 28 U.S.C. § 1654, the right to proceed pro se is not absolute. A court may deny a request for self-representation as untimely. United States v. Reddeck, 22 F.3d 1504, 1510-11(10th Cir. 1994). Here, once Defendant elected to waive the constitutional right to defend himself, he does not have an unlimited right to thereafter change his mind and seek self-representation. See United States v. Merchant, 992 F.2d 1091, 1095 (10th Cir.1993). Thus, the Tenth Circuit did not violate Defendant's rights to self-representation by denying his motion to dismiss counsel on direct appeal.

**F. Claim 5: Illegal sentence.**

Defendant's next claim is that his sentence is illegal because it had expired during the various appeals and the government did not file a stay of sentence; therefore, the court was not entitled to resentence Defendant or increase his sentence in accordance with the decision on remand. Defendant cites no authority for this proposition.

Stays in criminal cases are governed by Rule 38, Federal Rules of Criminal Procedure. See, Rule 8(c), Fed. R. App. P. Rule 38(b) provides that "[a] sentence of imprisonment shall be stayed if an appeal is taken from the conviction or sentence and the defendant is released pending disposition of appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure" (Rule 9(b) provides that stays may be conditioned upon giving of a bond or other security) (emphasis added).

Defendant correctly maintains that his sentence was not stayed during the appeals, because Defendant remained in federal custody during that time. However, Defendant is clearly mistaken in contending that his sentence expired before resentencing. Defendant was initially sentenced in 1989 to a total of 543 months (almost 47 years) imprisonment. In 1992, following the first remand, Defendant was sentenced to 442 months (almost 37 years). In 1994, following the final remand, Defendant was sentenced to 610 months (almost 51 years). Defendant's sentence did not expire during the five years pending final disposition of the appeals in his case, and the Court committed no error in resentencing Defendant in accordance with the decisions on remand. Accordingly, Defendant's claim that his sentence is illegal is without merit.

**G. Request to vacate imposition of restitution.**

In his Petition for Remission of Assessment, which the Court construes as setting forth an additional claim pursuant to 28 U.S.C. § 2255, Defendant contends that the restitution assessed by the Court as part of his sentence is "beyond the five year limit on assessments, and can no longer be collected by law." Defendant refers to 28 U.S.C. § 1355 and 18 U.S.C. § 3013(c) in support of this claim.

As part of the judgment and sentence entered May 9, 1994 after remand, Defendant was ordered to pay restitution in the amount of \$18,399 to repay the three banks which he was convicted

of robbing. Defendant was held to be jointly and severally liable for payment of restitution with his companion defendant, Gary Sewell.

The statutes cited by Defendant do not support the proposition that his obligation to pay restitution has expired. His first authority, 28 U.S.C. § 1355, governs proceedings related to civil fines, penalties or forfeitures incurred pursuant to federal law and is inapplicable to the instant restitution obligation. Defendant's second citation is to 18 U.S.C. § 3013. This statute sets out the mandatory Special Assessment of \$50 per felony conviction to be imposed upon persons convicted of federal crimes; section 3013(c) provides that the obligation to pay this assessment ceases five years after the date of the judgment.

However, § 3013(c) does not apply to restitution orders, which are instead governed by 18 U.S.C. §§ 3663 and 3664. United States v. Coleman, 9 F.3d 1480, 1486 (10th Cir. 1993). According to the provision in effect at the time Defendant was resentenced in 1994, the end of the period during which the court could require that Defendant make restitution "shall not be later than...five years after the end of the term of imprisonment imposed, if the court does not order probation." 18 U.S.C. §3663(f)(2)(B) (1994). Clearly, Defendant is still serving his term of imprisonment, and the restitution order remains in full force.

### *CONCLUSION*

Defendant's claims that his trial and appellate counsel provided ineffective assistance are without merit. Defendant's claims of gross governmental misconduct are either procedurally barred or barred because they have been previously considered and disposed of on direct appeal. His claims of illegal sentence and for remission of restitution are without merit. Therefore, the Court concludes that Defendant's motion to vacate, set aside, or correct sentence should be denied.

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

1. Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (#113), as amended (#114), is **denied**.
2. Defendant's "Motion Pursuant to Rule 8(d)" (#122) is **denied**.
3. Defendant's "Petition for Remission of Assessment" (#112) is **denied**.

SO ORDERED THIS 2<sup>nd</sup> day of June, 1998.

  
THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

**UNITED STATES DISTRICT COURT  
Northern District of Oklahoma**

UNITED STATES OF AMERICA

v.

DWAYNE ALBERT THORNHILL  
Defendant.

Case Number 97-CR-090-001-K

ENTERED ON DOCKET  
DATE June 8, 1998

**F I L E D**

JUN 05 1998

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

Phil Lombardi, Clerk  
DISTRICT COURT

The defendant, DWAYNE ALBERT THORNHILL, was represented by Kent R. Hudson.

The defendant pleaded guilty to Count 1 of the Indictment, February 12, 1998. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
21 USC 846	Conspiracy to Manufacture and Distribute Methamphetamine	6/8/97	1
21 USC 841(a)(1)	Possession With Intent to Distribute Methamphetamine	6/8/97	1

As pronounced on June 1, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 100, for Count 1 of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 4 day of June, 1998.

  
The Honorable Terry C. Kern, Chief  
United States District Judge

Defendant's SSN: 511-92-1491

Defendant's Date of Birth: 12/31/71

Defendant's residence and mailing address: 25880 Remington Ct., Tehachapi, CA 93561

Defendant: DWAYNE ALBERT THORNHILL  
Case Number: 97-CR-090-001-K

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 70 months.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be placed in a Bureau of Prisons facility near Tehachapi, California.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons before July 1, 1998 at 12:00 p.m.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal

By \_\_\_\_\_  
Deputy Marshal

Defendant: DWAYNE ALBERT THORNHILL  
 Case Number: 97-CR-090-001-K

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. The defendant shall participate in a program of mental health treatment (to include inpatient), as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Officer.
5. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.
6. The defendant shall abide by the "Special Financial Conditions" enumerated in Miscellaneous Order Number M-128, filed with the Clerk of the Court on March 18, 1992.

### STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: DWAYNE ALBERT THORNHILL  
Case Number: 97-CR-090-001-K

**FINE**

The defendant shall pay a fine of \$ 2,500, as to Count 1. This fine shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid during the term of supervised release.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: DWAYNE ALBERT THORNHILL  
Case Number: 97-CR-090-001-K

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	27
Criminal History Category:	I
Imprisonment Range:	70 months to 87 months
Supervised Release Range:	4 to 5 years
Fine Range:	\$ 12,500 to \$ 7,000,000
Restitution:	\$ n/a

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

BJS

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

**FILED**

JUN 4 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 BRANDON LEE GARRETT, )  
 )  
 Defendant. )

Case No. 94-CR-13-E

97C304E

ENTERED ON DOCKET

DATE JUN 06 1998

JUDGMENT

This matter came before the Court upon Defendant's Motion To Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket #51). The Court duly considered the issues and rendered a decision herein.

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

IT IS SO ORDERED THIS 3<sup>rd</sup> DAY OF JUNE, 1998.

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

2/59

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

**FILED**  
JUN 4 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
BRANDON LEE GARRETT, )  
 )  
Defendant. )

Case No. 94-CR-13-E

97C304E

ENTERED ON DOCKET

O R D E R

DATE JUN 06 1998

Now before the Court is the Motion To Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket #51) of Defendant Brandon Lee Garrett.

Garrett pled guilty on October 21, 1994 to one count of Armed Car jacking, in violation of 18 U.S.C. §2119, and one count of Carrying a Firearm During Commission of a Violent Crime, in violation of 18 U.S.C. §924(c). He was sentenced to 48 months as to count one and 60 months as to count two, with the sentences to run consecutively. Garrett did not appeal his sentence. He now argues in his §2255 motion that his conviction on violation of §924(c), carrying a firearm during commission of a violent crime, violates the Double Jeopardy Clause, because it results in multiple punishments for one crime: use of a firearm. He also argues that 18 U.S.C. §2119 is an unconstitutional attempt by Congress to regulate a purely intrastate issue.

The government raises the issue of procedural bar, arguing that both issues raised by Garrett could have been raised on direct appeal, and were not. The government asserts that failure to

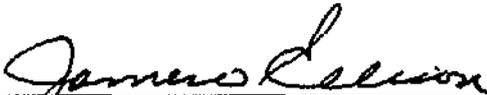
54

address an issue on direct appeal will bar review unless the defendant demonstrates cause and prejudice, or can show that a fundamental miscarriage of justice will occur unless his claim is addressed. United States v. Allen, 16 F.3d 377 (10th Cir. 1994).

In this case, Garrett, does not attempt to show either cause and prejudice or that a "miscarriage of justice" will occur unless his claim is addressed. He merely states that he accepted the advice of counsel that there were no grounds for appeal, that he believes that advice constituted "an error in judgment," but that he did not wish to make an ineffective assistance of counsel claim. The Court notes that the same arguments raised by Garrett were rejected by the Court in United States v. Overstreet, 40 F.3d 1090 (10th cir. 1994) (holding that although §2119 may "stretch the outer limits of the Commerce Clause", it is not unconstitutional, and that the cumulative punishments under 18 U.S.C. §924(c)(1) and 18 U.S.C. §2119 do not violate the Double Jeopardy Clause of the Fifth Amendment). Therefore Garrett can demonstrate neither prejudice nor a miscarriage of justice by failure to consider the issues he now raises.

Garrett's Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket #51) is denied as being procedurally barred.

IT IS SO ORDERED THIS 31<sup>st</sup> DAY OF JUNE, 1998.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

**FILED**

JUN 4 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SALVADOR HINOJOS, JR.

Defendant.

Case No. 93-CR-33-E

96C478 E

ENTERED ON DOCKET

DATE JUN 06 1998

**JUDGMENT**

This matter came before the Court upon the Motion Pursuant to 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket #45) of the Defendant, Salvador Hinojos, Jr. The Court duly considered the issues and rendered a decision herein.

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

IT IS SO ORDERED THIS 3<sup>rd</sup> DAY OF JUNE, 1998.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

57/2

UNITED STATES DISTRICT COURT  
Northern District of Oklahoma

**FILED**

JUN 4 1998 *rent*

UNITED STATES OF AMERICA

v.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
Case Number 97-CR-166-01-BU

GERALD RAMON MIRABEL  
Defendant.

ENTERED ON DOCKET  
DATE 6-5-98

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, GERALD RAMON MIRABEL, was represented by Lee Griffin Eberle.

The defendant pleaded guilty on February 26, 1998, to count One of the Indictment. Accordingly, the defendant is adjudged guilty of such count, involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 545	Smuggling Goods Into U.S.	9-11-97	1

As pronounced on May 28, 1998, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 100, for count(s) One of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 4<sup>th</sup> day of June, 1998.

United States District Court )  
Northern District of Oklahoma ) SS

I hereby certify that the foregoing  
is a true copy of the original on file  
in this court. Phil Lombardi, Clerk

By Rosanne J. Miller  
Deputy

Michael B. Buzage  
The Honorable Michael Buzage  
United States District Judge

Defendant's SSN: 261-49-0859

Defendant's Date of Birth: 02-04-60

Defendant's residence and mailing address: 2612 S. Maple Avenue, Broken Arrow, OK 74012

Defendant: GERALD RAMON MIRABEL  
Case Number: 97-CR-166-01-BU

### PROBATION

The defendant is hereby placed on probation for a term of 24 months.

While on probation, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If this judgment imposes a fine, special assessment, costs or restitution obligation, it shall be a condition of probation that the defendant pay any such fine, assessment, costs and restitution.
2. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
3. The defendant shall successfully participate in a program of testing and treatment (to include inpatient) for drug and alcohol abuse, as directed by the Probation Officer, until such time as released from the program by the Probation Officer.
4. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.
5. The defendant shall abide by the "Special Financial Conditions" enumerated in Miscellaneous Order Number M-128, filed with the Clerk of the Court on March 18, 1992.

### STANDARD CONDITIONS OF PROBATION

While the defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: GERALD RAMON MIRABEL  
Case Number: 97-CR-166-01-BU

**FINE**

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

The defendant shall pay a fine of \$ 500. This fine shall be paid in full immediately. Any amount not paid immediately shall be paid during the period of Probation.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: GERALD RAMON MIRABEL  
Case Number: 97-CR-166-01-BU

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	6
Criminal History Category:	1
Imprisonment Range:	0 months to 6 months
Supervised Release Range:	2 to 3 years
Fine Range:	\$ 500 to \$ 5,000
Restitution:	n/a

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

BJS



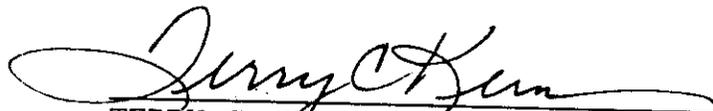
defendant Evans of approximately \$57,500, which included \$25,000 withdrawn from the Ameriwest Bancorp, Inc., account at First Interstate Bank of Oregon on November 14, 1995 and \$32,500 withdrawn from the Phoenix Capital Fund account at Bank IV Oklahoma, N.A. on December 13, 1994.

Regarding Count 20, the government seeks forfeiture by defendant Lorson of (1) a 1979 Bentley automobile bearing VIN SBK37898 and (2) \$25,000 in United States currency withdrawn from the AmeriWest Bancorp, Inc. account at First Interstate Bank of Oregon on November 14, 1995 and withdrawn from the Capital Fund account at Bank IV Oklahoma, N.A. on November 14, 1994,

At the hearing, the defendants did not dispute the government's basic argument that it is entitled to forfeiture. Defendants argued that the government is "double dipping", because the amounts alleged in Counts 16 and 17 were essentially "the same money", ultimately converted into a Bentley automobile, while the government seeks forfeiture as to both the currency and the automobile. The Court agrees with the government that this argument is premature. At this point, the Court will merely enter a ruling that the government is entitled to forfeiture as set forth in Counts 19 and 20 of the superseding indictment. The precise amount of forfeiture will not be determined until the judgment of forfeiture is entered at the time of sentencing. The defendants may rest assured that the government will not be permitted a Judgment which authorizes such "double dipping".

It is the Order of the Court that the government, having met its burden of proof, is granted forfeiture of the property described in Counts 19 and 20 of the superseding indictment.

ORDERED filed this 3 day of June, 1998.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
Northern District of Oklahoma

**FILED**

JUN 4 1998 *ml*

UNITED STATES OF AMERICA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

v.

Case Number 98-CR-017-001-BU

MICHAEL HUGHES  
Defendant.

ENTERED ON DOCKET  
DATE 6-4-98

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, MICHAEL HUGHES, was represented by Michael Abel.

The defendant pleaded guilty to Count 1 of the Indictment, March 26, 1998. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 USC 3146 (a)(1)	Failure to Appear for Sentencing	11/07/97	1

As pronounced on May 28, 1998, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 100, for Count 1 of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 4<sup>th</sup> day of June, 1998.

*Michael Barrage*  
The Honorable Michael Barrage  
United States District Judge

Defendant's SSN: 521-04-6479  
Defendant's Date of Birth: 07/21/62  
Defendant's mailing address: Lot 48, Block 16, Flintridge OK 74347  
Defendant's residence address: Tulsa County Jail

United States District Court )  
Northern District of Oklahoma ) SS  
I hereby certify that the foregoing  
is a true copy of the original on file  
in this court.  
Phil Lombardi, Clerk

*Rosanne J. Miller*  
Clerk

Defendant: MICHAEL HUGHES  
Case Number: 98-CR-017-001-BU

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 18 months, as to Count 1, to run consecutively to sentence previously imposed in Northern District of Oklahoma Case 97-CR-041-001-K.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be placed in a facility where he will participate in Intensive Substance Abuse Treatment while he is incarcerated.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal

By \_\_\_\_\_  
Deputy Marshal

Defendant: MICHAEL HUGHES  
Case Number: 98-CR-017-001-BU

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. The defendant shall successfully participate in a program of testing and treatment (to include inpatient) for drug and alcohol abuse, as directed by the Probation Officer, until such time as released from the program by the Probation Officer.
5. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.

### STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: MICHAEL HUGHES  
Case Number: 98-CR-017-001-BU

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	10
Criminal History Category:	VI
Imprisonment Range:	24 months to 30 months
Supervised Release Range:	2 to 3 years
Fine Range:	\$ 2,000 to \$ 20,000
Restitution:	\$ n/a

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence departs from the guideline range for the following reason(s): The Court finds that a departure is warranted in accordance with 18 USC § 3553(b) and USSG §5K2.0, because there exists a mitigating circumstance of a kind not adequately taken into consideration by the Sentencing Commission in formulating guidelines that should result in a sentence different from that described. The Court finds that imposing a sentence for the instant offense without departing would have the effect of "double counting", based on the enhancement for obstruction of justice given in the sentencing for the underlying offense.

BJJ

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

**FILED**

JUN 3 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

JACK DAVID COX, )

Defendant. )

Case No. 94-CR-51-E  
(96-C-876-E)

ENTERED ON DOCKET

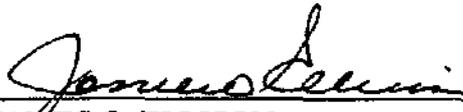
DATE JUN 04 1998

**JUDGMENT**

This matter came before the Court upon Defendant's motion to vacate set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 24 day of June, 1998.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

53

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

JUN 3 1998 *W*

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

SALVADOR HINOJOS, JR. )

Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 93-CR-33-E  
96-C-478-E

ENTERED ON DOCKET

DATE

JUN 04 1998

ORDER

Now before the Court is the Motion pursuant to 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket #45) of the Defendant, Salvador Hinojos, Jr.

Hinojos was found guilty of Possession of a controlled substance with intent to distribute, and carrying a firearm during the commission of a drug trafficking crime. He was sentenced to 37 months on count one, and 60 months on count two, to run consecutively. He appealed, alleging three errors: 1) denial of his motion to suppress evidence seized as a result of an allegedly pretextual stop, illegal detention and tainted consent; 2) denial of his motion for a mistrial based on prosecutorial misconduct; and 3) imposition of a fine for costs of incarceration. The tenth circuit vacated the ruling on the motion to suppress and the imposition of the fine, affirmed the denial of the motion for mistrial, and remanded for further proceedings. On remand, the Court again denied the Motion to Suppress, and this ruling was affirmed on Appeal. Hinojos now argues, in his §2255 motion that his §924(c) conviction for

*56*

carrying a firearm during a drug trafficking crime should be "overturned pursuant to Bailey v. United States, 116 S.Ct. 501 (1995)." Hinojos cites no other authority in support of his position, but argues, in the attachment to his §2255 motion that:

The gun belonged to someone who was related to my co-defendant. It was missing from their home and I had never been there. My co-defendant has been there that day in my truck which he had borrowed from me. I has never touched the gun. My co-defendant could have hidden the fun before he picked me up from my home or after we were stopped when he was left alone in the truck. I personally feel that I was wrongfully charged with carrying the firearm. I belief (sic) that the mandatory five year sentence should be vacated or reduced based on the fact that active employment of the firearm was not proven.

In discussing the evidence necessary to prove a charge of "using" a firearm in relation to a drug trafficking crime, the Court, in Bailey, held that "§924(c)(1) requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." Bailey, 116 S.Ct., at p. 505. This holding, in Bailey, however, does not help Hinojos. He was charged with, and convicted of "carrying" a firearm in relation to a drug trafficking crime, and Bailey makes it clear that "carrying" and "using" mean two different things, and that it is "using" which requires active employment.

Moreover, a review of the record reveals that the gun was found in the console of the truck that Hinojos was driving, next to a zip-lock storage bag containing cocaine. This evidence is sufficient to support a charge of "carrying" a firearm in relation to a drug trafficking crime in violation of §924(c). United States v. Cardenas, 864 F.2d 1528 (10th Cir. 1989), United States v. Jones, 49 F.3d 628 (10th Cir. 1995).

Hinojos' Motion pursuant to 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket #45) is denied.

IT IS SO ORDERED THIS 3<sup>RD</sup> DAY OF JUNE, 1998.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

F I L E D

JUN 1 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA )  
Plaintiff )  
VS )  
ANTHONY ROSS BENSON )  
Defendant )

Case Number 92-CR-072-001-E

ENTERED ON DOCKET

DATE 6/2/98

**ORDER MODIFYING CONDITIONS OF SUPERVISED RELEASE**

Now on this 28th day of May 1998, this cause comes on for revocation concerning allegations that Benson violated conditions of supervised release as set out in the Petition on Supervised Release filed on October 28, 1997. Benson is present in person and represented by counsel, Stephen Greubel. The Government is represented by Assistant United States Attorney, Lucy Creekmore, and the United States Probation Office is represented by David Plunkett.

On December 22, 1997, a Revocation Hearing was held regarding the allegations noted in the Petition on Supervised Release, filed on October 28, 1997, said allegations being that Tulsa Police officers recovered a loaded firearm on October 27, 1997, from a vehicle that was being driven by Benson, and that Benson failed to report for urinalysis on April 23, April 28, May 4, May 11, and May 15, 1997. The Court passed the Revocation Hearing to May 28, 1998, to allow disposition of state charges alleging Possession of a Firearm, After Former Conviction of a Felony. On May 4, 1998, the state charges were dismissed.

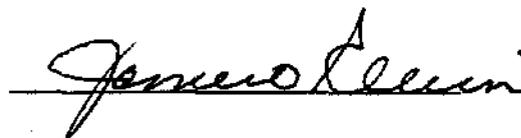
Based on evidence presented during the Revocation Hearing, the Court modified Benson's conditions of release as follows:

United States District Court  
Northern District of Oklahoma ) SS  
I hereby certify that the foregoing  
is a true copy of the original on file  
in this court.

Phil Lombardi, Clerk  
By B. McCallough  
Deputy

The defendant shall be placed on home detention for a period of two (2) months. During this time, the defendant shall remain at his place of residence except for employment and other activities approved in advance by the probation officer. The defendant shall maintain a telephone at his place of residence without any special services, modems, answering machines, or cordless telephones for the above period. The defendant shall wear an electronic device and shall observe the rules specified by the Probation Department. The entire cost of this program shall be paid by the U.S. Probation Office.

All other conditions previously imposed shall remain in full force and effect.



The Honorable James O. Ellison  
Senior United States District Judge

UNITED STATES DISTRICT COURT  
Northern District of Oklahoma

UNITED STATES OF AMERICA

v.

Case Number 97-CR-136-02-H

WILBUR FRANKLIN GARST, JR.  
Defendant.

**FILED**

JUN 1 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, WILBUR FRANKLIN GARST, JR., was represented by Randal D. Morley.

On motion of the United States the court has dismissed count 1 of the Indictment.

The defendant pleaded guilty on February 18, 1998, to count 2 of the Indictment.

Accordingly, the defendant is adjudged guilty of such count, involving the following offense(s):

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 USC 1952(a)(3)	Interstate Travel in Aid of Racketeering	3-8-97	2
18 USC 2	Aiding and Abetting	3-8-97	2

As pronounced on May 28, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 100, for count(s) 2 of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 29<sup>TH</sup> day of MAY, 1998.

  
The Honorable Sven Erik Holmes  
United States District Judge

Defendant's SSN: 511-70-9037

Defendant's Date of Birth: April 6, 1963

Defendant's residence and mailing address: 5534 E Newton Place, Tulsa, OK 74115

Defendant: WILBUR FRANKLIN GARST, JR.

Case Number: 97-CR-136-02-H

### PROBATION

The defendant is hereby placed on probation for a term of 3 years.

While on probation, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If this judgment imposes a fine, special assessment, costs or restitution obligation, it shall be a condition of probation that the defendant pay any such fine, assessment, costs and restitution.
2. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
3. The defendant shall successfully participate in a program of testing and treatment (to include inpatient) for drug and alcohol abuse, as directed by the Probation Officer, until such time as released from the program by the Probation Officer.
4. The defendant shall be placed on home detention to include electronic monitoring at the discretion of the U. S. Probation Office for a period of 4 months, to commence within 72 hours of sentencing date. During this time, the defendant shall remain at place of residence except for employment and other activities approved in advance by the probation office. The defendant shall maintain a telephone at place of residence without any special services, modems, answering machines, or cordless telephones for the above period. The defendant shall wear an electronic device and shall observe the rules specified by the Probation Office. The entire cost of this program shall be paid by the defendant.
5. The defendant shall perform 200 hours of community service at the Tulsa Volunteer Center or as directed by the Probation Officer.

### STANDARD CONDITIONS OF PROBATION

While the defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: WILBUR FRANKLIN GARST, JR.

Case Number: 97-CR-136-02-H

**FINE**

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

The defendant shall pay a fine of \$ 1,000. This fine shall be paid in full immediately. Any amount not paid immediately shall be paid during the period of Probation.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: WILBUR FRANKLIN GARST, JR.  
Case Number: 97-CR-136-02-H

**RESTITUTION AND FORFEITURE**

**RESTITUTION**

The defendant shall make restitution in the total amount of \$2,107.

The Court orders the defendant to immediately pay restitution in the amount of \$2,107. Upon forfeiture of \$1,120.50 which is currently in the custody of authorities, a restitution balance of \$986.50 will remain outstanding. Payments will be forwarded to Lady Luck Casino, 316 Beach Boulevard, Biloxi, Mississippi 39530, reference case number LL-03-97-034. The restitution shall be paid jointly and severally with codefendant, Tony Cahue.

Payments of restitution are to be made to the Clerk of the Court for the Northern District of Oklahoma for transfer to the payee(s).

Restitution shall be paid in full immediately. Any amount not paid immediately shall be paid during the period of probation.

If a victim has received compensation from insurance or any other source with respect to a loss, any restitution ordered shall be paid to the person who is a victim before any restitution is paid to any such provider of compensation.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

Defendant: WILBUR FRANKLIN GARST, JR.  
Case Number: 97-CR-136-02-H

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report, except defendant is entitled to two level decrease in offense level pursuant to USSG § 3E1.1(a).

**Guideline Range Determined by the Court:**

Total Offense Level:	7	
Criminal History Category:	I	
Imprisonment Range:	0 months to 6 months	Count 2
Supervised Release Range:	2 to 3 years	Count 2
Fine Range:	\$ 500 to \$ 5,000	Count 2
Restitution:	\$ 2,107	

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

UNITED STATES DISTRICT COURT  
Northern District of Oklahoma

UNITED STATES OF AMERICA

v.

Case Number 97-CR-136-001-H

TONY CAHUE  
Defendant.

**FILED**  
JUN 1 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, TONY CAHUE, was represented by Stephen J. Knorr.

On motion of the United States the court has dismissed count 1 of the Indictment.

The defendant pleaded guilty on February ~~18~~<sup>19</sup> 1998, to count 2 of the Indictment.

Accordingly, the defendant is adjudged guilty of such count, involving the following offense(s):

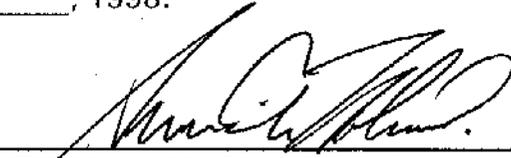
<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 USC 1952(a)(3)	Interstate Travel in Aid of Racketeering	3-8-97	2
18 USC 2	Aiding and Abetting	3-8-97	2

As pronounced on May 28, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 100, for count(s) 2 of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 29<sup>TH</sup> day of MAY, 1998.



The Honorable Sven Erik Holmes  
United States District Judge

Defendant's SSN: 459-50-2155

Defendant's Date of Birth: 07-05-30

Defendant's residence and mailing address: Tulsa City/County Jail, c/o U.S. Marshal's Office, 500 S Denver, Tulsa, OK 74103

Defendant: TONY CAHUE  
Case Number: 97-CR-136-001-H

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 18 months.

The Court makes the following recommendations to the Bureau of Prisons: Defendant be placed in a Bureau of Prison's Medical Facility. The Court further orders the defendant's medical records be attached to the presentence report and that placement in a medical facility be expedited.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal  
By \_\_\_\_\_  
Deputy Marshal

Defendant: TONY CAHUE

Case Number: 97-CR-136-001-H

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. The defendant shall successfully participate in a program of testing and treatment (to include inpatient) for drug and alcohol abuse, as directed by the Probation Officer, until such time as released from the program by the Probation Officer.
5. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.

**STANDARD CONDITIONS OF SUPERVISION**

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: TONY CAHUE  
Case Number: 97-CR-136-001-H

**RESTITUTION AND FORFEITURE**

**RESTITUTION**

The defendant shall make restitution in the total amount of \$3,486.

The defendant shall make restitution to the following persons in the following amounts:

The Court orders the defendant to immediately pay restitution in the amount of \$3,486. Upon forfeiture of \$1,120.50, which is in the custody of authorities, a restitution balance of \$2,607 will remain outstanding. Payments may be forwarded to Lady Luck Casino, 316 Beach Boulevard, Biloxi, Mississippi 39530, reference case number LL-03-97-034. \$986.50 of the restitution amount shall be paid jointly and severally with codefendant Wilbur Garst. The remaining \$1,620.50 shall be paid by this defendant. Any restitution amount not paid immediately shall be paid during the period of incarceration, with any remaining unpaid balance to be paid during the term of supervised release. Considering the defendant's earning ability and his limited financial resources, the Court does not impose any fine, cost of incarceration or supervision, and waives interest accrual on the restitution.

Payments of restitution are to be made to the Clerk of the Court for the Northern District of Oklahoma for transfer to the payee(s).

Restitution shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid as a condition of supervised release.

If a victim has received compensation from insurance or any other source with respect to a loss, any restitution ordered shall be paid to the person who is a victim before any restitution is paid to any such provider of compensation.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

Defendant: TONY CAHUE  
Case Number: 97-CR-136-001-H

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	7	
Criminal History Category:	v	
Imprisonment Range:	12 months to 18 months	Count 2
Supervised Release Range:	2 to 3 years	Count 2
Fine Range:	\$ 500 to \$ 5000	Count 2
Restitution:	\$ 3,486	

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

BTJ

UNITED STATES DISTRICT COURT  
Northern District of Oklahoma

UNITED STATES OF AMERICA

v.

Case Number 98-CR-15-01-H

ANTHONY RENARD MOSLEY  
Defendant.

**FILED**

JUN 1 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, ANTHONY RENARD MOSLEY, was represented by Jack Schisler.

The defendant pleaded guilty on February 26, 1998, to count(s) One of the Indictment. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 USC 513(a)	Possession and Uttering Counterfeit Security (Check)	12-27-97	1

As pronounced on May 29, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 100, for count(s) One of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 29<sup>TH</sup> day of MAY, 1998.

  
The Honorable Sven Erik Holmes  
United States District Judge

Defendant's SSN: 455-43-4820

Defendant's Date of Birth: 12/25/63

Defendant's residence and mailing address: 2601 Escalante, Fort Worth, Texas 76120

Defendant: ANTHONY RENARD MOSLEY  
Case Number: 98-CR-15-01-H

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 15 months.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal

By \_\_\_\_\_  
Deputy Marshal

Defendant: ANTHONY RENARD MOSLEY

Case Number: 98-CR-15-01-H

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. The defendant shall successfully participate in a program of testing and treatment (to include inpatient) for drug and alcohol abuse, as directed by the Probation Officer, until such time as released from the program by the Probation Officer.
5. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgement shall be provided to the U. S. Probation Office immediately upon taking residency.
6. The defendant shall abide by the "Special Financial Conditions" enumerated in Miscellaneous Order Number M-128, filed with the Clerk of the Court on March 18, 1992.

**STANDARD CONDITIONS OF SUPERVISION**

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: ANTHONY RENARD MOSLEY  
Case Number: 98-CR-15-01-H

**FINE**

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

The defendant shall pay a fine of \$ 500. This fine shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid during the term of supervised release.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: ANTHONY RENARD MOSLEY  
Case Number: 98-CR-15-01-H

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	8	
Criminal History Category:	V	
Imprisonment Range:	15 months to 21 months	Count One
Supervised Release Range:	2 to 3 years	Count One
Fine Range:	\$ 1,000 to \$ 10,000	Count One
Restitution:	n/a	

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.