

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

**F I L E D**

JUL - 9 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARK THIERRY, )  
)  
Plaintiff, )  
)  
vs. )  
)  
OKLAHOMA DEPARTMENT OF )  
ENVIRONMENTAL QUALITY, and )  
MARK COLEMAN )  
)  
Defendants. )

No. 98-C-147-B

ENTERED ON DOCKET  
JUL 10 1998  
DATE \_\_\_\_\_

**ORDER**

At the Case Management Conference on July 9, 1998, Plaintiff's counsel, on behalf of Plaintiff Mark Thierry, moved to dismiss this case without prejudice. Defendants having no objection, the Court dismiss the case without prejudice. By agreement of the parties, the parties will pay their respective attorney fees and costs.

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



THOMAS R. BRETT  
UNITED STATES DISTRICT COURT

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

**F I L E D**

JUL - 9 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

TYLER LEE FERRELL, )  
)  
Plaintiff, )  
)  
vs. )  
)  
CITY OF TULSA, TULSA POLICE )  
DEPARTMENT, OFFICER S.E. HICKEY, )  
OFFICER J.T.GATWOOD, )  
)  
Defendants. )

No. 98-C-105-B ✓

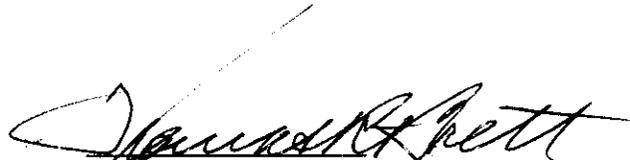
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**DATE JUL 10 1998**

**ORDER**

This matter came on for a Case Management Conference on July 9, 1998. Plaintiff's counsel did not appear. The only served defendant, the City of Tulsa, has been dismissed by this Court's Order dated July 6, 1998. The other defendants, Tulsa Police Department, Officer S.E. Hickey and Officer J.T. Gatwood, have not been served within the 120 day period set forth in Fed.R.Civ.P. 4(m). Accordingly, the Court dismisses the case without prejudice for failure to prosecute.

ORDERED this 7<sup>th</sup> day of July, 1998.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT COURT

**FILED**

JUL 9 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

CLESTER BILLS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ROGER RANDLE, STANLEY GLANZ,	)
and DREW DIAMOND,	)
	)
Defendants.	)

No. 97-CV-1131-B (E) ✓

ENTERED ON DOCKET  
DATE JUL 10 1998

**ORDER**

Pending before this Court is the amended civil rights complaint submitted by Plaintiff, a state prisoner appearing pro se and in forma pauperis, on February 27, 1998, as directed by the Court. As more fully stated below, the Court finds the amended complaint should be dismissed under the authority of 28 U.S.C. § 1915A.

***BACKGROUND***

By Order, dated January 14, 1998, Plaintiff was directed to:

- (1) file an amended complaint on the court-approved form and to include in it the dates of the events giving rise to his claims. In addition, the Court made note that Plaintiff named three (3) defendants in the caption of his complaint but identified only two (2) defendants in the body of his complaint. Plaintiff was advised that he must identify each defendant in both the caption and the body and describe the act(s) committed by each which allegedly violated his civil rights;

- (2) submit an amended motion for leave to proceed in forma pauperis, as Plaintiff had failed to attach a certified copy of the trust fund accounting for the 6 month period immediately preceding the filing of the complaint along with a completed financial affidavit signed by an authorized prison official; and
- (3) provide the requisite number of conformed copies along with summons and Marshal forms for service on the defendants.

On February 27, 1998, Plaintiff submitted four different versions of his amended complaint along with an amended in forma pauperis motion, copies of the complaint, summons and Marshal forms. The Court has granted in forma pauperis status; however, the deficiencies of the civil rights complaint as outlined in the Court's January 1998 Order have not been corrected. Plaintiff's amended complaint is now before the Court for review pursuant to 28 U.S.C. § 1915A.

Plaintiff has submitted four different incomprehensible versions of an amended complaint:

- Version 1: Clester Bills vs. Drue Diamon, Roger Randle, Standly Glane  
Nature of case: "i was charged with two counts of assault (sic) on polices (sic) offices (sic) - i went pro se and quitted (sic) on all charges"  
Count I: false arrest  
Count II: "i have memory lost do to my arrest in 1991"  
County III: "I've been in and out of mental health since i won in 1992"  
Relief requested: "pain and suffering; false arrest; mental cruelty; mental stress"
- Version 2: Clester Bills vs. Roger Randle, Drew Diamon, Standly Glazn  
Nature of case: false arrest  
Count 1: false arrest; mental stress; pain and suffering  
Supporting facts: "on the day i was aquited (sic) i was rushed to Parkside."  
Relief requested: "70-000000"
- Version 3: Clester Bills vs. Roger Randle, Drew Diamon, Standly Glazn  
Nature of case: "i was put in jail for a crime i didn't comet (sic); i was aqquiet (sic) on all charges"  
Count I: false arrest, suffing (sic) at this time from a hos (sic) of mental"  
Relief requested: "70-000000"

Version 4: Clester Bills vs. Drue Diamon, Roger Randle, Standly Glane

(same as #1 above, but in addition)

Nature of case: "I took my case to a jury trile - for a suit on polices officer, i was in Tulsa City on County Jail - i was aquited on all charges - i fell and hurt my back - they wounted take me to the hospital - the next day i was so nest up in my head - i was taken to parkside mental health center - hearing voices - depression and host of other ploblem - now i am a patient at star mental health center as of now i am a paintsint at joseph harp mental health center"

Relief requested: "\$70,000000 for mental stress - pain and suffering and false arrest"

### *ANALYSIS*

42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States,<sup>1</sup> and that defendant acted under color of law.<sup>2</sup> Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 507 U.S. 163, 168 (1993) (rejecting heightened pleading

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<sup>1</sup>The rights set forth in the Bill of Rights are held exclusively by the states, secured from infringement by the federal government. Flagg Bros. v. Brooks, 436 U.S. 149 (1978). Therefore, constitutional civil rights claims of individuals apply to the states only through the Fourteenth Amendment and require state action to afford relief under section 1983. See Monroe v. Pape, 365 U.S. 167 (1961), overruled on other grounds, Monell v. Dept. of Social Services, 436 U.S. 658 (1978). The state action test requires: (1) that the deprivation be caused by the exercise of a right or privilege created by the state or by a person for whom the state is responsible, and (2) that the actor must be someone who is a state actor. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

<sup>2</sup>There is an overlap between the state action requirement under the Fourteenth Amendment and action under color of law. See Lugar, 457 U.S. at 926. Where the plaintiff has already demonstrated state action under the first element the necessity to show action under color of law is also satisfied.

requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade, 841 F.2d at 1526 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). While pro se complaints are held to less stringent standards and must be liberally construed, nevertheless, the Court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Haines, 404 U.S. at 520; Hall, 935 F.2d at 1110.

The Prison Litigation Reform Act of 1996, added a new section to the in forma pauperis statute, entitled "Screening." See 28 U.S.C. § 1915A. That section requires the Court to review prisoner complaints before docketing, or as soon as practicable after docketing, and "dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted. Id.

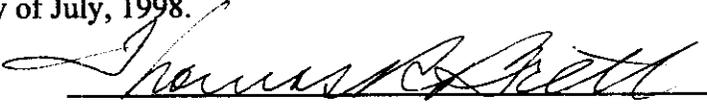
"The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a

legal interest which clearly does not exist. Id. A claim that is totally incomprehensible may be dismissed as frivolous as it is without an arguable basis in law. Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir. 1989); Mayfield v. Collins, 918 F.2d 560, 561 (5th Cir. 1991).

Even liberally construing any one of the various amended complaints in this case, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991), the Court concludes Plaintiff's allegations are factually frivolous, generally incomprehensible, do not raise constitutional claims, and thus, lack an arguable basis in law. West v. Atkins, 487 U.S. 42, 48 (1988). Therefore, the Court finds that Plaintiff's *Complaint* should be dismissed as frivolous without leave to amend. Hall, 935 F.2d at 1110 (a court may dismiss sua sponte "when it is 'patently obvious' that the plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile).

**ACCORDINGLY, IT IS HEREBY ORDERED** that Plaintiff's civil rights action is **dismissed without prejudice**. The Clerk is directed to "flag" this as a dismissal pursuant to 28 U.S.C. § 1915A. This dismissal constitutes at least the third occasion<sup>3</sup> where a civil action brought by Plaintiff under 28 U.S.C. § 1915 has been dismissed for failure to state a claim or as frivolous. Pursuant to 28 U.S.C. § 1915(g), Plaintiff is now barred from bringing a civil action or appealing a judgment in a civil action without full prepayment of fees.

SO ORDERED THIS 9<sup>th</sup> day of July, 1998.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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<sup>3</sup>Case No. 94-CV-1168K, dismissed with prejudice 5/10/95  
Case No. 94-CV-491-E, dismissed as frivolous under 28 U.S.C. § 1915(d), 6/27/94  
Case No. 94-CV-477-E, dismissed as frivolous under 28 U.S.C. § 1915(d), 6/27/94

DATE 7-10-98

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

**FILED**

JUL 09 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JUDY HOLLOWAY, )  
)  
Plaintiff, )  
)  
vs. )  
)  
MULTIMEDIA GAMES, INC., )  
)  
Defendant. )

Case No. 97-CV-572-K

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

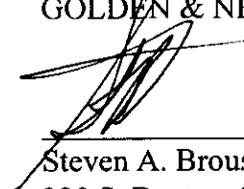
Plaintiff and Defendant, by and through their respective attorneys, have reached a mutually satisfactory settlement regarding Plaintiff's claims herein. Therefore, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties stipulate that this action should be dismissed with prejudice with each of the parties to bear their own costs and attorneys' fees.

Dated this 23 day of June, 1998.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON, P.C.

By:

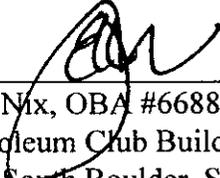


Steven A. Broussard, OBA#12582  
320 S. Boston, Suite 400  
Tulsa, OK 74103-3708  
(918) 594-0400

ATTORNEY FOR DEFENDANT  
MULTIMEDIA GAMES, INC.

-and-

By:

  
\_\_\_\_\_  
Jeff Nix, OBA #6688  
Petroleum Club Building  
601 South Boulder, Suite 610  
Tulsa, OK 74119  
(918) 587-3193

ATTORNEY FOR PLAINTIFF  
JUDY HOLLOWAY

ENTERED ON DOCKET

DATE 7-10-98

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

**FILED**

JUL 09 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

THAD ASHCRAFT and )  
 DEBORAH LANE ASHCRAFT, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 JACK UDELL ATKINS, )  
 )  
 Defendant. )

Case No. 97-CV-832-K (M) ✓

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

It is hereby stipulated and agreed by and between Ray H. Wilburn, as attorney for Plaintiffs Thad Ashcraft and Deborah Lane Ashcraft, and Ann C. Fries, as attorney for Defendant Jack Udell Atkins, that a settlement has been negotiated between the parties and that pursuant to Rule 41(A) of the Federal Rules of Civil Procedure, the above styled and numbered case should be dismissed with prejudice, each party to bear its own costs.

Respectfully submitted,

Ray H. Wilburn  
Ray H. Wilburn, OBA #9600

ATTORNEY FOR PLAINTIFFS

WILBURN, MASTERSON & SMILING  
7134 South Yale Avenue, Suite 560  
Tulsa, Oklahoma 74136-6337  
(918) 494-0414

Ann C. Fries  
Ann C. Fries, OBA #13040

ATTORNEY FOR DEFENDANT

LAW OFFICES OF EARL R. DONALDSON  
4500 South Garnett Road, Suite 230  
Tulsa, Oklahoma 74146-5220  
(918) 663-7878

**CERTIFICATE OF MAILING**

I, Ray H. Wilburn, hereby certify that on the 9th day of July, 1998, I mailed a true and correct copy of the above and foregoing Joint Stipulation of Dismissal with Prejudice with proper postage thereon fully prepaid to: Ms. Ann C. Fries, 4500 South Garnett Road, Suite 230, Tulsa, OK 74146-5220.

*Ray H. Wilburn*  
\_\_\_\_\_  
**RAY H. WILBURN** <sup>(S)</sup>

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

ANDREW P. GERMANY,  
SSN: 441-58-6037

Plaintiff,

v.

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

Defendant.

JUL 9 - 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 97-C-546-J ✓

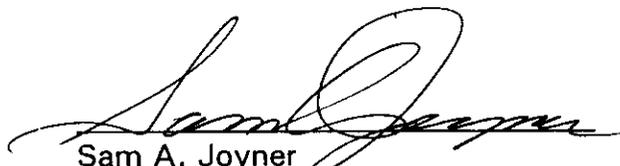
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DATE JUL 10 1998

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 8th day of July 1998.

  
Sam A. Joyner  
United States Magistrate Judge

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

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

JUL 9 - 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ANDREW P. GERMANY,  
SSN: 441-58-6037

Plaintiff,

v.

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

Defendant.

No. 97-C-546-JV ✓

ENTERED ON DOCKET

DATE JUL 10 1998

ORDER<sup>2/</sup>

Plaintiff, Andrew P. Germany, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.<sup>3/</sup> Plaintiff asserts that the Commissioner erred because (1) the ALJ's decision at Step Four of the sequential evaluation is not supported by substantial evidence, (2) the ALJ did not evaluate Plaintiff's complaints of pain in accordance with the correct legal standards, (3) the ALJ's finding that Plaintiff can perform a full range of medium work is not supported by the record, (4) the ALJ's findings that Plaintiff can perform a substantial number

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

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

<sup>3/</sup> Administrative Law Judge Leslie S. Hauger, Jr. (hereafter "ALJ") concluded that Plaintiff was not disabled by Order dated May 15, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on April 14, 1997. [R. at 5].

(11)

of jobs at the sedentary exertional level is not supported by substantial evidence, and (5) the Commissioner erred by failing to refer Plaintiff for additional neurological evaluation. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

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

Plaintiff was born on September 14, 1952, and was 43 years old at the time of the hearing before the ALJ. Plaintiff testified that he has neurofibromatosis.<sup>4/</sup> According to Plaintiff, on a scale of one to ten, his pain is generally at an eight and one-half to nine.

Plaintiff testified that he could lift ten to fifteen pounds, stand five to ten minutes, walk for five to ten minutes, and sit for five to ten minutes. [R. at 37]. Plaintiff previously worked for his brother as a janitor. Plaintiff testified that the work was tailored to his abilities. Plaintiff is deaf in his left ear. [R. at 38-39]. Plaintiff additionally has problems with his right hand. When Plaintiff was a child he severely injured his hand on a coke bottle. Plaintiff additionally claimed to suffer from severe pain in his low back, left shoulder, and left foot. [R. at 121].

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<sup>4/</sup> Taber's Cyclopedic Medical Dictionary 1299 (17th ed. 1993). "Previously known as Von Recklinghausen's neurofibromatosis, NF-1 affects about 1 in 4,000 persons. Clinically, there are multiple hyperpigmented areas. These appear shortly after birth and may be present any place on the body. Multiple cutaneous and subcutaneous tumors appear in late childhood. There may be a few or thousands. When the tumors are pressed, they pass through a small opening in the skin, leaving the space vacant where the tumor was in the skin. This characteristic, called buttonholing, helps to distinguish these tumors from lipomas. In about 2% to 5% of cases, the tumors become malignant. There is no cure, and tumors that give rise to symptoms or those that become malignant need to be excised. If the tumor is on a vital nerve, excision may be impossible. Radiation therapy is of benefit."

Plaintiff was examined by Angelo Dalessandro, D. O., on December 21, 1994. Dr. Dalessandro reported that Plaintiff had fibromas on his head, scalp, and torso. [R. at 149, 151]. He noted that Plaintiff has no hearing in his left ear. [R. at 150]. Plaintiff's right forearm showed signs of some muscle atrophy. [R. at 151]. In addition, Plaintiff had some weakness in his right hand. [R. at 151].

Plaintiff reported that he took the following medications: Vallium, Antivert, Daypro, Cataflan, Somaco, Aspirin, and B-12. [R. at 122].

On June 18, 1996, Burhan Say, M.D., noted that his physical examination on May 23, 1996 indicated that Plaintiff had several neurofibromas on his limbs and trunks. The largest was reported at 5-7 centimeters in size. The doctor also reported that Plaintiff had scoliosis and difficulty in flexing his spine. [R. at 187]. The doctor concluded that Plaintiff definitely needed a neurology evaluation and an MRI study because his skull and ear lesions had not been checked for a period of time.

The record contains no Residual Functional Capacity Assessment form and nothing indicating the amount of weight that Plaintiff could lift.

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

Disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.<sup>5/</sup> See 20 C.F.R. § 404.1520.

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

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

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<sup>5/</sup> Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

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

"The finding of the Secretary<sup>6/</sup> as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

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

The ALJ concluded that Plaintiff was not disabled. The ALJ found that Plaintiff could perform work at the medium and light exertional levels. The ALJ noted that Plaintiff's past relevant work was as a janitor/housekeeper, and based on the

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<sup>6/</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

vocational expert's testimony concluded that Plaintiff could return to his past relevant work. In addition, the ALJ determined that Plaintiff could work as a sedentary assembler and a waxer.

#### IV. REVIEW

##### **STEP FOUR EVALUATION**

Plaintiff initially asserts that the ALJ's evaluation at Step Four of the sequential evaluation process is inadequate. Plaintiff notes that his past relevant work as a janitor was for his brother and numerous concessions were made by Plaintiff's brother to enable Plaintiff to perform the work.

Social Security Regulation 82-62 requires an ALJ to develop the record with respect to a claimant's past relevant work.

The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision.

.....

[D]etailed information about strength, endurance, manipulative ability, mental demands and other job requirements must be obtained as appropriate. This information will be derived from a detailed description of the work obtained from the claimant, employer, or other informed source. Information concerning job titles, dates work was performed, rate of compensation, tools and machines used, knowledge required, the extent of supervision and independent judgment required, and a description of tasks and responsibilities will permit a judgment as to the skill level and the current relevance of the individual's work experience.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982). The ALJ must make specific factual findings detailing how the requirements of claimant's past relevant work fit the claimant's current limitations. The ALJ's findings must contain:

1. A finding of fact as to the individual's RFC.
2. A finding of fact as to the physical and mental demands of the past job/occupation.
3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993).

In this case, the ALJ did not make the detailed findings as required by the regulations. The ALJ's reference to the testimony of a vocational expert cannot substitute for the findings required by the regulations.

However, the ALJ made alternative findings at Step Five. If the ALJ's findings are supported by substantial evidence at Step Five, the Commissioner's decision may still be affirmed.

#### **PAIN AND CREDIBILITY EVALUATIONS**

Plaintiff asserts that the ALJ's determination with respect to his pain is not supported by substantial evidence.

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all

the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

[T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

The mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

In this case, the ALJ noted that the record contained no objective evidence to support Plaintiff's complaints of pain until April 1994 when Plaintiff began to see a chiropractor. The ALJ observed that Plaintiff's back pain was relieved by hot showers, and that Plaintiff took limited medications. The ALJ additionally observed that Plaintiff testified he could lift only ten to fifteen pounds and stand, sit or walk only five to ten minutes, but that Plaintiff went deer hunting in November 1995 and sat in his hearing for over 30 minutes. The Court concludes that the record contains substantial evidence to support the ALJ's determinations with respect to Plaintiff's pain and his credibility.

#### **RESIDUAL FUNCTIONAL CAPACITY**

Plaintiff asserts that the record does not support the ALJ's finding that Plaintiff has the residual functional capacity to perform a full range of medium work.

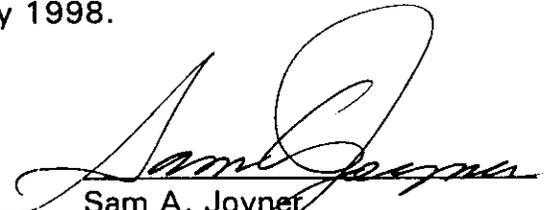
Plaintiff has been diagnosed with neurofibromatosis. Plaintiff's most recent evaluator, Dr. Say, concluded that Plaintiff had physical limitations and should have an MRI to check various lesions. Plaintiff had a severe injury to his arm and hand

when he was a child. The record contains no Residual Functional Capacity Assessment and contains nothing indicating the amount of weight Plaintiff can lift or carry, or the amount of time Plaintiff can walk, sit or stand. Plaintiff did testify that he can lift ten to fifteen pounds, and sit, stand, or walk for five to ten minutes. This testimony alone does not support a finding that Plaintiff can perform a full range of either sedentary, light, or medium work.

The ALJ concluded, based on the testimony of a vocational expert, that Plaintiff could work as an unskilled sedentary assembler or as a waxer (stenciling). However, the record does not contain substantial evidence to support the ALJ's conclusions that Plaintiff can perform the physical demands of each of these jobs. On remand, the ALJ should obtain a Residual Functional Capacity Assessment or other evidence to document Plaintiff's physical capabilities.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

Dated this 9 day of July 1998.

  
Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUL 9 - 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ELWOOD JONES,  
SSN: 442-62-4036

Plaintiff,

v.

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

Defendant.

Case No. 97-CV-423-J

ENTERED ON DOCKET

DATE JUL 10 1998

**JUDGMENT**

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 9 day of July 1998.

  
Sam A. Joyner  
United States Magistrate Judge

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

(13)

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

JUL 9 - 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ELWOOD JONES, )  
SSN: 442-62-4036 )  
 )  
Plaintiff, )

v. )

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

Case No. 97-CV-423-J ✓

ENTERED ON DOCKET  
DATE JUL 10 1998

ORDER<sup>2/</sup>

Now before the Court is Plaintiff's appeal of a decision by the Commissioner of the Social Security Administration ("Commissioner") denying him disability insurance benefits under Title II of the Social Security Act. The Administrative Law Judge ("ALJ"), Stephen C. Calvarese, denied benefits at step five of the sequential evaluation process used by the Commissioner to evaluate disability claims.

The ALJ determined that Plaintiff retained the residual functional capacity ("RFC") to perform a limited range of medium work and found that there were significant jobs in the national economy Plaintiff could perform given his RFC. On appeal, Plaintiff argues (1) that the ALJ's RFC determination is not supported by substantial evidence, (2) that the ALJ's credibility determination regarding Plaintiff's

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

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

(12)

subjective pain complaints is not supported by substantial evidence, and (3) that the hypothetical question posed to the vocational expert did not adequately describe Plaintiff's impairments. The Court has meticulously reviewed the entire record and for the reasons discussed below the Commissioner's decision is **REVERSED**.

## I. **STANDARD OF REVIEW**

A disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . .

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.<sup>3/</sup>

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<sup>3/</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). See 20 C.F.R. § 404.1525. If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

The standard of review applied by this Court to the Commissioner's disability determinations is set forth in 42 U.S.C. § 405(g). According to § 405(g), "the finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when

he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

## II. DISCUSSION

The Court has meticulously reviewed the medical evidence and the ALJ's thorough and well-reasoned opinion. Based on this review, the Court finds (1) that the ALJ's RFC determination is supported by substantial evidence, and (2) that the ALJ's credibility determination regarding Plaintiff's subjective pain complaints is supported by the correct analysis and it is also supported by substantial evidence. Thus, the Court affirms the ALJ's opinion on these issues.

The ALJ found that Plaintiff had the following RFC:

The claimant has the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for lifting/carrying over 50 pounds occasionally or 25 pounds frequently (exertional), avoid dust, fumes, and gases, and requires air conditioned environment (non-exertional) (20 CFR 404.1545).

*R. at 22, ¶ 5.*

The undersigned concludes that the claimant retains the residual functional capacity to perform work activities at the medium exertional level, with limitations on lifting/carrying over 50 pounds occasionally or 25 pounds frequently, and, to accommodate the chronic asthma, avoid dust, fumes, and gases, and requires air conditioned environment.

*R. at 17-18.*

The ALJ concluded that, given Plaintiff's RFC, there are a substantial number of jobs in the national economy that Plaintiff can perform. The evidence used by the ALJ to support his conclusion came from the vocational expert that testified at the

hearing. The vocational expert's testimony was based on a hypothetical person with the following limitations, as described by the ALJ:

Say I have an individual who is 36 years of age, . . . male and has finished 12th grade and has a good ability to read, write, and use numbers. And let's assume that this person has a work history you just described for the claimant. Let's assume that this person can perform sedentary light or medium work with these additional restrictions. And the primary restrictions would be related to the asthma problem and of the nonexertional type restrictions. This person would need to avoid dust, fumes, pollens, ragweed in the fall, and those would be the primary restrictions.

*R. at 66-67.* The ALJ further refined his hypothetical by adding an air conditioned environment as an additional requirement/limitation. *R. at 67-68.*

The problem with the ALJ's reliance on the vocational expert's testimony is that the limitations presented to the vocational expert do not take account of the fact that the ALJ found that Plaintiff could not perform the lifting and carrying requirements of medium work. Nowhere does the ALJ present the vocational expert with a hypothetical question which included lifting and carrying limitations. Thus, the vocational expert's testimony cannot support the ALJ's conclusion because it was based on a hypothetical person who did not have one of the limitations that the ALJ specifically found Plaintiff had.

The vocational expert identified three types of jobs that she believed the hypothetical person described by the ALJ could perform: assembler at the sedentary level, weight recorder at the sedentary/light level, and hand packager at the light level. Even though these jobs are all at an exertional level lower than medium, the Court is

unable to determine whether Plaintiff could perform at the light or sedentary level. While the ALJ specifically found that Plaintiff could not perform the lifting/carrying requirements of medium work, there are no findings by the ALJ as to what Plaintiff is capable of lifting and carrying. Thus, the Court has no way to determine whether Plaintiff could perform the lifting and carrying requirements of the jobs identified by the vocational expert.

The Court also finds that the cross examination of the vocational expert raised serious questions about the jobs that she did identify. The vocational expert identified a weight recorder job which could be performed at a rock crushing plant. The vocational expert was not, however, able to adequately explain how such a job could be performed in a dust free environment. The vocational expert also identified 1,980 hand packaging jobs in Oklahoma and 192,339 hand packaging jobs in the entire United States. The vocational expert was not, however, able to identify which of those jobs could be performed in an air conditioned environment.

### **CONCLUSION**

The testimony of the vocational expert does not provide substantial evidence to support the ALJ's conclusion that, given Plaintiff's RFC, Plaintiff is capable of performing a significant number of jobs in the national economy. The decision of the Commissioner is, therefore, reversed and this case is remanded for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this 9 day of July 1998.

  
Sam A. Joyner  
United States Magistrate Judge





standard to assess Plaintiff's subjective complaints of pain, and (4) that the ALJ failed to compare the demands of Plaintiff's past work with her present abilities. For the reasons discussed below the Commissioner's decision is **AFFIRMED**.

## I. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . .

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.<sup>3/</sup>

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<sup>3/</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). See 20 C.F.R. § 404.1525. If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

The standard of review applied by this Court to the Commissioner's disability determinations is set forth in 42 U.S.C. § 405(g). According to § 405(g), "the finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when

he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

## II. DISCUSSION

Plaintiff was previously employed as a telephone enumerator for seven years. Plaintiff worked eight months out of twelve. Plaintiff worked for a company who published city telephone directories. As an enumerator, Plaintiff would call customers all day long and verify that the information in the directory was correct. Plaintiff sat for 8 hours a day. Her job involved no lifting, carrying, walking or standing. *R. at 112*. Plaintiff was occasionally required to bend or reach. *R. at 112*.

Plaintiff states that she is unable to work because she has diabetes, headaches, dizziness, burning feet, and pain in her neck, shoulder, knees and feet. Despite her subjective complaints, the ALJ found that Plaintiff retained the RFC to return to her past work as a telephone enumerator.

The Court has meticulously reviewed the medical evidence and the ALJ's opinion. Based on this review, the Court finds (1) that the ALJ's RFC determination is supported by substantial evidence, and (2) that the ALJ's credibility determination regarding Plaintiff's subjective complaints of pain is supported by the correct analysis and it is also supported by substantial evidence.

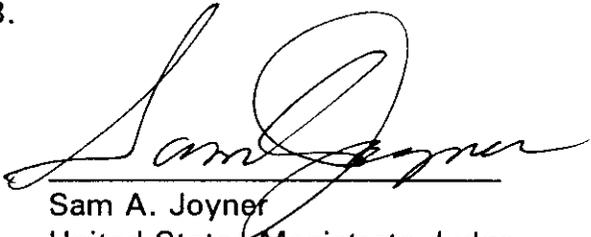
The Court also finds no error by the ALJ with regard to the development and evaluation of the demands of Plaintiff's past work as a telephone enumerator. The demands of Plaintiff's telephone enumerator job are adequately developed in the record and they were adequately considered by the ALJ.

**CONCLUSION**

The decision by the Commissioner to deny Plaintiff disability insurance benefits under Title II of the Social Security Act is **AFFIRMED**.

IT IS SO ORDERED.

Dated this   1   day of July 1998.

  
\_\_\_\_\_  
Sam A. Joyner  
United States Magistrate Judge

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

DULCE MARIA GRINAN-NARANJO, )  
SSN: 441-78-1587 )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
KENNETH S. APFEL, Commissioner )  
of Social Security Administration, )  
 )  
 )  
Defendant. )

JUL 9 - 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 97-C-452-J ✓

ENTERED ON DOCKET  
DATE JUL 10 1998

**JUDGMENT**

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 8th day of July 1998.

  
Sam A. Joyner  
United States Magistrate Judge

15

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

DULCE MARIA GRINAN-NARANJO, )  
 SSN: 441-78-1587 )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KENNETH S. APFEL, Commissioner )  
 of Social Security Administration,<sup>1/</sup> )  
 )  
 Defendant. )

No. 97-C-452-J ✓

ENTERED ON DOCKET  
 JUL 10 1998  
 DATE \_\_\_\_\_

**FILED**

JUL 9 - 1998  


Phil Lombardi, Clerk  
 U.S. DISTRICT COURT

ORDER<sup>2/</sup>

Plaintiff, Dulce Maria Grinan-Naranjo, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.<sup>3/</sup> Plaintiff asserts that the Commissioner erred because (1) the ALJ erred by failing to fully develop Plaintiff's alleged mental impairment, (2) the ALJ's findings regarding Plaintiff's residual functional capacity are erroneous, and (3) the ALJ's findings at Step Four are inadequate to support his decision. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

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

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

<sup>3/</sup> Administrative Law Judge Stephen C. Calvarese (hereafter "ALJ") concluded that Plaintiff was not disabled on May 20, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on March 22, 1997. [R. at 4].

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

Plaintiff was born in Cuba on May 30, 1954. She was 41 years old at the time of her hearing before the ALJ. [R. at 29]. Plaintiff speaks Spanish and some English.

Plaintiff testified that she could stand approximately seven to eight minutes and sit approximately five to six minutes. [R. at 42]. Plaintiff attempted suicide several years ago but testified that her last suicidal thoughts were in 1992. However, Plaintiff continues to hear voices and believes that somebody may break into her house. [R. at 49].

According to Plaintiff she broke her leg and continues to have difficulty with her leg. In addition, Plaintiff's back and legs hurt, she has skin grafts on her chest and arms (from a suicide attempt), and she wears orthopedic shoes. [R. at 37-40]. Plaintiff stated that she sleeps only four hours each night. [R. at 100].

Plaintiff visited her doctor several times with complaints of foot pain, and saw Dr. Davis with complaints of back pain. [R. at 109 - 132]. Plaintiff was admitted to Eastern State Hospital on November 11, 1982 for a mental evaluation. The report noted that Plaintiff had self-inflicted burns on 25% of her body. [R. at 163]. Plaintiff was additionally admitted for mental evaluations on August 7, 1982, and on August 21, 1988. [R. at 168, 171].

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

Disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

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

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

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of

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<sup>4/</sup> Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

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

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

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

### III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff could perform light work. Based on the testimony of a vocational expert, the ALJ determined that Plaintiff's past relevant work as a housekeeper was at the "light" exertional level and that Plaintiff could therefore return to her work as a housekeeper. The ALJ noted that Plaintiff's most recent mental evaluations were at least five to six years before the hearing and concluded that Plaintiff did not have a mental impairment.

### IV. REVIEW

#### **MENTAL IMPAIRMENT**

Plaintiff asserts that when a record contains evidence of a mental impairment an ALJ is required to obtain the assistance of a medical advisor in completing a PRT form. Plaintiff asserts that the ALJ improperly completed the form without assistance, and that the ALJ neglected to discuss his findings with regard to Plaintiff's alleged mental impairment in his decision.

The regulations and case law are clear--an ALJ does not have an absolute duty to obtain the assistance of a medical advisor when completing a PRT Form. The Social Security Act requires only that "[a]n initial determination under subsection (a), (c), (g), or (i) of this section<sup>6/</sup> that an individual is not under a disability, in any case where

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<sup>6/</sup> If the claimant does not assert a claim of a "mental impairment" until the administrative hearing level, the ALJ may be in the position to make the first or "initial" determination of the mental impairment. If the ALJ's determination was considered the "initial determination" under 42 U.S.C. § 421(h), the ALJ would be required, by the statute, to make every reasonable effort to obtain the assistance of a qualified psychiatrist or psychologist. However, the statute specifically includes only certain subparts (a, c, g, and i) of the statute in the "duty" to use all reasonable efforts to obtain the assistance of a medical advisor. The statute excludes subpart (d) which is judicial review. Thus there is no such duty at the ALJ hearing level. See, e.g., 42 U.S.C.

there is evidence which indicates the existence of a mental impairment, shall be made only if the Commissioner of Social Security has made every reasonable effort to insure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment." 42 U.S.C. § 421(h). When a mental impairment is alleged for the first time at the administrative hearing level, the regulations provide that the ALJ may remand the case to the State agency for completion of the PRT Form and for a new disability determination. 20 C.F.R. § 404.1520a(d)(1)(i).

In this case, Plaintiff did not initially allege a mental impairment. Rather, the first mention by Plaintiff of a mental impairment occurred at the hearing before the ALJ. The ALJ did not err by completing the PRT Form.

In Bernal v. Bowen, 851 F.2d 297, 301 (10th Cir. 1988), the claimant did not allege a "mental impairment" until the administrative hearing level. One of Bernal's doctors reported that Bernal had "symptoms consistent with depression." In addition, Bernal was examined by a consulting psychologist, who made a final diagnosis of "[m]ajor depression, recurrent, with melancholia." The consulting psychologist did not conclude that Bernal would be unable to perform his past relevant work.

The claimant in Bernal challenged the decision of the Secretary asserting that the ALJ erred by completing the medical review and RFC assessment (PRT Form) without the assistance of a qualified psychiatrist or psychologist. The Tenth Circuit

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§ 421(h) (the duty applies, e.g., at the state determination level, at the review of the state determination, and at the subsequent review of a prior disability determination). The regulations are also fairly clear and track the statute. See 20 C.F.R. § 404.1520a(d)(1)(iii).

noted that at the initial and reconsideration levels the standard document must be signed by a medical consultant, but that at the ALJ hearing level, the regulations provide that the ALJ may complete the form by himself, may request the assistance of a medical advisor, or may remand the case to the State agency for completion of the document. Bernal, 851 F.2d at 302. The Tenth Circuit concluded that the completion of the PRT Form by the ALJ without the assistance of a psychiatrist or psychologist was not error.

In light of this legislative history, the court cannot find that the Secretary or the ALJ has the absolute duty to have a psychiatrist or psychologist complete the reports. Nor are we compelled to delineate the boundaries of the duties imposed under 421(h) at this time. In this case, the record is completely devoid of any evidence seriously challenging the ALJ's final determination regarding the severity of Bernal's impairments or the appropriateness of the RFC assessment given by the ALJ. Since the ALJ's decision is amply supported by the medical reports and the record, Mr. Bernal was not prejudiced by the ALJ's actions. For these reasons, we find no error in the fact that the case review and RFC were completed by the ALJ without the assistance of a mental health professional.

Id. at 302-03.

The Tenth Circuit Court of Appeal's decision in Bernal was modified to some degree by Andrade v. Secretary of Health & Human Services, 985 F.2d 1045, 1050 (10th Cir. 1993). In Andrade, the claimant did not assert a "mental impairment" until just prior to the ALJ hearing. The ALJ completed the PRT Form at the administrative hearing without the assistance of a psychiatrist or psychologist. Andrade notes that "as allowed by the regulations, the ALJ appears to have completed the standard

document, including the residual functional capacity assessment, without the assistance of a medical consultant." Andrade, 985 F.2d at 1049.

The record in Andrade indicated that the claimant was undergoing an intense psychochemotherapeutic treatment program since August of 1988. (The hearing before the ALJ occurred on December 20, 1988.) At the hearing, the claimant additionally testified about his severe depression. The claimant submitted a letter from his doctor at the hearing, and his attorney submitted additional records from the claimant's doctor after the hearing.

The Tenth Circuit concluded that the ALJ did not sufficiently consider the claimant's alleged mental impairment. Andrade, 985 F.2d at 1048. The Tenth Circuit additionally explained its conclusion in conjunction with Bernal.

In a previous case, this court found "no error in the fact that the case review and [residual functional capacity assessment] were completed by the ALJ without the assistance of a mental health professional." Bernal v. Bowen, 851 F.2d 297, 302-03 (10th Cir. 1988). Our conclusion in Bernal was based on three considerations. First, we found no absolute duty under 42 U.S.C. § 421(h) for the Secretary or the ALJ to have a psychologist or psychiatrist complete the medical portion of the case review and the residual functional capacity assessment. Bernal, 851 F.2d at 302. Second, the record lacked any evidence seriously challenging the ALJ's assessment of Mr. Bernal's residual functional capacity or the ALJ's conclusion regarding the severity of Mr. Bernal's mental impairment. Id. And, third, "Mr. Bernal was not prejudiced by the ALJ's actions" because "the ALJ's decision was amply supported by the medical reports and the record." Id.

In this case, however, we cannot conclude that substantial evidence supports the ALJ's decision regarding the extent of claimant's mental impairment.

\* \* \*

In Bernal, we did not "delineate the boundaries of the duties imposed under 421(h) . . . ." Bernal, 851 F.2d at 302. And, we do not, by this decision, attempt to define the phrase "every reasonable effort." We hold only that, based on the particular circumstances of this case, the ALJ abused the discretion afforded to him by the regulations, 20 C.F.R. §§ 404.1520a & 416.920a, by assessing claimant's residual functional capacity without making any effort to obtain the assistance of a mental health professional. Accordingly, we remand this case for proper consideration of claimant's alleged mental impairment.

Id. at 1050.

However, the Andrade Court also states that "when the record contains evidence of a mental impairment, the Secretary cannot determine that the claimant is not under a disability without first making every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment." Andrade, 985 F.2d at 1048. To reconcile this statement with the above-quoted language from Andrade, one must conclude that the Andrade Court finds that it is not error for the ALJ to complete the PRT Form, without the assistance of a mental health professional, where the record contains some evidence of a mental impairment but lacks any evidence seriously rebutting the ALJ's assessment of the mental impairment, and where the ALJ's decision is supported by substantial evidence.

The Court concludes that this case must be remanded to the Commissioner for other reasons. On remand, the allegation by Plaintiff that she has mental impairment will no longer be alleged "for the first time" at the ALJ hearing level. In accordance

with the regulations, therefore, the Commissioner should make every effort to obtain the expertise of a professional when completing the PRT form.

#### **RESIDUAL FUNCTIONAL CAPACITY**

Plaintiff has additionally alleged that the ALJ did not appropriately evaluate her complaints of pain under Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995). Plaintiff asserts that she has pain as a result of problems related to her back, foot, leg, and skin grafts. Plaintiff additionally asserts that no medical evidence in the record supports the ALJ's conclusions that Plaintiff can perform the physical requirements of light work.

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

[T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

The mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the case referenced by Plaintiff, the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions. Id. at 390-91.

Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 391. The Court specifically noted that the ALJ should consider such factors as:

the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Id. at 391. The Tenth Circuit remanded the case, requiring the Secretary to make "express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain." Id.

The ALJ's evaluation of Plaintiff's pain is limited. Initially, whether or not Plaintiff's complaints meet the first and second steps of Luna is debatable. The ALJ does not specify whether or not Plaintiff's impairments could cause the pain alleged or whether or not Plaintiff has established the requisite "nexus." Instead, the ALJ skips to step three of Luna and evaluates Plaintiff's credibility. However, the credibility analysis by the ALJ is simply not in accord with the requirements of Kepler.

After careful evaluation, the Administrative Law Judge finds the claimant's subjective complaints to include pain, depression, lack of energy, paranoia, and dizziness are not substantiated to be of such intensity, frequency and duration as to affect her concentration or prevent the performance of work activity at the level identified here. To the extent that the claimant's testimony tends to show otherwise, such testimony, in light of all of the evidence, including the medical exhibits, is deemed not sufficiently credible to support a finding of disability under current criteria.

On remand, the ALJ should evaluate Plaintiff's complaints of pain in accordance with Luna and Kepler. If the ALJ reaches step three of the Luna analysis, and evaluates Plaintiff's credibility, the ALJ should make specific findings with respect to Plaintiff's credibility and include such findings in his decision.

#### **STEP FOUR: PAST RELEVANT WORK**

Plaintiff asserts that the ALJ determined that Plaintiff was not disabled at Step Four but that the ALJ failed to make the requisite findings of a Step Four evaluation.

Social Security Regulation 82-62 requires an ALJ to develop the record with respect to a claimant's past relevant work.

The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision.

. . . .

[D]etailed information about strength, endurance, manipulative ability, mental demands and other job requirements must be obtained as appropriate. This information will be derived from a detailed description of the work obtained from the claimant, employer, or other informed source. Information concerning job titles, dates work was performed, rate of compensation, tools and machines used, knowledge required, the extent of

supervision and independent judgment required, and a description of tasks and responsibilities will permit a judgment as to the skill level and the current relevance of the individual's work experience.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982). The ALJ must make specific factual findings detailing how the requirements of claimant's past relevant work fit the claimant's current limitations. The ALJ's findings must contain:

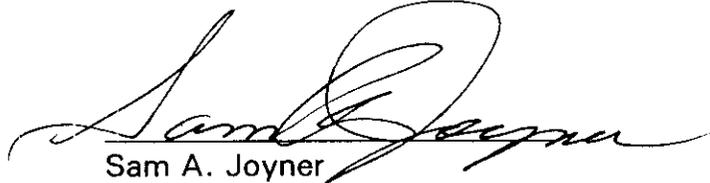
1. A finding of fact as to the individual's RFC.
2. A finding of fact as to the physical and mental demands of the past job/occupation.
3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993).

The ALJ did not make specific findings with respect to the requirements of Plaintiff's past relevant work. Instead, the ALJ found that Plaintiff could do light work, and relied on the testimony of a vocational expert in concluding that Plaintiff could perform work as a housekeeper. See Winfrey v. Chater, 92 F.3d 1017, 1024-25 (10th Cir.1996) ("This practice of delegating to a VE many of the ALJ's fact finding responsibilities at step four appears to be of increasing prevalence and is to be discouraged.").

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

Dated this 9 day of July 1998.

A handwritten signature in cursive script, appearing to read "Sam A. Joyner".

Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL - 8 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

VERL D. HAVICE,

Plaintiff,

vs.

KENNETH D. APFEL, Commissioner of the  
Social Security Administration,

Defendant.

Case No. 94-CV-0953-E

ENTERED ON DOCKET

DATE JUL 09 1998

JUDGMENT

This action has come before the Court for consideration and an Order awarding plaintiff attorney's fees has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

Dated this 8<sup>th</sup> day of July, 1998.

Claire V Eagan  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

KENNETH L. JACKSON,  
SSN: 445-62-4287

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,

Defendant.

JUL 8 - 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

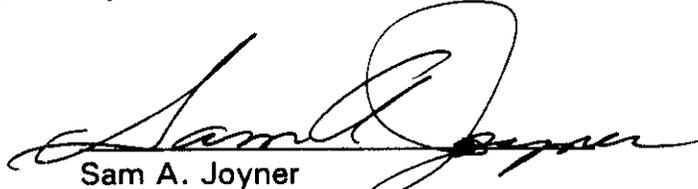
No. 97-C-319-J ✓

ENTERED ON DOCKET  
DATE JUL 09 1998

**JUDGMENT**

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 7th day of July 1998.

  
Sam A. Joyner  
United States Magistrate Judge

(H)

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

KENNETH L. JACKSON, )  
SSN: 445-62-4287 )

Plaintiff, )

v. )

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

Defendant. )

JUL 7 - 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 97-C-319-J

ENTERED ON DOCKET

DATE JUL 09 1998

**ORDER**<sup>2/</sup>

Plaintiff, Kenneth L. Jackson, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.<sup>3/</sup> Plaintiff asserts that the Commissioner erred because (1) the ALJ's credibility determination was not supported by substantial evidence, (2) the ALJ applied an incorrect legal standard in disregarding the findings of the Veteran's Administration, (3) the ALJ failed to evaluate Plaintiff's alleged mental impairment and failed to attach a Psychiatric Review Technique form ("PRT") to his decision, and (4) the ALJ's findings regarding Plaintiff's

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

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

<sup>3/</sup> Administrative Law Judge Judge R.J. Payne (hereafter "ALJ") concluded that Plaintiff was not disabled on October 17, 1995. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on January 31, 1997. [R. at 8].

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RFC are not supported by the record. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

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

Plaintiff testified, at the hearing, that he was currently attending Junior College classes and was enrolled in six hours each semester. According to Plaintiff he drove (approximately five minutes) to his class and sat in class for approximately one hour and twenty minutes each week day.

Plaintiff testified that he was disabled due to low back pain, pain in his neck, knee, leg and ankle, shortness of breath, asthma, chest pain, high blood pressure, and depression.

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

The Commissioner has established a five-step process for the evaluation of social security claims.<sup>4/</sup> See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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<sup>4/</sup> Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

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

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

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

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

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

The ALJ concluded that Plaintiff was not disabled. The ALJ found that Plaintiff was limited to light work activity which did not require repetitive pushing or pulling of arm controls, repetitive overhead reaching, repetitive rotation, flexion, or extension of the neck, more than occasional repetitive bilateral hand motion, exposure to unprotected heights, or exposure to dust, allergens, fumes, smoke, odors, or gases.

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

Based on the testimony of a vocational expert the ALJ found that Plaintiff could work as an office helper, kitchen helper, or telephone solicitor. The ALJ did not address Plaintiff's alleged mental impairment and did not attach a PRT to his decision.

#### IV. REVIEW

##### **MENTAL IMPAIRMENT**

In completing his "Reconsideration of Disability" form, Plaintiff listed, as one of his impairments, "depression." [R. at 119]. In the hearing before the ALJ, Plaintiff testified that he had a mental impairment, that part of his disability rating from the Veteran's Administration was from his mental impairment, and that he currently took medications for stress and depression. [R. at 66-67]. The Veteran's Administration disability rating for Plaintiff included a 30% impairment attributed to dysthymia.<sup>6/</sup> [R. at 684].

The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. § 1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas.<sup>7/</sup> 20 C.F.R. § 1520a(b)(3). If each of the four areas is rated as having an impact of "none," "never," "slight," or "seldom," the conclusion is that "the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of [the claimant's] mental ability to do basic work activities." See 20 C.F.R. § 1520a(c)(1). Although the regulations do

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<sup>6/</sup> Taber's Cyclopedic Medical Dictionary 594 (17th ed. 1993), defines dysthymia as "a chronic, mild form of depression that has been present for at least two years."

<sup>7/</sup> The four areas are: (1) activities of daily living; (2) social functioning; (3) concentration, persistence, or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. § 1520a(b)(3).

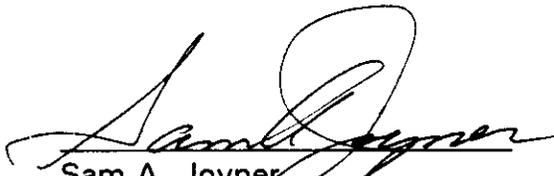
not specify that a rating above "none" or "slight" is presumed "severe," that is the logical inference. See Hargis v. Sullivan, 945 F.2d 1482, 1488 n.5 (10th Cir. 1991).

If the mental impairment is severe, the Listings must be consulted. 20 C.F.R. § 1520a(c)(2). If a claimant meets or equals a Listing, the claimant is disabled. 20 C.F.R. § 1520a(c)(2). If a claimant does not meet or equal a Listing, the claimant's residual functional capacity must be assessed to determine the level, if any, of the claimant's impairment. 20 C.F.R. § 1520a(c)(3). An ALJ must attach a Psychiatric Review Technique form ("PRT") detailing the ALJ's assessment of the claimant's level of mental impairment to his decision. 20 C.F.R. § 1520a(d).

In this case, the ALJ did not evaluate Plaintiff's mental impairment and did not attach a PRT to his decision. Defendant, in Defendant's brief, does not address the failure by the ALJ to attach a PRT to the ALJ's decision. Defendant asserts that Plaintiff does not have a severe mental impairment, that Plaintiff takes only a mild dosage of antidepressant medication, and that Plaintiff was not under counseling. These types of evaluations are reserved for the Commissioner. This Court cannot be the initial evaluator of Plaintiff's mental impairment. That province is solely for the Commissioner, with the Court reviewing those evaluations to determine whether they are supported by substantial evidence. Due to the ALJ's failure to address Plaintiff's asserted mental impairment and the failure by the ALJ to attach a PRT to his decision, this Court must reverse the decision of the Commissioner. On remand, the Commissioner should address Plaintiff's alleged mental impairment.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this decision.

Dated this 7 day of July 1998.



Sam A. Joyner  
United States Magistrate Judge

ENTERED ON DOCKET

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

DATE 7-9-98

ROBERT WILLIAM CLAYTON,	)
	)
Petitioner,	)
	)
vs.	)
	)
RON J. WARD, et al.,	)
	)
	)
Respondents.	)

No. 96-C-173-K /

**F I L E D**  
 JUL - 9 1998  
 Phil Lombardi, Clerk  
 U.S. DISTRICT COURT

**JUDGMENT**

This matter came before the Court for consideration of the Petitioner's petition for writ of habeas corpus. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

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

ORDERED THIS 8 DAY OF JULY, 1998

  
 TERRY C. KERN, CHIEF  
 UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 7-9-98

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

ROBERT WILLIAM CLAYTON, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 RON J. WARD, et al., )  
 )  
 Respondents. )

No. 96-C-173-K ✓

**FILED**

JUL 09 1998

*P*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MEMORANDUM OPINION

This matter is before the Court for consideration of a petition for writ of habeas corpus filed by Oklahoma death row inmate Robert William Clayton pursuant to 28 U.S.C. § 2254. Petitioner, who appears through counsel, challenges his convictions and sentences in Tulsa County District Court, Case No. CRF-85-2501. The Respondents have filed a response to the petition denying the allegations of the petition. Petitioner was granted permission to amend and supplement his petition on March 24, 1998. The entire state court record has also been produced and has been reviewed by the Court.

**PROCEDURAL BACKGROUND**

On March 1, 1986, Petitioner was convicted of First Degree Murder in the District Court of Tulsa County, for the death of Rhonda Timmons. During the sentencing phase of the trial, the jury found the existence of two aggravating circumstances: (1) that the murder was especially heinous, atrocious or cruel and (2) that there was a probability that Petitioner constituted a continuing

threat to society. The trial court followed the jury's recommendation that the penalty of death be imposed for the murder.

Petitioner filed a direct appeal of his conviction in the Oklahoma Court of Criminal Appeals, Case No. F-86-165. In a published opinion, that court rejected Petitioner's alleged errors and affirmed the conviction and sentence. Clayton v. State, 840 P.2d 18 (Okla. Crim. App. 1992). Petitioner next sought certiorari review from the United States Supreme Court. The high court denied Petitioner's application. Clayton v. Oklahoma, 507 U.S. 1008 (1993).

Petitioner then filed an application for post-conviction relief in the District Court of Tulsa County. After the district court denied relief, Petitioner appealed to the Oklahoma Court of Criminal Appeals, Case No. PC-94-180. By published opinion, the Oklahoma Court affirmed the district court's denial of relief. Clayton v. State, 892 P.2d 646 (Okla. Crim. App. 1995). Petitioner again sought a writ of certiorari in the United States Supreme Court and again the Court denied Petitioner's application. Clayton v. Oklahoma, 516 U.S. 846 (1995).

Petitioner's habeas petition in this Court was filed on March 5, 1996, and this Court--through the Honorable Thomas R. Brett--issued a stay of execution on that same date. A response to the petition was filed by respondent on May 8, 1996. The case was subsequently transferred to the undersigned.

### FACTUAL BACKGROUND

Pursuant to 28 U.S.C. § 2254(d), the historical facts as found by the state court are to be presumed correct. Accordingly, the facts set forth by the Oklahoma Court of Criminal Appeals will be reiterated herein, amplified by other pertinent facts apparent from the record.

Petitioner Robert William Clayton was employed as a grounds keeper at the South Glen Apartments in Tulsa, Oklahoma in June, 1985. On June 25, 1985, Petitioner told a co-worker that Petitioner was going to take a nap in the shop during the lunch hour. The co-worker returned from lunch to find the Petitioner was no longer there. Rhonda Timmons, a resident in the apartment complex in whom Petitioner had expressed an interest to co-workers earlier in the summer, had been found murdered on that day in her South Glen apartment.

The body was discovered by the husband of Rhonda Timmons, who had come home for lunch, and who had spoken to his wife on the telephone at 10:30 a.m. Upon arriving at shortly after 12:30 p.m., Mr. Timmons found the back door unlocked. He entered the apartment and noticed blood "everywhere". Yelling for his wife, he followed a blood trail until he found his wife's body slumped in front of the crib in their baby's bedroom. The baby was not hurt.

Between 12:00 and 12:30 p.m. on that day, Petitioner arrived at the apartment of Helen Syphurs, who lived in another apartment complex in close proximity to the South Glen complex. Petitioner was breathing heavily and told Syphurs he had been in a fight with

two men who tried to rob him. Petitioner took a shower and put his clothes in a paper bag. Sypnurs testified that she had seen no blood on Petitioner's clothes.

Sypnurs then took Petitioner, who was wearing a towel, to the Reinke home, where Petitioner and his friend Tony Hartsfield also resided. Petitioner changed clothes and reiterated that he had been in a fight. Mrs. Reinke testified that she noticed blood on the thighs and knees of Petitioner's overalls, which appeared to still be wet. Petitioner put his clothes in a washing machine, but apparently dropped a blood-stained sock. Police retrieved the sock and determined it was stained with Type AB blood. Petitioner has type O blood, while the victim's blood was Type AB.

At 3:30 p.m., police arrived at the Reinke home and asked to see Petitioner. Mrs. Reinke testified that Petitioner said he was going to run because the police were there. Ultimately, Mr. Reinke persuaded Petitioner to talk to the police. Petitioner's friend Hartsfield testified that as Petitioner went outside he told Hartsfield not to let the police find out about the folding knife which Petitioner usually carried. The police recovered the knife at the Reinke home through their own search. Expert testimony established that the knife could have caused Rhonda Timmons' stab wounds, but tests performed on the minute amount of blood found on the knife were inconclusive. No trace of blood was found on the clothes which Petitioner had washed.

In a statement to police which the trial court deemed admissible, Petitioner admitted stabbing the victim, but said he

did so only because she made sexual advances toward him.

During the second stage of the trial, the State presented evidence that Petitioner had used a folding knife to threaten and intimidate a rape victim and her boyfriend in Alabama. Further testimony by Mr. Hartsfield implicated Petitioner in a beating and robbery of a man in Pasadena, Texas. However, other testimony indicated that Hartsfield, rather than Petitioner, assaulted the Texas man.

In mitigation, Petitioner called a psychologist who testified that her examination and testing of Petitioner revealed that he had a "full scale" I.Q. of 68, placing him in the lower one to two percentile of the population. The doctor further testified that Petitioner exhibited passive, aggressive and paranoid traits in his personality, as well as a tendency to be dependent and submissive. She stated that he was emotionally immature and self-centered and unable to empathize with others. Finally, the doctor stated that Petitioner had disclosed that he had only finished the seventh grade and was mistreated by his alcoholic father.

#### **GROUND FOR RELIEF**

Petitioner asserts eighteen (18) grounds for relief in his Petition for Writ of Habeas Corpus. Each claim will be addressed separately.

Much of the Respondents' response brief is of limited value, because it takes the position that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is applicable to this action,

despite the fact that the action was filed prior to the effective date of the AEDPA, April 24, 1996. It is now established that this position is incorrect. See Nguyen v. Reynolds, 131 F.3d 1340, 1345 (10th Cir.1997); see also Duvall v. Reynolds, 139 F.3d 768, 776 (10th Cir.1998). Accordingly, the Court reviews Petitioner's petition under pre-AEDPA law.

**Grounds I -- Ineffective assistance of counsel in first stage.**

Petitioner alleges that various acts and omissions committed by trial counsel operated to violate his Sixth Amendment rights.

Petitioner first raised this issue in his initial application for post-conviction relief as both a substantive claim and as a basis for a claim of ineffective assistance of appellate counsel. Although the district court addressed the claim on the merits, the Oklahoma Court of Criminal Appeals addressed the claim only to the extent it related to the appellate ineffectiveness claim. Respondents thus urge application of procedural bar, but nonetheless address the substance of the claim as an "integral part" of the appellate counsel claim.

Pursuant to the Tenth Circuit's decision in Brecheen v. Reynolds, 41 F.3d 1343, 1363-64 (10th Cir. 1994), cert. denied, 515 U.S. 1135 (1995), claims of ineffective assistance of counsel may be raised for the first time collaterally in order to develop the factual basis for the claim.<sup>1</sup> Consequently, each of the

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<sup>1</sup>Although not raised by the parties, a different result is not mandated by English v. Cody, 1998 WL 348019 (10<sup>th</sup> Cir.). See id. at \*7 (existing precedent mandates that a state procedural

deficiencies alleged by Petitioner will be addressed on the merits.

To prevail on an ineffective assistance of counsel claim, Petitioner must first show that his counsel "committed serious errors in light of 'prevailing professional norms'" such that his legal representation fell below an objective standard of reasonableness. United States v. Haddock, 12 F.3d 950, 955 (10th Cir.1993). Petitioner must overcome a presumption that his counsel's conduct was constitutionally effective. Id. If Petitioner is able to show constitutionally deficient performance, he must then demonstrate that "there is a 'reasonable probability' that the outcome would have been different had those errors not occurred." Id.

Petitioner cites numerous instances in which he argues that his trial counsel did not properly conduct cross-examination. Petitioner argues that there was a "wealth of information" calling into question Petitioner's guilt and strongly implicating one or two of the State's primary witnesses. In an appendix to his petition, Petitioner includes an affidavit by trial defense counsel Ron Wallace, executed February 27, 1996. Mr. Wallace states that he had tried numerous felony cases but that this was the first death penalty case in which he was lead counsel. Regarding his view of the evidence, Mr. Wallace states: "In preparing for Mr. Clayton's trial, I determined that there was not any way to present a defense that denied Mr. Clayton's involvement in Rhonda Timmons'

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bar never be applied when trial and appellate counsel are the same). Such is the situation in the case at bar.

death, and that we simply had very little evidence to fight back with about the issue of guilt." (Affidavit at ¶5). Further, "[t]he primary defense presented at trial was that the State had not proved its case beyond a reasonable doubt. This defense was not strongly asserted in order to maintain credibility with the jury in the mitigation phase of trial." Id. at ¶7. Also, "[Petitioner] was informed of this mitigation focused defense strategy, but did not respond or indicate what he felt about the strategy." Id. at ¶8.

Counsel's affidavit clearly places his trial conduct within the realm of a strategic decision. "A tactical decision by counsel will almost never be overturned by habeas corpus." Nixon v. Newsome, 888 F.2d 112, 115 (11th Cir.1989). "For counsel's [decision] to rise to the level of constitutional ineffectiveness, the decision. . . must have been 'completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy.'" Hatch v. Oklahoma, 58 F.3d 1447, 1459 (10th Cir.1995) (quoting United States v. Ortiz Oliveras, 717 F.2d 1, 4 (1st Cir.1983), cert. denied, 116 S.Ct. 1881 (1996)). The reasonableness of counsel's challenged conduct must be assessed at the time of the conduct. Dever v. Kansas State Penitentiary, 36 F.3d 1531, 1537 (10th Cir.1994). Neither hindsight nor success is the measure. Id. As noted, Mr. Wallace's affidavit indicates that he had tried several felony cases previously. Therefore, he was not inexperienced in the task of devising trial strategy based upon a view of the State's evidence.

Under the applicable standard, the Court declines to grant habeas relief on this basis. With the scientific test of the bloody sock and Petitioner's confession to police admitted by the trial court, the evidence of guilt was overwhelming. Counsel's decision to put the State to their proof pending the mitigation phase was within the realm of trial strategy and was not constitutionally deficient.

### **Ground II - Prosecutorial Misconduct**

Petitioner argues that the "theatrical presentation" by the prosecutor, manifested in certain alleged improper words and actions, should result in reversal. The exhaustion requirement of 28 U.S.C. §2254(b) requires that the Petitioner "fairly present" the substance of his federal habeas claim to the state court so that it has the first opportunity to hear the claim. Nichols v. Sullivan, 867 F.2d 1250, 1252 (10th Cir.1989). It is clear that the Petitioner raised the issue of prosecutorial misconduct on direct appeal. See Clayton, 840 P.2d at 29-30. This Court holds that Petitioner has exhausted his state remedies on this claim.

Habeas relief for prosecutorial misconduct is available only if the conduct was so egregious in the context of the trial as a whole that it rendered the trial fundamentally unfair. See Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Robison v. Maynard, 829 F.2d 1501, 1509-09 (10th Cir.1987). When evaluating claims of prosecutorial misconduct based on improper remarks made by the prosecutor, we "look . . . at the strength of the evidence

against defendant and decide whether the prosecutor's statements. . . 'could have tipped the scales in favor of the prosecution.'" See Fero v. Kerby, 39 F.3d 1462, 1474 (10th Cir.1994) (internal quotation and citation omitted), cert. denied, 515 U.S. 1122 (1995). Applying this standard, after review of the record, the Court declines to hold that the prosecutor's conduct was such that the defendant's conviction should be overturned.

### Ground III - Failure to Disclose Exculpatory Material

Petitioner alleges that five items of a potentially exculpatory nature may not have been disclosed to him prior to trial. These items are a recorded statement of Bill Timmons, a recorded statement of Tony Hartsfield, the sack within which the petitioner carried his bloody clothes from Ms. Syphurs' home to the Reinkes' home, an apparently incomplete police evidence log, and the status of Tony Hartsfield's Texas case.

Petitioner concedes that he failed to raise this claim either on direct appeal or in his application for post-conviction relief. The substance of a federal claim in a petition for habeas corpus must first be presented to the state courts. Pickard v. Connor, 404 U.S. 270, 278 (1971). Petitioner has failed to exhaust his state court remedies.

However, the exhaustion requirements for a state prisoner's habeas petition may be waived when the petitioner demonstrates that requiring him to bring his federal constitutional claim in the state courts would be "futile". See Wallace v. Cody, 951 F.2d

1170, 1171 (10<sup>th</sup> Cir.1991). The futility exception also applies in situations where a procedural doctrine in the state courts would prevent a habeas petitioner from pursuing his unexhausted claim. See Harris v. Reed, 489 U.S. 225, 263 n.9 (1989). Respondent points to 22 O.S. §1086, which generally bars any claim not raised in the original post-conviction relief motion. That statute does provide an exception when the state court "finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application." The record is clear that Petitioner has failed to assert any reason which a state court could find "sufficient" to excuse failure to raise this issue previously. Accordingly, because it would send Petitioner on a futile task, this Court declines to dismiss the claim for failure to exhaust remedies.

Thus, to overcome the procedural default, Petitioner must demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10<sup>th</sup> Cir.1991). Petitioner has failed to meet this standard. In the habeas petition itself, petitioner cites as his reason for failure to previously raise this claim a "lack of meaningful discovery at any state court level". This assertion is odd, in that petitioner also describes abundant evidence which was turned over to trial counsel by the prosecution. By Order filed March 18, 1997 (docket #22), this Court granted in part petitioner's motion

for discovery, to enable him to explore undisclosed evidence. Petitioner's supplementary filing (#23), after the permitted discovery, simply describes possibly sloppy record keeping by the Tulsa County Sheriff's Office. "Cause and prejudice" have not been demonstrated.

Assuming arguendo that the "cause and prejudice" test has been satisfied, the Court denies this claim on the merits. The Constitution is not violated every time the prosecution fails to disclose evidence that may be helpful to a defendant. Kyles v. Whitley, 115 S.Ct. 1555, 1567 (1995). To establish a Brady violation, a petitioner must show that (1) the prosecution suppressed evidence; (2) the evidence was favorable to him; and (3) the evidence was material. Banks v. Reynolds, 1995 WL 242619 (10<sup>th</sup> Cir. Apr.26, 1985). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985); see Smith v. N.M. Dep't of Corrections, 50 F.3d 801, 826 (10<sup>th</sup> Cir.1995). The materiality of the evidence must be evaluated in light of the entire record to determine whether the evidence "creates a reasonable doubt that did not otherwise exist." Banks, 1995 WL 242619, at \*9 (quotation omitted). Applying this standard, the Court denies the third claim for relief. The evidence of Petitioner's guilt was overwhelming and even assuming the disputed items were not disclosed by the state prosecutor

before trial, a fact which has not been established, the result of the trial would not have been affected.

**Ground IV - Incompetent and Unsubstantiated Expert Testimony**

Petitioner next claims that he was prejudiced by the testimony of Kenneth Ede, who testified as an expert on blood splatters. This issue was presented on direct appeal, and was rejected by the Oklahoma Court of Criminal Appeals. 840 P.2d at 28-29. The issue was re-urged on petition for post-conviction relief, based upon new evidence of Ede's lack of qualifications. On appeal, the Oklahoma Court of Criminal Appeals found "serious doubt" of Ede's qualifications, and determined admission of the testimony was error. However, the court went on to hold that, in light of the overwhelming evidence even aside from Ede's testimony, the admission of such testimony was harmless error. 892 P.2d at 652-53.

This Court must determine, in light of the entire record, whether the erroneously admitted testimony so influenced the jury that we cannot conclude that it did not substantially affect the verdict, or whether we have grave doubt as to the harmlessness of the errors alleged. Tuttle v. State of Utah, 57 F.3d 879, 884 (10<sup>th</sup> Cir.1995). Petitioner argues that, absent Ede's testimony, there was no evidence from which the jury could conclude that Rhonda Timmons was conscious after the first blow was struck. The Court

disagrees. The testimony of the medical examiner also provided evidence for this conclusion.<sup>2</sup> The Court denies relief on this claim.

**Ground V - Newly discovered evidence.**

Petitioner contends that interviews conducted by his counsel with Sherry (Reinke) Smith and Donald Reinke, ten years after his conviction, reveal discrepancies in their testimony and lend further support to his first three habeas claims. Petitioner failed to raise this claim on appeal or by post-conviction motion. In any event, newly discovered evidence merely attempting to impeach a prosecution witness will rarely support the grant of relief. Garcia v. State, 545 P.2d 1295, 1297 (Okla.Crim.App.1976); Clark v. Lewis, 1 F.3d 814, 824 (9<sup>th</sup> Cir.1993). This Court sees no basis to depart from the general rule. This claim for relief is denied.

**Ground VI - Petitioner was denied effective assistance of trial counsel and prejudiced by the admission of his confession**

In his next ground for relief, Petitioner asserts that he is entitled to habeas relief because his trial counsel failed to keep out of evidence Petitioner's confession to authorities. Petitioner argues that the confession was involuntary due to Petitioner's low intelligence level. On direct appeal, the Oklahoma Court of

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<sup>2</sup>The Oklahoma Court of Criminal Appeals reached the same conclusion. 892 P.2d at 653.

Criminal Appeals found the confession voluntary. 840 P.2d at 26-27. On review of appeal from denial of post-conviction relief, the same court declined to find counsel ineffective, based upon its review of the record. 892 P.2d at 655. Upon independent review, this Court reaches the same conclusion and denies relief.

**Ground VII - The trial court improperly admitted Petitioner's confession after Petitioner had invoked his right to silence.**

This issue was raised on direct appeal. The Oklahoma Court of Criminal Appeals denied relief, finding that the record demonstrated that Petitioner had recommenced discussions with authorities prior to making his second statement. 840 P.2d at 26-28. This Court agrees with the state court's conclusion, and therefore denies relief.

**Ground VIII - Petitioner was prejudiced by the introduction at trial of his request for an attorney and his attorney's instruction to him to remain silent.**

Petitioner failed to raise this claim on direct appeal or by motion for post-conviction relief. However, Petitioner has shown "cause" by arguing that his counsel was ineffective and prejudice in violation of a constitutional right. The Court addresses the claim on the merits. Applying the "harmless error" standard set forth in Brecht v. Abrahamson, 507 U.S. 619 (1993), the Court concludes that the testimony did not have "substantial and injurious effect or influence in determining the jury's verdict". The testimony was not extensive, and the jury was presented with

vast evidence of Petitioner's guilt. Relief is denied.

**Ground IX - The trial court improperly failed to instruct the jury as to the lesser included offense of first degree manslaughter.**

In his ninth ground for relief, Petitioner claims that the trial court failed to instruct the jury as to the lesser included offense of manslaughter in the first degree. This claim was raised in Petitioner's direct appeal and his application for post-conviction relief.

It is well settled that on habeas corpus review a petitioner attacking a state court judgment based on an erroneous jury instruction has a great burden. Odum v. Boone, 62 F.3d 327, 330 (10th Cir. 1995). A federal court can overturn a state conviction premised upon improper jury instructions only where the instructions "so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 146-47 (1973); Maes v. Thomas, 46 F.3d 979, 984 (10th Cir. 1994). In addition, it has been held that where the alleged error is the failure to give an instruction, the burden on a habeas petitioner to show a violation of the right to due process is especially heavy. Hendricks v. Vasquez, 974 F.2d 1099, 1106 (9th Cir. 1992). See also Devier v. Zant, 3 F.3d 1445, 1465, (11th Cir. 1993), cert. denied, \_\_\_ U.S. \_\_\_, 115 S.Ct. 1125 (1995).

Petitioner was charged with first degree murder. As

characterized by the Tenth Circuit in Parks v. Brown, 840 F.2d 1496, 1499-1500 (10th Cir. 1987):

Under Oklahoma law, a person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Further, "malice is defined as the "deliberate intention" to take the life of another, which intent is manifested by "external circumstances capable of proof." Okla.Stat. tit. 21, § 701.7(A) (1981).

With regard to the lesser included offense of first degree manslaughter, "[t]o warrant a First Degree Manslaughter instruction under 21 O.S.1981, § 711(2), evidence must be presented to support the conclusion that the homicide was perpetrated without a design to effect death by means of a dangerous weapon." Malone v. State, 876 P.2d 707, 712 (Okla. Crim. App. 1994) (citation omitted). No such evidence was presented here. After independent review of the trial record, this Court has reviewed the determination of the Oklahoma Court of Criminal Appeals on this issue on direct appeal, 840 P.2d at 30, and on appeal of denial of post-conviction relief, 892 P.2d at 653, and agrees with it.

The Court finds that no rational trier of fact could have found the elements of first-degree manslaughter and acquitted Petitioner of first-degree murder under the evidence presented at trial. The evidence warranted only an instruction of premeditated, malice aforethought murder. As a consequence, an instruction on manslaughter was unwarranted.

Ground X - Trial court failed to appoint psychological expert.

Petitioner failed to raise this issue on direct appeal. The Oklahoma Court of Appeals construed this as a waiver when Petitioner attempted to raise the issue on appeal from denial of post-conviction relief. 892 P.2d at 650-51 & n.3. However, because Petitioner has alleged the "cause" of ineffective appellate counsel and "prejudice", the Court will consider the claim. Denial of a psychiatric expert when the "continuing threat" aggravator is alleged is error. Brewer v. Reynolds, 51 F.3d 1519, 1529 (10<sup>th</sup> Cir.1995), but of a type subject to harmless-error analysis. Id. The parties, as is unfortunately typical of the briefs in this case, have not aided the Court in determining where in the record any ruling took place. The Court's own review of the record reveals Findings entered by Judge Beasley on August 7, 1991, in which he states that the defendant's request for examination and determination of competency had been withdrawn. Under the circumstances, the Court cannot find error warranting habeas relief. Relief is denied as to the tenth claim. In any event, it appears the issue of competency was subsumed by the post-conviction hearing which is the subject of Petitioner's sixteenth ground for relief. See also 840 P.2d at 24.

Ground XI - Ineffective counsel during second stage.

In this Ground, Petitioner alleges that his trial counsel was ineffective in failing to present certain mitigating evidence and

failing to investigate further possible evidence. This issue was presented to the Oklahoma Court of Criminal Appeals which concluded, "[a]llegations of trial counsel's ineffectiveness are not warranted by the record." 892 P.2d at 656. The Court has considered Petitioner's argument, based on the instances cited to the Oklahoma Court of Criminal Appeals and some different instances cited to this Court. The Court is not persuaded that relief on this ground is appropriate.

**Ground XII - There was insufficient evidence to support a finding of the aggravating circumstance of especially heinous, atrocious or cruel.**

This argument was rejected by the Oklahoma Court of Criminal Appeals both on direct appeal, 840 P.2d at 30-31, and on appeal from denial of post-conviction relief. 892 P.2d at 651-53. The Court, upon review of the record, agrees with the state court's analysis. Relief is denied.

**Ground XIII - Oklahoma's "continuing threat" aggravator is unconstitutional.**

This argument has been consistently rejected, most recently in Castro v. Ward, 138 F.3d 810, 816-17 (10<sup>th</sup> Cir.1998). Relief is denied.

**Ground XIV - The sentencing instructions deprived Petitioner of his constitutional rights.**

Petitioner next claims error in various instructions given at the sentencing stage. First, he asserts that the "antisympathy" instruction precluded the jury from considering mitigating evidence. The Oklahoma Court of Criminal Appeals has consistently rejected this argument. See Powell v. State, 906 P.2d 765, 783 (Okla.Crim.App.1995). This Court agrees, and denies relief.

Next, he argues that the instructions did not advise the jury that they had a duty to consider mitigating circumstances and that its findings regarding mitigating circumstances did not have to be unanimous. Once again, these arguments have been consistently rejected by the Oklahoma Court of Criminal Appeals. See, e.g., Charm v. State, 924 P.2d 754, 772-73 & n.57 (Okla.Crim.App.1996). This Court agrees with the state court's reasoning and finds habeas relief unwarranted on this claim.

**Ground XV - Petitioner was denied the right to have the jury consider his mitigation evidence by the prosecutor's questions on voir dire.**

This argument was raised on direct appeal, and rejected by the Oklahoma Court of Criminal Appeals. 840 P.2d at 26. Upon review, this Court agrees and denies relief.

Ground XVI - Petitioner's Retrospective Competency Hearing.

During the initial appeal of this case, the Oklahoma Court of Criminal Appeals issued an order remanding the case to the district court for purposes of a post-trial competency evaluation, a procedure which the appellate court has used in the past. The hearing was held, and a jury found defendant competent. Petitioner raised an allegation of error as to the use of the procedure once the appeal was resumed. The state court rejected the argument. 840 P.2d at 24-25. The same court has recently reaffirmed use of the procedure. Bryan v. State, 935 P.2d 338, 350-51 (Okla.Crim.App.1997). This Court declines to grant relief as to use of the procedure itself.

Next, Petitioner argues that, in light of Cooper v. Oklahoma, 116 S.Ct. 1373 (1996), the trial court applied an unconstitutional burden of proof in the competency hearing. Respondent contends that this claim is procedurally barred.

In 1995, Oklahoma amended its statute governing post-conviction claims in capital cases. This statute, which contains two prerequisites to prevent the procedural bar of claims collaterally reviewed, states in pertinent part as follows:

The only issues that may be raised in an application for post-conviction relief are those that:

1. Were not and could not have been raised in a direct appeal; and
2. Support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is

factually innocent.

22 O.S. §1089(C). Examples of claims which "could not have raised" on direct appeal include certain ineffective assistance of trial or appellate counsel claims, 22 O.S. §1089(D)(4)(b)(1) & (2), as well as claims, the legal basis of which:

a. Was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date, or

b. Is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.

22 O.S. §1089(D)(9)(a) & (b).

Under this statute, the question is whether the United States Supreme Court decision in Cooper v. Oklahoma, 116 S.Ct. 1373 (1996) is an intervening change of law that could not have been raised on direct appeal. In Cooper, the Supreme Court declared unconstitutional the Oklahoma statute which placed upon a defendant the burden of proving his incompetence by clear and convincing evidence. The Supreme Court held that this burden violated due process, stating that "requiring the defendant to prove incompetence by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is competent." Id. at 1381.

Petitioner did not challenge the application of the clear and convincing burden in his direct appeal. Thus, the Cooper claim is waived from review in this proceeding unless it "could not have

been raised" or was "unavailable" because the legal basis of the claim was not recognized by or could not have been reasonably formulated as precedent, or because the decision was a new rule of constitutional law given retroactive effect that had not been announced on or before Petitioner's direct appeal. See 22 O.S. §1089(D) (9) (a) & (b).

The Court finds that on the date of Petitioner's direct appeal, the legal basis for a constitutional challenge to Oklahoma's clear and convincing burden of proof for competency hearings was either recognized or could have been reasonably formulated from United States Supreme Court decisions. In Cooper, the Supreme Court stated that its previous decisions had "repeatedly and consistently recognized" that due process is violated when an incompetent defendant is tried. 116 S.Ct. at 1376. Additionally, the unanimous Supreme Court determined that a great deal of case and statutory law mandated its finding that the Oklahoma statute was unconstitutional. Moreover, the Supreme Court noted that Oklahoma was one of only four states to use the clear and convincing standard of proof. 116 S.Ct. at 1380. Thus, because of the well-settled right of a criminal defendant not to be tried if incompetent and because of the wealth of case and statutory support to challenge the clear and convincing standard, the legal basis for a constitutional challenge to Oklahoma's burden of proof for competency hearings was recognized by and could have been reasonably formulated from a decision of the United States

Supreme Court.<sup>3</sup>

The Court also concludes that Cooper is not a new rule of constitutional law which would entitle Petitioner to relief. A "new" rule of constitutional law is formulated when a case "breaks new ground or imposes a new obligation on the States or the Federal Government", or if the case's result "was not dictated by precedent existing at the time the defendant's conviction became final." Teague v. Lane, 489 U.S. 288, 301 (1989). Cooper did not break new ground or impose new obligations upon state and federal government. Instead, the Supreme Court merely "applied well established constitutional principles to facts generated by a rather new state statute." Walker, 933 P.2d at 339. Furthermore, the Supreme Court's holding in Cooper was the clear result of precedent requiring states to "jealously guard" fundamental rights in the area of a defendant's incompetence. 116 S.Ct. at 1381. Since Cooper, by its own terms, was dictated by existing precedent and did not impose a new obligation on the state or federal governments, the case is not a "new" rule of constitutional law. Accordingly, under the clear provisions of Oklahoma's post-conviction statute, Petitioner's failure to raise the issue of Oklahoma's burden of proof for competency hearings on direct appeal prevents this Court's review of the issue in a post-conviction

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<sup>3</sup>The Oklahoma Court of Criminal Appeals has reached the same result as does this Court with respect to the Cooper claim. Walker v. State, 933 P.2d 327, 339 (Okla.Crim.App.1997).

proceedings. Relief is denied.<sup>4</sup>

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<sup>4</sup>Petitioner has not alleged ineffective counsel in failing to raise the Cooper issue on appeal, unless the Court permits such a claim within the sweeping generalization of ineffectiveness in claim XVIII. The Oklahoma Court of Criminal Appeals has held that a conclusory allegation of ineffectiveness for omitting the Cooper issue does not support a finding of ineffectiveness. Valdez v. State, 933 P.2d 931, 934 (Okla.Ct.Crim.App.1997). Here, Petitioner has not even made a conclusory allegation on this basis.

In any event, it is established that counsel is not ineffective for failing to anticipate arguments or appellate issues which only blossomed after the trial or appeal was complete. See Lilly v. Gilmore, 988 F.2d 783, 786 (7<sup>th</sup> Cir.1993) (The Sixth Amendment does not require counsel to forecast changes or advances in the law); Coleman v. Saffle, 869 F.2d 1377, 1394 n.15 (10<sup>th</sup> Cir.1989) (holding that competency of counsel should be measured by what he reasonably should have known at the time of trial, ten years earlier.) In De Yonghe v. Scott, 1998 WL 166075 (10<sup>th</sup> Cir.), the court held that trial and appellate counsel were not ineffective for failing to anticipate the Oklahoma Supreme Court's decision finding a "presumed not guilty" jury instruction constitutionally infirm. Similarly, the Cooper decision was rendered after trial and appeal of the present case. This Court declines to hold that any counsel who did not anticipate the overturning of long-established Oklahoma law was ineffective.

Finally, this Court has reviewed the transcript of the competency hearing conducted in September, 1991. Petitioner was represented by counsel other than his trial and appellate counsel. The only expert witness called by Petitioner was Dr. Nicholson, who testified "I don't know" if Petitioner was competent at the time of trial. (Tr. at 87 l.16). By contrast, Dr. Sherman, testifying for the prosecution, affirmatively stated that the Petitioner was competent at the time of trial. (Tr. at 67 l.15). Therefore, this Court concludes that Petitioner could not have persuaded a jury of his incompetence even by the "preponderance of the evidence" standard set forth in Cooper. With no possibility of altered result, no finding of ineffective counsel will be made. See Lucero v. Kerby, 133 F.3d 1299, 1323 (10<sup>th</sup> Cir.1998) (petitioner must show there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different).

**Claim XVII - Cumulative Error in the First and Second Stages**

Petitioner raised this argument on appeal from denial of post-conviction relief, where it was rejected by the Oklahoma Court of Criminal Appeals. 892 P.2d at 657. For the reasons stated in this order, upon review, the Court does not find such an accumulation of error that habeas relief is appropriate.

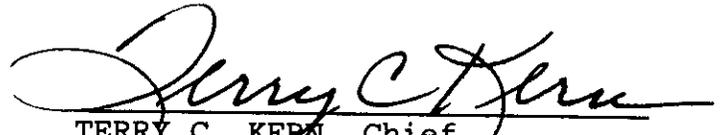
**Claim XVIII - Ineffective Appellate Counsel**

In his final claim, Petitioner takes one paragraph to make an all-encompassing allegation of ineffective post-conviction and appellate counsel. Petitioner cites the alleged understaffing and heavy caseload of the Oklahoma Appellate Public Defender System. While the Court is not unaware of these realities, it reiterates that it sees no basis for finding that counsel was ineffective, justifying habeas relief, particularly in view of the abundant evidence of guilt in this case. Regarding Petitioner's request for an evidentiary hearing, the Court finds that the facts were adequately developed in the state court proceedings and denies the request. Castro v. Ward, 138 F.3d 810, 832 (10<sup>th</sup> Cir.1998).

**CONCLUSION**

After careful review of the petition for writ of habeas corpus and the record, the Court finds Petitioner is not entitled to relief. ACCORDINGLY, the Writ of Habeas Corpus is denied.

IT IS SO ORDERED this 8 day of July, 1998.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

For 7-29-98

DATE 7-9-98

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

JUANITA H. WRIGHT,

Plaintiff,

v.

CHRISTOPHER ALLEN HOGG and BRUCE OAKLEY  
INC., an Arkansas corporation, and LEGION  
INSURANCE COMPANY, A Pennsylvania  
corporation,

Defendants.

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**FILED**  
JUL 09 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

AMENDED JOURNAL ENTRY OF JUDGMENT

On the 15<sup>th</sup> day of June, 1998 the above captioned matter came before this Court for jury trial. Present were Plaintiff, Juanita Wright and her attorneys, Karen Goins and Tony Laizure of the Stipe Law Firm, and Defendant Christopher Allen Hogg his attorney, Tim Tipton of Feldman, Hall, Franden, Woodard & Farris. Not present, but represented by Mr. Tipton were Defendants, Bruce Oakley, Inc. and Legion Insurance Company. The jury was empaneled and sworn. It heard the evidence, the charges of the Court and the argument of counsel and returned its verdict of \$80,000.00 plus pre-judgment interest, court costs and case expenses on the 16<sup>th</sup> day of June, 1998 in favor of the Plaintiff, Juanita Wright.

The petition was filed on August 18, 1997 and the pre-judgment interest is calculated as follows:

$$1997 - \$80,000.00 \times \text{Interest rate of } 9.15 = \$7,320.00 \div$$
$$365 = 20.05 \text{ per day} \times 136 \text{ days} = \qquad \qquad \qquad \$2,726.80$$

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1998 - \$82,726.80 x Interest rate of 9.22% = \$7,610.87 ÷

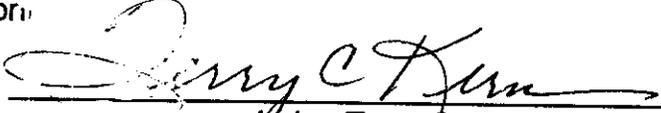
365 = 20.85 per day x 167 days =

3,481.95

Total Pre-Judgment Interest

\$6,208.75

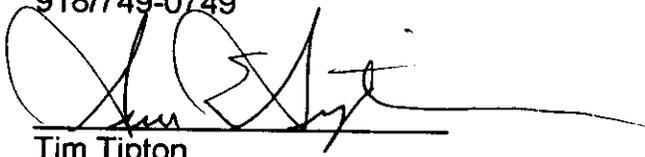
**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that judgment be entered in favor of Plaintiff Juanita Wright in the amount of \$86,208.75, plus post-judgment interest and costs to be granted for this action.

  
\_\_\_\_\_  
Judge Terry-C. Kern

APPROVED:

  
\_\_\_\_\_  
Karen Goins

Anthony M. Laizure  
Stipe Law Firm  
2417 East Skelly Drive  
Tulsa, OK 74105  
918/749-0749

  
\_\_\_\_\_  
Tim Tipton

Feldman, Hall, Franden, Woodard & Farris  
525 South Main, Suite 1400  
Tulsa, OK 74103-4523

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

**FILED**

JUL 8 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RAYMOND L. WOFFORD and )  
MILDRED E. WOFFORD, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
AMERICAN RED CROSS and THE AMERICAN )  
NATIONAL RED CROSS; FRANK FORE, M.D., )  
 )  
Defendants. )

Case No. 96-CV-468-H

ENTERED ON DOCKET  
DATE JUL 9 1998

**ORDER**

This matter comes before the Court on the Report and Recommendation of the United States Magistrate Judge (Docket # 106) with respect to the payment of attorneys' fees for the court-appointed attorney for the non-party blood donor. The non-party blood donor has filed an objection to the Report and Recommendation and Plaintiffs have responded to the objection.

When a party objects to a nondispositive order of a Magistrate Judge, Rule 72(a) of the Federal Rules of Civil Procedure provides in pertinent part that:

[t]he district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

Fed. R. Civ. P. 72(a).

The Magistrate Judge found that \$1,500 of the fees submitted by the non-party blood donor's attorney, Nancy Siegel, were either duplicative or beyond the scope of the appointment, and recommended a reduction of total attorneys' fees in that amount. The Magistrate Judge further recommended that of the remaining requested fees of \$8,198.64, Plaintiffs should pay \$2,473.06 within ten days from an order adopting the Report and Recommendation. The

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Magistrate Judge further recommended that the balance of \$5,198.64 be taxed as costs to be paid by the non-prevailing party at the conclusion of the litigation.

Based upon a careful review of the Report and Recommendation of the Magistrate Judge, the objection of the non-party blood donor, and Plaintiffs' response, the Court agrees with the Magistrate Judge that \$1,500 of the submitted fees were either duplicative or beyond the scope of the appointment. The Court further finds, however, that Plaintiffs should pay the remaining balance of \$8,198.64 (minus the \$526.94 that Plaintiffs have already paid) to the donor's counsel within ten days from the file date of this order, rather than at the conclusion of the litigation as the Magistrate Judge recommended. The Court appreciates the full consideration that the Magistrate Judge has given this matter. The Court believes, however, that in this situation the court-appointed attorney should not bear the cost of her representation until the conclusion of the litigation. The Magistrate's orders are clear and unequivocal on the terms and conditions of Ms. Siegel's representation. She has satisfied those terms and accordingly is entitled to compensation for services performed within the scope of her appointment. To do otherwise would be to undermine the authority of the Court to appoint and supervise compliance with its orders.<sup>1</sup>

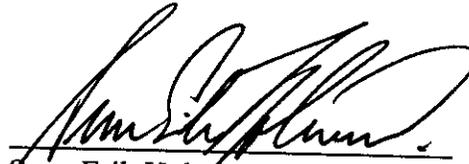
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<sup>1</sup> The Court notes that under the Magistrate's April 2, 1997 order, any fees or expenses paid by Plaintiffs may still be taxed as costs to be paid by the non-prevailing party at the conclusion of the litigation.

For the reasons set forth above, the Report and Recommendation (Docket # 106) is hereby adopted in part and denied in part. Plaintiffs are to pay \$7,671.70 to Nancy Siegel, the attorney for the non-party donor, within ten days from the file date of this order.

IT IS SO ORDERED.

This 8<sup>TH</sup> day of July, 1998.



Sven Erik Holmes  
United States District Judge

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

WORLDBLINK GAMING CORP.,  
an Oklahoma corporation,

*Plaintiff,*

*versus*

NETWORK GAMING INTERNATIONAL CORP.,  
a Canadian corporation,

and

HENRY JUNG,

a citizen or subject of  
the Dominion of Canada,

*Defendants.*

ENTERED ON DOCKET

DATE JUL 9 1998

No. 97-CV-406-H

**FILED**

JUL 8 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**PARTIAL JUDGMENT (ON LIABILITY)**  
(Consent Decree)  
and  
**ORDER OF BIFURCATION**

This matter comes on for consideration of the Parties' joint Application to enter Judgment by consent and agreement herein.

The Court FINDS as follows:

1. The Plaintiff, WorldLink Gaming Corporation ("WorldLink"), is a corporation chartered and organized under the laws of the State of Oklahoma, U.S.A., and is headquartered in Tulsa, Oklahoma.
2. The corporate Defendant, Network Gaming International Corporation ("NGI"), is a Canadian corporation chartered and organized under the laws of British Columbia, and is headquartered in Vancouver, British Columbia, Dominion of Canada.
3. The individual Defendant, Mr. Henry Jung, is a subject or citizen of the Dominion of Canada. Mr. Jung is further NGI's General Manager.

4. The events giving rise to this dispute were the mailing or transmission, from Vancouver into various places within the United States, to include Tulsa, Oklahoma, of certain letters in April of 1997, from NGI, and signed by Mr. Jung, charging WorldLink with infringement of certain copyrights held by NGI, and also suggesting the possibility that WorldLink may also have misappropriated certain other intellectual property claimed by NGI as trade secrets.
5. The acts and/or omissions which NGI/Jung suspected WorldLink of committing, and which suspected underlying acts and/or omissions led to the circulations of NGI's/Jung's letters referred in the preceding Paragraph, took place entirely or primarily in Tulsa, Oklahoma, U.S.A.
6. Both NGI and Mr. Jung were personally served with process herein on or about August 26, 1997. when Mr. Jung, personally and as NGI's General Manager, were voluntarily within the United States.
7. NGI and Mr. Jung now confess that there has, in fact, been no infringement by WorldLink of any of NGI's copyrights (or copyright interests), and that, likewise, there has been no misappropriation by WorldLink of any of NGI's trade secrets or other intellectual property.
8. In fact, NGI and Mr. Jung further confess WorldLink's non-liability for any and all further causes, known and unknown, which NGI or Mr. Jung may have against WorldLink as of this date.
9. Mr. Jung disclaims any personal co-ownership or other interest in or to any intellectual or other property, to include copyright and trade secrets, owned or held by NGI; however, Mr. Jung admits signing, mailing and transmitting the letters referred to in Paragraph 4, supra.
10. Based on these confessions, the Court finds that WorldLink has infringed no copyright or similar interest in any computer programs, coding, software, or other works of authorship now or heretofore owned or held by NGI and/or by Mr. Jung; that WorldLink

has misappropriated no trade secrets or other intellectual property owned or held by NGI and/or Mr. Jung; and that WorldLink has not, as of up to and including this date, violated any other rights of NGI and/or Mr. Jung, whether under the law of the United States, the Dominion of Canada, the State of Oklahoma, the Province of British Columbia, or elsewhere.

11. The Parties have not resolved between themselves the question of damages suffered by WorldLink as a result of the accusatory letters circulated by NGI/Jung.

From these Findings, the Court CONCLUDES as follows:

1. NGI's/Jung's utterances of their charges of infringement/misappropriation against WorldLink creates subject-matter jurisdiction for a declaratory judgment action, of infringement/misappropriate *vel non*, under the Declaratory Judgment Act, Title 28, United States Code, Sections 2201 et seq, and under 28 U.S.C. 1331 and 1338(b).
2. Diversity, supplemental, and pendent jurisdiction over the remaining causes herein is vested in this Court by virtue of 28 U.S.C. 1332(b), 1338(b), and 1367.
3. The Court achieved *in personam* jurisdiction over the corporate and the individual Defendants herein under Federal Rules of Civil Procedure No. 4(e)(1), 4(h)(1), and 4(k)(1)(A), in conjunction with the Oklahoma "long-arm" statute, 12 Okla.Stat. 2004(F), by virtue of Mr. Jung's, in both his individual and corporate capacities (as General Manager of NGI), being personally served with process while in the United States. Personal jurisdiction is also asserted over the Defendants by their voluntary Appearance(s) herein.
4. Venue is properly placed in this Court by virtue of 28 U.S.C. 1391(d), 1391(b)(2), 1391(c), and 1400 (since, in a declaratory judgment action, the plaintiff is the accused infringer, and the "substantive" defendant).
5. In intellectual property disputes, the accuser of infringement or misappropriation, even though a defendant in a declaratory judgment action, bears the burden of proving infringement or misappropriation.

6. Based on the Defendants' express confession of non-infringement, non-misappropriation, and non-liability in general, WorldLink's right to a declaratory judgment for non-infringement, non-misappropriation, and non-liability, necessarily follows.

### JUDGMENT AND INJUNCTION

1. The Court judicially determines, declares, and adjudges that WorldLink does not infringe, and has not in the past infringed, any copyright, or copyright interest, now or previously owned or claimed by Network Gaming International Corporation, or any of NGI's predecessors in title thereto, or to which any of NGI's licensees may make claim.

2. The Court judicially determines, declares, and adjudges that WorldLink is not misappropriating, and has not in the past misappropriated or otherwise violated any trade secret, or other intellectual property, now or previously owned or claimed by Network Gaming International Corporation, or any of NGI's predecessors in title thereto, or to which any of NGI's licensees may make claim.

3. The Court judicially determines, declares and adjudges that WorldLink has not heretofore violated, and is not now violating, any other legal right, whether known or unknown, which may have accrued at any time to and including the date of this Judgment.

4. The foregoing judicial determinations, declarations, and adjudications extend to, and cover, not only WorldLink itself, but also any and all of WorldLink's past, present, or prospective principals, directors, officers, employees, agents, and/or affiliates; to their successors, heirs and assigns; and their licensees, sub-licensees, end users and gamers — for any act relating to any WorldLink or WorldLink-related activity, product. or service.

5. By virtue of these adjudications, WorldLink is entitled to injunctive relief against NGI and Mr. Jung, as follows:

NGI and Jung are hereby permanently enjoined from making, voicing, uttering, publishing, or circulating any further and future allegations or accusations that any of WorldLink's (and/or persons' or entities' in privity with WorldLink) activities, based on

WorldLink's past or present products or services, to the date of the affidavit of the expert's report (June 30, 1998), such as WorldLink's "Rocket Bingo" and "TMVS"™ games and software, in any way infringes or otherwise violates any intellectual property right now or previously held by NGI, to include claims of copyright infringement, trade secret (or other intellectual property) misappropriation, or is contrary to or violative of any other past or present property or other legal right belonging to NGI; and/or that customers, licensees or sublicensees, patrons, end users, or gamers using any past or present product or service of WorldLink's in any way thereby infringe or violate any past or present right of NGI.

6. This Judgment does not address or decide the question of monetary damages. All questions of damages are hereby bifurcated from the issues of liability. Following the entry of this Partial Judgment, the Parties shall have ninety (90) days within which to resolve the remaining issues herein, and to notify the Court of such resolution, through the filing of an appropriate stipulation, report, or proposed order. In the absence of any such filing within ninety days, or upon the application by any Party hereto after such period, the Court shall schedule a Status and Scheduling Conference on the issues remaining herein.

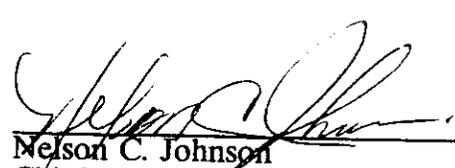
This Document shall constitute the Court's Findings of Fact and Conclusions of Law envisioned in Federal Rule of Civil Procedure No. 52, and the Judgment as envisioned by Federal Rule of Civil Procedure No. 58, on the matters actually resolved by these partial Findings, Conclusions, and Judgment.

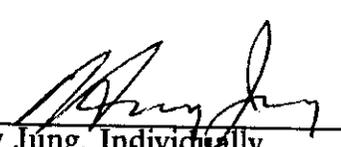
IT IS SO ORDERED, this 8<sup>TH</sup> day of July, 1998.

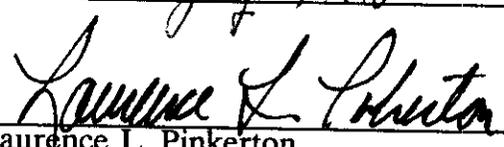
  
SVEN ERIK HOLMES  
United States District Judge

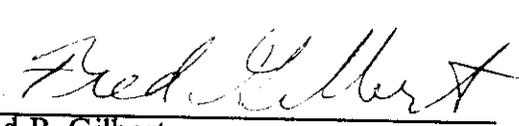
APPROVED:

  
\_\_\_\_\_  
Keith Folkstead  
President of NGI  
Date: 7/23/98

  
\_\_\_\_\_  
Nelson C. Johnson  
Chief Executive Officer of WorldLink  
Date: 7-7-98

  
\_\_\_\_\_  
Henry Jung, Individually  
Date: July 3, 1998

  
\_\_\_\_\_  
Laurence L. Pinkerton  
Attorney for Defendants  
Date: 7/7/98

  
\_\_\_\_\_  
Fred P. Gilbert  
Attorney for Plaintiff  
Date: July 2, 1998

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

**F I L E D**

JUL - 7 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
)  
)  
THE SUM OF ONE THOUSAND )  
FOUR HUNDRED FORTY AND )  
No/100 DOLLARS (\$1,440.00) )  
IN UNITED STATES CURRENCY; )  
et al., )  
)  
Defendants. )

No. 96-CV-934-B ✓

ENTERED ON DOCKET

DATE JUL 08 1998

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This forfeiture action, brought pursuant to 21 U.S.C. §881(a)(4), was tried to the Court without a jury on June 15, 1998. After considering the evidence, stipulations of fact and law, and the applicable legal authority, the Court hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. United States of America ("Plaintiff"), seeks forfeiture of the Defendant, 1994 Ford Thunderbird, VIN 1FALP6241RH220862 ("Defendant Vehicle").
2. Cheryl K. Ceasar ("Cheryl Ceasar"), claiming ownership of the vehicle and asserting that she is an innocent owner, filed an answer to the complaint on December 19, 1996.
3. Cheryl Ceasar is the natural mother of DeAndre' Ceasar ("DeAndre Ceasar").

At all relevant times, including September, 1996, DeAndre Ceasar was living with Cheryl Ceasar, a single mother.

4. Cheryl Ceasar had been employed with Internal Revenue Service for more than 18 years, one year as a Group Manager. Following a period of disability, she was thereafter employed at a local bank.

5. Cheryl Ceasar is aware of the fact that the Drug Enforcement Agency and Federal Bureau of Investigation seize property that is used to facilitate drug transactions.

6. In approximately the first week of August, 1996, DeAndre Ceasar saw an ad in the paper for the Defendant Vehicle and showed it to his mother, Cheryl Ceasar. DeAndre expressed an interest in his mother purchasing the vehicle. DeAndre and Cheryl Ceasar went to the dealership, looked at the vehicle and DeAndre test-drove it. The Thunderbird was purchased and DeAndre drove the vehicle from the car lot. Cheryl Ceasar drove the car in which they had come to test-drive the Thunderbird, a 1996 Camry, which she referenced as her vehicle.

7. The Defendant Vehicle was purchased from Jim Norton Buick on or about August 5, 1996, for a total purchase price of \$12,529.00. Cheryl Ceasar made a down payment of \$3,500.00 at the time the Defendant Vehicle was purchased. The balance of the purchase price, \$9,029.00, was financed through Liberty Bank and Trust Company of Tulsa, N.A., with Cheryl Ceasar executing the promissory note. The promissory note with Liberty Bank and Trust Company of Tulsa, N.A. provides for 54 monthly payments of \$194.39.

8. Each payment on the loan for the Defendant Vehicle was made by payroll

deduction from the paycheck of Cheryl Ceasar.

9. Transfer of the title, excise tax and tag for the Defendant Vehicle was paid by Cheryl Ceasar with a check from her personal checking account.

10. George Pullen, the Jim Norton Buick car salesman involved in the sale of the Defendant Vehicle, wrote the name of "D'Andre" in parentheses by Cheryl Ceasar's name in the purchaser's name blank of the Purchase Order form.

11. Throughout the sales transaction, based on the conduct of DeAndre Ceasar and Cheryl Ceasar and conversations with them, it appeared to the car salesman that Cheryl Ceasar was purchasing the Defendant Vehicle for DeAndre Ceasar. DeAndre Ceasar and Cheryl Ceasar had looked at two different Thunderbirds together. The car search was instigated by DeAndre Ceasar.

12. Cheryl Ceasar provided DeAndre Ceasar with approximately \$20.00 per week to spend for meals, snacks, entertainment, CDs, cassettes, gas, clothes, computer lab fees, his pager, and other necessary and discretionary expenses. The only other legitimate source of income of DeAndre Ceasar known to Cheryl Ceasar was \$10.00 per month from Mercedes Simmons, Cheryl Ceasar's mother and DeAndre Ceasar's grandmother. Cheryl Ceasar testified that DeAndre may have had other sources of income of which she was not aware.

13. DeAndre Ceasar has had pagers since 1992, with approximately 3 different pager numbers. Cheryl Ceasar directly pays the monthly maintenance on the pager approximately 6 months out of a year in addition to the cash she gives him.

14. Officer Bill Yelton, Tulsa Police Department, testified at trial as a drug expert

witness. During his testimony he stated that pagers are known to be used to make drug transactions easier and more convenient for the seller. The seller can arrange the transaction at his/her convenience and be more in control of the sale.

15. At the time Cheryl Ceasar purchased the Defendant Vehicle, the odometer showed 35,431 miles. Cheryl Ceasar had knowledge of the mileage at purchase. On September 25, 1996, the date of the seizure, the odometer on the Defendant Vehicle showed 42,192 miles. A total of 6,761 miles was driven on the car in the 51 days from the date the Defendant Vehicle was purchased until seizure, for an average of 132 miles a day. Cheryl Ceasar drove the Defendant Vehicle approximately four (4) times for approximately 100 miles prior to the date the vehicle was seized. Cheryl Ceasar does not know where DeAndre Ceasar drove the car to accumulate the mileage placed on the Defendant Vehicle during the 51 days since purchase. DeAndre did not have sufficient legitimate sources of income to purchase gasoline for the number of miles he drove the Defendant Vehicle.

16. The Alpine CD player stereo system in the Defendant Vehicle was selected by DeAndre Ceasar and charged by DeAndre Ceasar on the credit card of Cheryl Ceasar. DeAndre Ceasar paid the installation charge for installation of the stereo system in the Defendant Vehicle. Cheryl Ceasar only used the stereo system approximately three (3) times since it was installed in the Defendant Vehicle.

17. Cheryl Ceasar and DeAndre Ceasar were covered by the insurance of the Defendant Vehicle as persons who would be driving the vehicle. Insurance coverage for the Defendant Vehicle was paid by Cheryl Ceasar with a check from her personal checking

account.

18. On September 4, 1996, DeAndre Ceasar had the oil changed in the Defendant Vehicle by Jiffy Lube, 2726 South Harvard, Tulsa, Oklahoma. The charge for this oil change was paid by Cheryl Ceasar with a check written on her personal checking account. The name DeAndre Ceasar appears on the oil change receipt and the Customer Maintenance Folder.

19. DeAndre Ceasar had permission to drive the Defendant Vehicle from the date of purchase to the date of seizure, including but not limited to September 10 and 11, 1996. The Defendant Vehicle was the primary means of transportation for DeAndre Ceasar.

20. In addition to purchasing the Defendant Vehicle for DeAndre Ceasar to drive, Cheryl Ceasar previously purchased a 1986 Jeep Grand Wagoneer, in October 1995. All of the funds to purchase the Jeep originated from Cheryl Ceasar, including \$3,000.00 she transferred into her Morning Star Federal Credit Union account. The source of the \$3,000.00 was from Cheryl Ceasar's state tax refund.

21. Cheryl Ceasar transferred the above-referenced \$3,000.00 out of DeAndre Ceasar's Morning Star Federal Credit Union savings account for the purpose of evidencing that DeAndre Ceasar had no assets for student loan application purposes.

22. The Jeep was driven almost exclusively by DeAndre Ceasar and has not been running since July of 1996. The Defendant Vehicle was purchased for DeAndre Ceasar's use on August 5, 1996. Cheryl Ceasar had purchased a 1996 Toyota Camry, in February 1996, which was her primary means of transportation.

23. Cheryl Ceasar did not place any restrictions on the use of the Defendant Vehicle by DeAndre Ceasar.

24. The contents of the Defendant Vehicle were owned by or under the control of DeAndre Ceasar. The following personal property of DeAndre Ceasar was in the Defendant Vehicle at the time of seizure: Sports magazines and sports section of newspapers, AAA batteries, Swisher Sweet Cigars, Alpine CD player and remote control, lighters, CDs, cassette tapes, FunHouse tickets, Sweet Breath, gold chain necklace and a Starship Records & Tapes receipt.

25. Cheryl Ceasar testified at trial that she had smelled the odor of marijuana in her house on one individual visiting her son one time. She told DeAndre Ceasar that she smelled marijuana and he told her it was on the individual's clothes.

26. A confidential informant provided information to law enforcement that he/she had smoked marijuana, on more than one occasion, with DeAndre Ceasar in his bedroom at Cheryl Ceasar's residence. According to the informant, he/she and DeAndre Ceasar smoked marijuana while Cheryl Ceasar was in the residence.

27. Operation Safehome is a Department of Justice initiative to target illegal activity in the federally funded public housing areas, specifically the illegal distribution of illegal narcotics and illegal firearms. A confidential and reliable informant, Brian Benefiel, was utilized to obtain evidence of these illegal activities. Brian Benefiel has been utilized by several state and federal agencies to including Alcohol, Tobacco & Firearms, Tulsa Police Department, Tulsa County Sheriff's Office, and Oklahoma Bureau of Narcotics.

28. As a result of Operation Safehome in September, 1996, approximately 100 individuals were arrested and charged in United States District Court and Tulsa County District Court for unlawful distribution/possession of controlled substances, along with other federal and state charges. DeAndre Ceasar and two known associates of DeAndre Ceasar were among those arrested on narcotics charges during Operation Safehome. One of the individuals, Johnny Lee Hughes, a/k/a "John John", was indicted in United States District Court on two counts of unlawful distribution of crack cocaine and one count of unlawful distribution of cocaine powder. Robert Louis Hicks, a/k/a "Rocky", was also indicted in United States District Court on five counts of unlawful distribution of crack cocaine, one count of unlawful distribution of marijuana and one count of use of a firearm during a drug trafficking crime. Both pled guilty to felony drug charges.

29. Robert "Rocky" Hicks and Johnnie Lee "John John" Hughes are two known narcotics associates of DeAndre Ceasar. A narcotics search warrant had previously been executed at the residence of Johnnie Hughes and his parents. Subsequently, Johnnie Hughes' parents were charged in Tulsa County District Court with maintaining a dwelling where narcotics are sold or distributed. Thereafter, the residence was seized and forfeited.

30. DeAndre Ceasar appeared to be an experienced narcotics trafficker based on his demeanor during the transaction which took place on September 11, 1996.

31. Between May 1996 and September 1996, Brian Benefiel observed DeAndre Ceasar in the Defendant Vehicle on six or seven occasions in the Brightwater Apartment complex, located at 2200 South Phoenix, Tulsa, Oklahoma.

32. Two different times between May 1996 and September 1996, DeAndre Ceasar told Brian Benefiel that the Defendant Vehicle was his vehicle. One of these occurrences was on September 10, 1996 while at Andre's, a/k/a "Dray Day's" residence.

33. On September 10, 1996, at approximately 7:30 p.m., Brian Benefiel was at Andre's, a/k/a "Dray Day's" residence located in the Gilcrease Hills area of Tulsa, Oklahoma. While DeAndre Ceasar was in the driveway, in the Defendant Vehicle, DeAndre Ceasar asked Brian Benefiel if he wanted a "dime" (marijuana). Subsequently, from the Defendant Vehicle, DeAndre Ceasar sold Brian Benefiel approximately 2.6 grams of marijuana in a baggie. Brian Benefiel observed DeAndre Ceasar take the baggie from a larger bag containing several other baggies of marijuana from the console of the Defendant Vehicle. DeAndre Ceasar then received \$10.00 in United States Currency from Brian Benefiel and gave Brian Benefiel his pager number of 561-0314.

34. DeAndre Ceasar was charged with two counts of unlawful delivery of marijuana in Osage County District Court, for sale of marijuana on two occasions on September 11, 1996. On September 11, 1996, at approximately 1:03 p.m., S.A. Jeffrey S. Finn, of Housing and Urban Development, observed DeAndre Ceasar drive a 1994 Ford Thunderbird bearing tag #IUR-009 (the Defendant Vehicle) to the Homeland store located at Edison and Gilcrease, Tulsa, Oklahoma; Brian Benefiel, wearing a fanny pack equipped with video and audio, walked to the Defendant Vehicle driven by DeAndre Ceasar and sat down in the vehicle. Once inside the vehicle, DeAndre Ceasar sold Brian Benefiel a zip lock baggie containing 11.1 grams of marijuana, a controlled dangerous substance. DeAndre

Ceasar then received \$50.00 in United States Currency from Brian Benefiel in exchange for the marijuana. Brian Benefiel then exited the Defendant Vehicle. DeAndre Ceasar then left in the Defendant Vehicle, the same vehicle in which he had driven to the distribution point with the marijuana. In addition to the video/audio recording, Detectives Powell and Benge, Tulsa Police Department, were able to observe Brian Benefiel exit S.A. Finn's vehicle, walk to DeAndre Ceasar's vehicle, get inside the Defendant Vehicle, exit the Defendant Vehicle, and walk back toward S.A. Finn's vehicle.

35. On September 11, 1996, at approximately 3:40 p.m., Brian Benefiel was let out of S.A. Finn's vehicle at the Homeland located at Edison and Gilcrease, Tulsa, Oklahoma, wearing a fanny pack equipped with video and audio equipment. Brian Benefiel walked to the pay phone outside the convenience store located at Edison and Gilcrease, Tulsa, Oklahoma, and paged DeAndre Ceasar. An individual, whose voice Brian Benefiel recognized as DeAndre Ceasar's, returned the page to the pay phone. Shortly thereafter, S.A. Finn observed DeAndre Ceasar drive the 1994 Ford Thunderbird bearing tag #IUR-009 (the Defendant Vehicle) to the convenience store located at Edison and Gilcrease, Tulsa, Oklahoma; DeAndre Ceasar exited the Defendant Vehicle and walked toward Brian Benefiel. DeAndre Ceasar gave Brian Benefiel a zip lock baggie containing 11.1 grams of marijuana, a controlled dangerous substance. DeAndre Ceasar then received \$50.00 in United States Currency from Brian Benefiel in exchange for the marijuana. DeAndre Ceasar then left in the Defendant Vehicle, the same vehicle in which he had driven to the distribution point with the marijuana. In addition to the audio/video recording, S.A. Finn

observed the entire transaction from his vehicle located in the parking lot west of the convenience store located at Edison and Gilcrease, Tulsa, Oklahoma. During recorded conversations on September 11, 1996, DeAndre Ceasar stated he could sell Brian Benefiel larger quantities of marijuana. During these conversations DeAndre Ceasar also discussed Rocky a/k/a Robert Louis Hicks, the quality of Rocky's marijuana, the quality of DeAndre Ceasar's marijuana, and Andre a/k/a Dray Day contacting DeAndre Ceasar. Brian Benefiel and DeAndre Ceasar also discussed whether DeAndre Ceasar could use a front end cover for his Thunderbird.

36. On December 20, 1996, DeAndre Ceasar pled guilty to two counts of unlawful delivery of marijuana in Osage County District Court. DeAndre Ceasar was sentenced to a three (3) year deferred sentence on both counts to run concurrently, a fine of \$2,000.00 and \$383.60 in court costs. DeAndre Ceasar's attorney's fees were paid by Cheryl Ceasar and his father. The \$2,000.00 fine was paid equally by DeAndre Ceasar's father and Cheryl Ceasar.

#### CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter pursuant to 28 U.S.C. §§ 1345, 1355, 1356 and 1395, and 21 U.S.C. §881.
2. Any Finding of Fact which might be properly characterized a Conclusion of Law should be considered as such, and vice versa.
3. A forfeiture proceeding is an *in rem* action brought against seized property pursuant to the fiction that the property itself is guilty of facilitating crime or is proceeds of

crime. See *Calero-Toldeo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (1974).

4. To contest a forfeiture action, an individual must first demonstrate an interest in the seized property sufficient to satisfy the court of his standing as a claimant. *United States v. Three Hundred Sixty-Four Thousand Nine Hundred Sixty Dollars (\$364,960) In U.S. Currency*, 661 F.2d 319, 326 (5<sup>th</sup> Cir. 1981). The owner of the seized property must have an interest sufficient to establish standing. *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 647 F.2d 864, 866 (8<sup>th</sup> Cir. 1981), *cert. denied*, 454 U.S. 1143, 102 S.Ct. 1002, 71 L.Ed.2d 294, (hereinafter cited as *Douglas Aircraft, Appeal 2*). In general terms, ownership may be defined as a possessory interest in the seized property from which flows the right to exercise dominion and control. *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27, 28 (8<sup>th</sup> Cir. 1979) (hereinafter cited as *Douglas Aircraft, Appeal 1*). Ownership may be established by proof of actual possession, control, title, or financial stake. *Douglas Aircraft, Appeal 2*, 647 F.2d at 866. The possession of bare legal title to the seized property, however, by one who does not control and exercise dominion over the property is insufficient to establish ownership. *Douglas Aircraft, Appeal 1*, 604 F.2d at 28.

5. Claimant Cheryl Ceasar failed to establish sufficient ownership interest in the Defendant Vehicle.

6. DeAndre Ceasar was the beneficial owner of the Defendant Vehicle.

7. Claimant Cheryl Ceasar failed to establish that she exercised dominion and control over the Defendant Vehicle.

8. In a forfeiture proceeding the Government bears the initial burden of proof, as

it must show probable cause for the institution of the suit. 21 U.S.C. §881(d)(1981). Section 881(d) makes the probable cause standard of 19 U.S.C. §1615 applicable to forfeiture suits under Section 881(a)(6). *United States v. One 1971 Chevrolet Corvette Automobile*, 496 F.2d 210, 212 (5<sup>th</sup> Cir. 1974).

9. The test for determining probable cause for forfeiture is the same as that which applies to arrests, searches, and seizures. The United States must show reasonable ground for belief of guilt supported by less than prima facie proof but more than mere suspicion. *United States f. \$149,442.43 in U.S. Currency*, 965 F.2d 868, 876 (10<sup>th</sup> Cir. 1992); *See also United States v. One 1978 Chevrolet Impala*, 614 F.2d 983 (5<sup>th</sup> Cir. 1980), *United States v. One 1975 Ford F100 Pickup Truck*, 558 F.2d 755, 756 (5<sup>th</sup> Cir. 1977), *United States v. One 1971 Chevrolet Corvette Automobile*, 496 F.2d 210, 212 (5<sup>th</sup> Cir. 1974).

10. Hearsay evidence is admissible in a forfeiture proceeding to the same extent that it is admissible in any other “probable cause” hearing. *United States v. \$250,000*, 808 F.2d 895, 899 (1<sup>st</sup> Cir. 1987); *United States v. 1964 Beechcraft*, 691 F.2d 725, 728 (5<sup>th</sup> Cir. 1982) *rehg. denied* 969 F.2d 996, *cert. denied* 461 U.S. 914, 103 S.Ct. 1893, 77 L.Ed.2d 283.

11. The Government had probable cause to seize the Defendant 1994 Ford Thunderbird and institute this forfeiture suit. Probable cause was predicated on the use of the Defendant Vehicle to transport marijuana for sale and facilitating a drug exchange.

12. Once the Government establishes probable cause, the burden of proof shifts to the claimant to prove a defense to the forfeiture. 19 U.S.C. §1615 (1980); *U.S. v.*

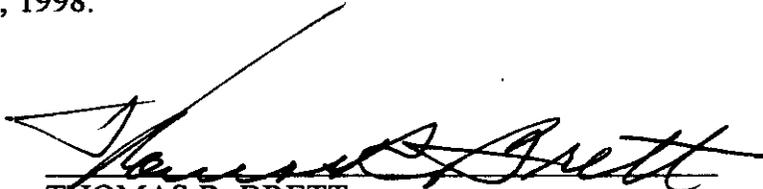
\$149,442.43 in U.S. Currency at 876, See also *United States v. One 1975 Ford F100 Pickup Truck*, 558 F.2d 755, 756 (5<sup>th</sup> Cir. 1977), *United States v. One 1971 Chevrolet Corvette Automobile*, 496 F.2d 210, 212 (5<sup>th</sup> Cir. 1975). The claimants must prove a defense by a preponderance of the evidence. *Ford F100 Pickup Truck*, 558 F.2d at 756.

13. “Innocence [of the claimant], in and of itself, is an insufficient defense to forfeiture.” *United States v. One 1957 Rockwell Aero Commander 680 Aircraft*, 671 F.2d 414, 417 (10<sup>th</sup> Cir. 1982). See also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-90 (1974). To prevail on the defense of innocence, claimants must establish that 1) they were not involved in the wrongful activity; 2) they were not aware of the wrongful activity, and 3) they had done all that reasonably could be expected to prevent the proscribed use of their property. *Pearson Yacht Leasing Co.*, 416 U.S. at 689.

14. Claimant Cheryl Ceasar failed to establish she was not aware of the wrongful activity and that she had taken any steps to prevent the proscribed use of the property or any defense to the forfeiture of the Defendant Vehicle by a preponderance of the evidence.

A separate Judgment of Forfeiture in keeping with these Findings of Fact and Conclusions of Law shall be prepared and submitted by Plaintiff within five (5) days of the date of this Order.

DATED this 6<sup>th</sup> day of July, 1998.

  
THOMAS R. BRETT  
SENIOR UNITED STATES DISTRICT JUDGE

**FILED**  
JUL - 7 1998

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

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JAMES HOOVER, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
HERITAGE MANOR NURSING CENTER, )  
 )  
Defendant. )

No. 98CV0365E(J) /  
ENTERED ON DOCKET  
DATE JUL 8 1998

NOTICE OF DISMISSAL

COMES NOW the plaintiff, James Hoover, and dismisses this  
action without prejudice to the refiling of this action.

*Glen Mullins*

\_\_\_\_\_  
GLEN MULLINS, #6503  
2728 N.W. 39th Street  
Oklahoma City, Oklahoma 73112  
405/943-2471

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF MAILING

This is to certify that on this 6<sup>th</sup> day of July, 1998,  
a true and correct copy of the above and foregoing was mailed, with  
postage prepaid thereon, to Heritage Manor Nursing Center, 3434  
Kentucky Place, Bartlesville, Oklahoma, 74006.

*Glen Mullins*

\_\_\_\_\_  
GLEN MULLINS

*Mail  
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**F I L E D**

JUL - 7 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

MEGAN M. DILL, )  
)  
Plaintiff, )  
)  
vs. )  
)  
DENAMERICA CORP. and )  
JEROME ANDERSON, )  
)  
Defendants. )

Case No. 97-CV-1031-B (J)

ENTERED ON DOCKET

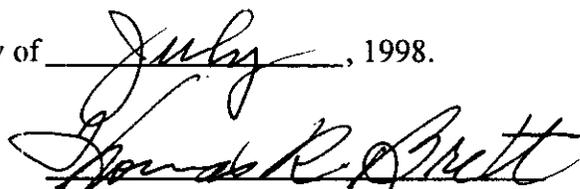
DATE JUL 08 1998

**ORDER OF DISMISSAL WITH PREJUDICE**

NOW this Court having reviewed the Stipulation of Dismissal with Prejudice filed by the parties, dismissing this action against the Defendants, DenAmerica Corp. and Jerome Anderson, with prejudice, in its entirety, the Court finds that the claims asserted against the Defendants DenAmerica Corp. and Jerome Anderson, should be, and are hereby dismissed with prejudice.

This Order of Dismissal with Prejudice terminates this litigation.

IT IS SO ORDERED this 6<sup>th</sup> day of July, 1998.



HONORABLE THOMAS R. BRETT  
Senior Judge, United States District Court  
Northern District of Oklahoma

**Order of Dismissal With Prejudice**

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(11)

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DATE 7-8-98

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

JUL 7 - 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

HAROLD WALLACE,	)
	)
Petitioner,	)
	)
vs.	)
	)
RITA MAXWELL,	)
	)
Respondent.	)
	)

Case No. 96-C-507K(J) ✓

**REPORT AND RECOMMENDATION**

Petitioner filed a Petition for a Writ of Habeas Corpus on June 6, 1996. [Doc. No. 1-1]. Petitioner asserts that his sentence was improperly enhanced by a "felony" conviction in Colorado because the Colorado "felony" would not have been classified as a felony under Oklahoma law.

Respondent filed its first Response to the Petition on August 22, 1996. [Doc. No. 6-1]. Respondent requested that the District Court dismiss the Petition because it was not within the applicable statute of limitations. The United States Magistrate Judge, by Report and Recommendation dated June 16, 1997, recommended that the motion to dismiss be denied. [Doc. No. 8-1]. The District Court adopted the Report and Recommendation by order filed July 15, 1997. [Doc. No. 9-1].

Respondent filed a Reply to the Petition for a Writ of Habeas Corpus on August 11, 1997. [Doc. No. 12-1]. Petitioner filed a Reply on August 21, 1997. The matter

has been referred to the undersigned United States Magistrate Judge by minute order dated December 31, 1996.

The undersigned United States Magistrate Judge has reviewed Petitioner's Petition, the briefs filed by the parties, and the cases relied upon by the parties. The United States Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED**.

#### **I. FACTUAL BACKGROUND**

Petitioner was convicted of robbery with a firearm after former conviction of three felonies on January 11, 1985. Petitioner was sentenced to fifty years. Petitioner did not appeal this conviction.

Petitioner filed an application for post-conviction relief requesting leave to file a direct appeal out of time. Petitioner's request was granted, and Petitioner filed a direct appeal in the Oklahoma Court of Criminal Appeals on February 14, 1986. Petitioner asserted the following three errors: (1) the trial court erred in allowing trial counsel to stipulate to Petitioner's prior convictions without Petitioner's knowing, intelligent and voluntary personal consent; (2) the trial court improperly admitted inaccurate photographs into evidence; and (3) the trial court erred by acting as an advocate for the state. The appellate court found no merit to Petitioner's appeal, and the judgment of the trial court was affirmed by the Oklahoma Court of Criminal Appeals on December 9, 1987. See Wallace v. State, 747 P.2d 324 (Okla. Cr. 1987).

Petitioner filed a second application for post-conviction relief. In his second application, Petitioner asserted that one of the three prior convictions was improperly

used to enhance Petitioner's sentence because the prior conviction was a misdemeanor. Petitioner's second request for relief was denied on January 31, 1995. Petitioner appealed to the Oklahoma Court of Criminal Appeals and argued that his sentence was illegally enhanced with an inapplicable former conviction, that his failure to raise this issue in his first petition for post conviction relief was based on a change in state law, and that the doctrine of *res judicata* did not bar his claim. The Oklahoma Court of Criminal Appeals dismissed the appeal on April 21, 1996, based on Petitioner's failure to file his petition in error within the appropriate time.

Petitioner filed his Petition for a Writ of Habeas Corpus in this court on June 6, 1996. Petitioner asserts that the trial court illegally enhanced his sentence through the use of an invalid former "conviction." Petitioner additionally asserts that he was deprived of due process because the state court improperly determined that Petitioner's failure to raise the issues on his first habeas petition resulted in a waiver of those issues not raised.

## **II. EXHAUSTION AND EVIDENTIARY HEARING**

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace

v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986).

Respondent acknowledges that the issue which Petitioner presents to this Court was previously presented by Petitioner to the state courts in Oklahoma. To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). "[E]xhaustion of state remedies is not required where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition." Goodwin v. State of Oklahoma, 923 F.2d 156, 157 (10th Cir. 1991). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam). The Magistrate Judge concludes that Petitioner has exhausted his claims.

The granting of an evidentiary hearing is discretionary with the court. Because the issues raised by Petitioner can be resolved on the basis of the record, the Magistrate Judge declines to hold an evidentiary hearing. See Townsend v. Sain, 372 U.S. 293, 318 (1963), *overruled in part* by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

### **III. RECOMMENDATION REGARDING ALLEGED ERROR**

#### **Procedural Bar**

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the highest court of the state declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), *cert. denied*, 115 S. Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991).

"A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. Additionally, a finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. at 986 (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), *cert. denied*, 502 U.S. 1110 (1992)).

The Oklahoma Court of Criminal Appeals did not address Petitioner's argument in his second request for post conviction relief because Petitioner did not file a petition in error. The trial court initially found that Petitioner was procedurally barred because Petitioner had not raised the arguments in his first request for post conviction relief. The trial court additionally noted that Petitioner's asserted error was harmless.

The state court's refusal to address the issue asserted by Petitioner is an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently See Rule 5.2C(5), Rules of the Court of Criminal Appeals ("Failure to file a petition in error, with a brief, within the time provided, shall constitute a procedural bar for this Court to consider the appeal."); Duvall v. State, 869 P.2d 332, 333-34 (Okla. Ct. Crim. App. 1994); Shown v. Boone, 1995 WL 330752 (10th Cir. June 5, 1995).

Because of his procedural default, this Court may not consider Petitioner's claim unless Petitioner is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claim is not considered. See Coleman, 501 U.S. 722, 749-50. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. A petitioner is additionally required to establish prejudice, which requires showing "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The alternative is proof of a "fundamental miscarriage of justice," which requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

In his Response to the State's motion to dismiss, Petitioner generally asserts that he is not procedurally barred. Petitioner states that he is "actually innocent" of the crime of which he was convicted.

The miscarriage of justice exception applies when a prisoner "supplements his constitutional claim with a colorable showing of factual innocence." Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986). This exception permits federal habeas relief 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). The exception for actual innocence is narrow and has been characterized by the Supreme Court as being a case in which the State has convicted the wrong person of the crime. Sawyer v. Whitley, 505 U.S. 333 (1992). A claim of innocence requires a petitioner to establish actual innocence, not "legal" innocence. Selsor v. Kaiser, 22 F.3d 1029 (10th Cir. Anderson v. United States, 25 F.3d 704, 707 (8th Cir. 1994).

Petitioner generally asserts that he is "actually innocent." Petitioner does not provide much explanation for his claim of actual innocence. Petitioner does state that "it is irrefutable that the Petitioner is actually innocent of the sentence, *i.e.* the Petitioner's present sentence was illegally enhanced by an invalid prior conviction." This is not a claim of factual innocence. Petitioner is not asserting that he is actually innocent, but is asserting that because the crime to which he was found guilty was improperly enhanced he was improperly sentenced and is "innocent" of that "sentence." Petitioner's claim is insufficient to meet the requirements of "fundamental miscarriage of justice" or "actual innocence." See, e.g., Sawyer v. Whitley, 505 U.S.

333, 339, 112 S. Ct. 2514, 2518 (1992) (fundamental miscarriage of justice is narrow exception; "the miscarriage of justice exception would allow successive claims to be heard if the petitioner establish[ed] that under the probative evidence he has a colorable claim of factual innocence.") (citations omitted).

In his Petition for a Writ of Habeas Corpus, Petitioner additionally asserted that he met the cause and prejudice standards because the case law upon which he relied (to prove that the Colorado statute was improperly used) were decided after his conviction and initial appeal. Petitioner's assertion that a later case (i.e., a case decided after his first post-conviction application) supports Petitioner's argument does not satisfy the cause requirement where the case law, at the time Petitioner filed post-conviction application, was adequate to support the argument he urges now. See, e.g., Smith v. Murray, 477 U.S. 527, 536 (1986) ("[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was `available' at all."). Regardless, the Oklahoma Court of Criminal Appeals applied the procedural bar because of Petitioner's failure to file a petition in error. Petitioner asserts nothing to overcome the cause and prejudice hurdle with respect to this failure.

#### **CONCLUSION**

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

**OBJECTIONS**

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **THE FAILURE TO FILE WRITTEN OBJECTIONS TO THIS REPORT AND RECOMMENDATION MAY BAR THE PARTY FAILING TO OBJECT FROM APPEALING ANY OF THE FACTUAL OR LEGAL FINDINGS IN THIS REPORT AND RECOMMENDATION THAT ARE ULTIMATELY ACCEPTED OR ADOPTED BY THE DISTRICT COURT.** See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 7th day of July 1998.

  
Sam A. Joyner  
United States Magistrate Judge

**CERTIFICATE OF SERVICE**

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

8th Day of July, 1998.  
S. Schwetke

DATE 7-8-98

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

JUL 7 - 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN RE: BILL F. BLAIR, )  
 )  
 Debtor/Appellant, )  
 )  
 vs. )  
 )  
 THE STATE OF OKLAHOMA, EX REL THE )  
 OKLAHOMA TAX COMMISSION, )  
 )  
 Creditor/Appellee. )

Case No. 96-C-999-K(J) /

**REPORT AND RECOMMENDATION**

Debtor appeals the determination of the Bankruptcy Court that § 362(a)(6) either "(1) does not stay 'assessment' which occurs through no act performed after bankruptcy but merely by operation of law, or (2) does stay such 'assessment' but ordinarily entitles the tax creditor whose assessment is stayed to protection from prejudice while the stay remains in effect." See Order Denying Debtor's Request(s) for Relief, filed in the Bankruptcy Court of the Northern District of Oklahoma, August 7, 1996 (emphasis in original).

**I. FACTS AND PROCEDURAL HISTORY**

Debtor filed an action in Bankruptcy Court asserting that the Oklahoma Tax Commission's tax assessment was either barred by the statute of limitations or barred due to the imposition of the automatic stay. The parties submitted stipulated facts to the Bankruptcy Court and requested that the Court decide the legal issues.

The following facts were stipulated to by the parties:

4

On September 15, 1987, the Debtor signed an extension with the Internal Revenue Service for an audit of Debtor's 1983, 1984, and 1985 tax years. On January 14, 1991, the IRS made an adjustment to the Federal Income Tax Returns of Bill F. Blair for the years 1983, 1984, and 1985. The Debtor was notified of the changes on or about February 18, 1991.

The Debtor did not file an amended Oklahoma income tax return, report the corrected Oklahoma net income, or notify the Oklahoma Tax Commission of changes, for 1983, 1984 or 1985 tax years. On November 27, 1991, the Oklahoma Tax Commission submitted a "proposed assessment" of additional income taxes due for the tax years 1983, 1984, and 1985 based on the IRS report. The November 27, 1991 "proposed assessment" was to become final if it was not protested within 30 days. On December 20, 1991, (one week before the assessment would become final) the Debtor filed for Chapter 7 bankruptcy protection. On April 21, 1992, Debtor obtained his final discharge from bankruptcy. The Oklahoma Tax Commission did not issue a new assessment after Debtor's final discharge. On March 2, 1993, the Oklahoma Tax Commission filed a Tax Lien against the Debtor's property. Debtor contacted the Oklahoma Tax Commission on March 25, 1993, and requested that they cease efforts to collect the assessment and release the lien placed on Debtor's property.

The Bankruptcy Court issued an Order on August 7, 1996. The Court distinguished the various cases cited and relied on by the parties. The Court noted that under some circumstances equitable principles could be applied to claimed violations of the bankruptcy stay. The Court observed that the only inequitable conduct in the case was by the debtor. The Court reached alternative conclusions.

For present purposes, this Court determines that § 361(a)(6) either (1) does not stay "assessment" which occurs through no act performed after bankruptcy but merely by operation of law, or (2) does stay such "assessment" but ordinarily entitles the tax creditor whose assessment is stayed to protection from prejudice while the stay remains in effect. The Court need not choose between these alternatives, or consider any modification of or exception from them, at the behest of a debtor whose own conduct has been inequitable and whose own arguments

are inconsistent. Either way, Blair fails to persuade this Court that OTC's assessment and tax lien are in any way invalid, unenforceable or irregular.

See Order Denying Debtor's Request(s) for Relief, filed in the Bankruptcy Court of the Northern District of Oklahoma, August 7, 1996 (emphasis in original).

The Debtor appealed the decision of the Bankruptcy Court.

## **II. ANALYSIS**

The Oklahoma Tax Commission sent a proposed assessment of additional income tax to Debtor on November 27, 1991. The proposed assessment stated that it would become final if Debtor did not protest the assessment within 30 days. One week before the assessment would become "final," Debtor filed for bankruptcy. The Oklahoma Tax Commission did nothing with respect to the "proposed assessment" during the pendency of Debtor's bankruptcy. Debtor did nothing with respect to the "proposed assessment" during the pendency of the bankruptcy.

Debtor's discharge from bankruptcy was obtained April 12, 1992. The Oklahoma Tax Commission did nothing further with respect to the "proposed assessment" after Debtor's discharge. Debtor did nothing further with respect to the "proposed assessment." The Oklahoma Tax Commission filed a tax lien against Debtor on March 2, 1993.

Section 362 of the Bankruptcy Code provides that:

(a) Except as provided in subsection (b) of this section, a petition filed under Section 301, 302, 303 of this title . . . operates as a stay, applicable to all entities of -

\* \* \*

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

11 U.S.C. § 362(a). The automatic stay remains in effect until the case is closed, dismissed, or a discharge is granted or denied. 11 U.S.C. § 362(c).

Debtor asserts that the tax assessment was to become final "by operation of law" 30 days after it was sent. Therefore, the assessment became final during the time that the automatic stay was in effect and the assessment is therefore void and in violation of the stay. Debtor additionally notes that the statute of limitations for an assessment is two years from the date of notice of the IRS adjustment and since the Oklahoma Tax Commission never "re-assessed" Debtor, and the statute of limitations has expired, the Oklahoma Tax Commission cannot make an assessment.

The Oklahoma Tax Commission did nothing to further the assessment after the filing of the bankruptcy by the Debtor. The result that Debtor urges, that the Oklahoma Tax Commission violated the automatic stay by not doing anything, would certainly be anomalous.

The automatic stay of § 362(a) stays any "act" to "collect, assess, or recover a claim against the debtor." "Act" is interpreted broadly and can include an "act" by "operation of law." See, e.g., In re Fuller, 134 B.R. 945 (B.A.P. 9th Cir. 1991) ("'[A]ct' has been interpreted broadly, so that the automatic stay prevents the creation or perfection of a lien, even by 'operation of law' where no overt act is required."). The Magistrate Judge concludes that the statute should be interpreted broadly.

The assessment became final in 30 days if Debtor did not object. Debtor did not object to the assessment, but filed for bankruptcy prior to the expiration of the 30 days. The Magistrate Judge recommends that the District Court find that § 362(a) acted as a stay with respect to the assessment becoming final. The stay was then "lifted" when the Debtor's discharge was granted. 11 U.S.C. § 362(c)(2). After the discharge, Debtor had the remainder of the time (one week) to file an objection to the assessment. Absent the Debtor's filing of an objection, the assessment became final.

In the alternative, the Bankruptcy Court concluded that the equities of the situation favored the Oklahoma Tax Commission. A review of the record and the decision of the Bankruptcy Court supports that conclusion. The Bankruptcy Court concluded, based on the equities involved, in favor of the Oklahoma Tax Commission.

#### **CONCLUSION**

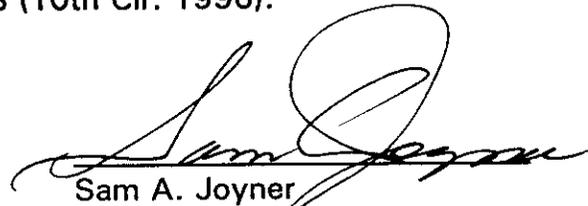
The United States Magistrate Judge recommends that the decision of the Bankruptcy Court be **AFFIRMED**.

#### **OBJECTIONS**

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

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

Dated this 7th day of July 1998.

  
Sam A. Joyner  
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 8th Day of July, 1998.  
S. Schurlock



## **I. FACTUAL BACKGROUND**

Petitioner pled guilty on September 23, 1994, to unlawful possession of a controlled drug with intent to distribute, second offence. Petitioner was sentenced to thirty years. Petitioner asserts that he agreed to plea guilty only to a charge that was enhanced by another drug charge.

According to Petitioner, his sentence has been wrongfully enhanced. Petitioner asserts that his sentence could have been enhanced by two different statutes. An enhancement under one of the statutes would permit Petitioner to accumulate more good time credits than enhancement under a different statute. Petitioner would therefore serve a shorter sentence if his sentence was enhanced by that statute.

Petitioner did not file a direct appeal, but did file an application for post-conviction relief. The trial court denied the application and the denial was affirmed by the Oklahoma Court of Criminal Appeals. The trial court concluded that Petitioner was procedurally barred from raising his claims.

## **II. EXHAUSTION AND EVIDENTIARY HEARING**

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace

v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986).

Respondent acknowledges that the issue which Petitioner presents to this Court was previously presented by Petitioner to the state courts in Oklahoma. To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). "[E]xhaustion of state remedies is not required where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition." Goodwin v. State of Oklahoma, 923 F.2d 156, 157 (10th Cir. 1991). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam). The Magistrate Judge concludes that Petitioner has exhausted his claim of ineffective assistance of counsel.

The granting of an evidentiary hearing is discretionary with the court. Because the issues raised by Petitioner can be resolved on the basis of the record, the Magistrate Judge declines to hold an evidentiary hearing. See Townsend v. Sain, 372 U.S. 293, 318 (1963), *overruled in part* by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

### III. RECOMMENDATION REGARDING ALLEGED ERROR

#### **Procedural Bar**

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the highest court of the state declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), *cert. denied*, 115 S. Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991).

"A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. Additionally, a finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. at 986 (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), *cert. denied*, 502 U.S. 1110 (1992)).

The Oklahoma Court of Criminal Appeals declined to address Petitioner's argument that his sentence was improperly enhanced.<sup>1/</sup> The Court additionally noted that Petitioner provided no reason for the failure to file a timely appeal.

The state court's refusal to address the issue asserted by Petitioner is an "independent" state ground because "it was the exclusive basis for the state court's holding."<sup>2/</sup> Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not raised in a direct appeal from the district court.

Because of his procedural default, this Court may not consider Petitioner's claim unless Petitioner is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claim is not considered. See Coleman, 501 U.S. 722, 749-50. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986).

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<sup>1/</sup> The Oklahoma Court discussed the decision by the trial court that the enhancement was appropriate pursuant to state law. The Oklahoma Court, however, noted that the second page of the information had not been included in the record. The Court additionally noted that "Petitioner's application fails to articulate sufficient reason or special circumstance explaining his failure to timely file a certiorari appeal as set forth in Section IV, 22 O.S. Supp. 1995, Ch. 18, App., Rules of the Court of Criminal Appeals, and as required by Section 1086 of Title 22. After a thorough consideration of the entire record before us, we find Petitioner has not established that the District Court erred in its findings and conclusions. As Petitioner has failed to show entitlement to relief in a post-conviction proceeding, the order of the District Court of Tulsa County denying Petitioner's application for post-conviction relief is affirmed." See Respondent's Brief, [Doc. No. 8-1], Exhibit B, at 2-3.

<sup>2/</sup> Although the Court discusses the factual issue raised by Petitioner, the Court notes that the record does not contain the second page of the information or the plea agreement which would be necessary for review.

Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. A petitioner is additionally required to establish prejudice, which requires showing "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The alternative is proof of a "fundamental miscarriage of justice," which 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).

Petitioner alleges that he is "actually innocent." Petitioner notes that

In the case at bar as has been stated the Petitioner is actually innocent of a sentence enhanced under any other statute then under the "DRUG" Statute, thus, the respondent's claim is not only without merit but also irrelevant.

Petitioner's Reply Brief at 3.

The miscarriage of justice exception applies when a prisoner "supplements his constitutional claim with a colorable showing of factual innocence." Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986). This exception permits federal habeas relief 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). The exception for actual innocence is narrow and has been characterized by the Supreme Court as being a case in which the State has convicted the wrong person of the crime. Sawyer v. Whitley, 505 U.S. 333 (1992). A claim of innocence requires a petitioner to establish actual innocence, not "legal" innocence. Selsor v. Kaiser, 22 F.3d 1029 (10th Cir. Anderson v. United States, 25 F.3d 704, 707 (8th Cir. 1994).

In this case Petitioner pled guilty. Petitioner asserts that his sentence was improper because his guilty plea was improperly enhanced. Petitioner's claim is not a claim of factual innocence. Petitioner is not asserting that he is innocent, but is asserting that the crime to which he pled guilty was improperly enhanced. This claim is insufficient to meet the requirements of "fundamental miscarriage of justice" or "actual innocence." See, e.g., Sawyer v. Whitley, 505 U.S. 333, 339, 112 S. Ct. 2514, 2518 (1992) (fundamental miscarriage of justice is narrow exception; "the miscarriage of justice exception would allow successive claims to be heard if the petitioner establish[ed] that under the probative evidence he has a colorable claim of factual innocence.") (citations omitted).

#### **CONCLUSION**

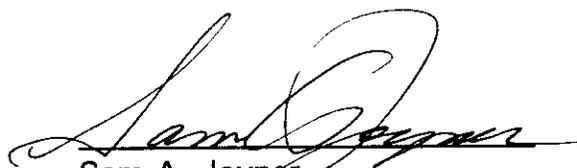
The United States Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED**.

#### **OBJECTIONS**

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

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

Dated this 7 day of July 1998.

  
Sam A. Joyner  
United States Magistrate Judge

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 8th Day of July, 1998.

D. Schivelke

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

**FILED**  
JUL 7 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARVIN WASHINGTON, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 RON CHAMPION, et al., )  
 )  
 Respondents. )

Case No. 95-CV-1077-C ✓

ENTERED ON DOCKET  
DATE JUL 8 1998

**JUDGMENT**

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 25 day of June, 1998.

  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 7 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARVIN WASHINGTON, )  
)  
Petitioner, )  
)  
vs. )  
)  
RON CHAMPION, )  
)  
Respondent. )

Case No. 95-CV-1077-C

ENTERED ON DOCKET

DATE JUL 8 1998

**ORDER**

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his conviction entered in Osage County District Court, Case No. CRF-90-209. He raises eleven (11) grounds of error allegedly justifying habeas corpus relief. Pursuant to this Court's Order of September 30, 1996 (#20), Respondent has filed a Rule 5 response to grounds 1, 3, 6, 8, 9, and 10 (#23). Petitioner has filed a reply to Respondent's response (#27). In addition, Petitioner has filed supplemental briefs addressing grounds 2, 4, 5, 7, and 11 (#s 28 and 29), previously found by this Court to be procedurally barred absent a showing of cause and prejudice or a fundamental miscarriage of justice. As more fully set out below the Court concludes that this petition should be denied.

***BACKGROUND***

Petitioner was charged in Osage County, District Court Case No. CRF-90-209, with First Degree Murder. He was tried by jury on September 3-4, 12-13 and 16-18, 1991 and found guilty of First Degree Manslaughter. On October 15, 1991, after the jury deadlocked on the issue of punishment, the trial court judge sentenced Petitioner to a fifty (50) year term of imprisonment.

On direct appeal, counsel for Petitioner raised seven issues, including grounds numbered 1, 3, 6, 8, 9 and 10 in the instant petition. The Court of Criminal Appeals affirmed the judgement and sentence on October 24, 1992, in an unpublished summary opinion.

On April 1, 1995, Petitioner filed a petition for post-conviction relief in Osage County District Court, raising seven additional issues. On June 1, 1995, the trial court denied the application by minute order. However, rather than appealing the minute order, Petitioner filed a petition for a writ of habeas corpus in the Court of Criminal Appeals, raising the issues presented in his application for post-conviction relief. On August 23, 1995, the Court of Criminal Appeals denied habeas relief.

On October 27, 1995, Petitioner filed the instant petition for writ of habeas corpus. According to Petitioner, federal habeas corpus relief is warranted based on the following eleven (11) grounds:

- Ground I: Judicial considersion [sic] of the victim impact statement and the victim's family loss in determing [sic] petitioner sentenced was reversable [sic] error and prejudicial to the petitioner excessives [sic] punishment
- Ground II: The judge violated the petitioner's rights to a jury trial and constitutional rights to be sentenced by the jury rather than by the judge, constitutional rights protected and guranteed [sic] const. act 2-19, 20
- Ground III: The sentence was cruel and unusal [sic] punishment considering the circumstances of the petitioner's eight amendment rights
- Ground IIII: Ineffective assistance of trial counsel and appellat counsel the constitutional protects and gurantees [sic] against this with the 6 amendment and both counsel were procedural error
- Ground V: Prosection [sic] failure to produce evidence favorable to the petitioner violated the Constitution 5th and 14th amendments "Brady"

- Ground 6: Improper judicial conduct during jury deliberations is reversible [sic] error, judge's abuse of discretion were prejudicial to petitioner where trial judge's action during deliberations intimidated and coerced jurors into returning a verdict before completing diligent deliberations [sic].
- Ground 7: Unconstitutional juror instructions deprived [sic] the petitioner to a fair and impartial trial.
- Ground 8: Improper misconduct by the prosecutor, improper remarks by the prosecutor by bringing up other crimes not related to the case contaminated [sic] the jury's mind relating to sympathy.
- Ground 9: Admission of petitioner's statements is reversible [sic] error where court permitted a prejudicial line of questioning before the jury where its [sic] admissibility had not been determined [sic] in a *in camera* hearing.
- Ground 10: Denial of motion to suppress [sic] petitioner's statements [sic] made before custodial interrogation [sic] is reversible [sic] error where the statement lacks any probative value and was prejudicial to the petitioner.
- Ground 11: Federal right to a speedy trial.

Respondent filed a motion to dismiss and brief in support (#s 5 and 6) arguing that the petition should be dismissed as a mixed petition containing both exhausted and unexhausted grounds. However, on September 30, 1996, after an additional round of briefing on the issue of futility, this Court ruled that although Petitioner had never fairly presented grounds numbered 2, 4, 5, 7 and 11 to the Court of Criminal Appeals, if he were now to return to state court to file a second application for post-conviction relief and appeal any denial to the Court of Criminal Appeals, the state courts would find his claims procedurally barred. Therefore, this Court denied Respondent's motion to dismiss based on the conclusion that because of Petitioner's procedural default, it would be futile to require him to return to state court. Respondent was directed to respond to claims numbered 1, 3, 6, 8, 9, and 10. Petitioner was directed to reply to Respondent's response and also to show cause and prejudice or a fundamental miscarriage of justice as to grounds 2, 4, 5, 7 and 11. See #20.

## *ANALYSIS*

### **A. Applicability of the Antiterrorism and Effective Death Penalty Act ("AEDPA")**

On April 24, 1996, President Clinton signed the AEDPA into law. Because Petitioner filed his petition for writ of habeas corpus on October 27, 1995, almost six (6) months before enactment of the AEDPA, the Court concludes that the provisions of the Act do not apply to this case.<sup>1</sup> This case will be reviewed pursuant to pre-AEDPA standards.

### **B. Procedural bar applies to preclude consideration of claims 2, 4, 5, 7, and 11**

The alleged procedural default in this case results from Petitioner's failure to present claims 2, 4, 5, 7, and 11 to the Oklahoma Court of Criminal Appeals in an appeal from the state trial court's denial of his first application for post-conviction relief and his failure to provide the state district court sufficient reason for failure to raise these claims in prior proceedings.

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

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<sup>1</sup>Although no effective date is specified for those provisions of the AEDPA applicable to non-capital cases, the Supreme Court has ruled that the AEDPA does not apply to non-capital habeas corpus cases pending on the date of enactment. See Lindh v. Murphy, 117 S.Ct. 2059 (1997).

from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

Applying these principles to the instant case, the Court concludes Petitioner's claims 2, 4, 5, 7 and 11 are barred by the procedural default doctrine. The state court's procedural bar as would be applied to Petitioner's claims would be an "independent" state ground because it would be "the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar would be an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not raised in a first request for post-conviction relief. Okla. Stat. tit. 22, § 1086.

Because of Petitioner's procedural default, this Court may not consider Petitioner's claims numbered 2, 4, 5, 7 and 11 unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 501 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attributes his failure to raise these claims on direct appeal to appellate counsel's

ineffectiveness.<sup>2</sup> See #28. Ineffective assistance of counsel is cause for a procedural default. Coleman, 501 U.S. at 755. However, a claim of ineffective assistance of counsel must first "be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." Murray, 477 U.S. at 489. Here, Petitioner raised his ineffective assistance of appellate counsel claim in his application for post-conviction relief filed in Osage County District Court where relief was summarily denied by minute order (#12, Exs. I and J). However, Petitioner failed to present the claim to the Oklahoma Court of Criminal Appeals in an appeal from the denial of post-conviction relief by the state district court. This Court has previously ruled that to require Petitioner to return to state court now to pursue this claim and the other unexhausted claims would be futile as the state courts would impose a procedural bar as a result of Petitioner's failure to follow established state post-conviction procedures. Petitioner has offered no reason explaining his failure to appeal properly the state district court's denial of post-conviction relief. Thus, he has failed to convince this Court that there was cause for his procedural default and resulting prejudice. See Reyes v. Keane, 118 F.3d 136, 140 (2d Cir. 1997) (concluding that "a petitioner may not bring an ineffective assistance claim as cause for a default when that ineffective assistance claim itself is procedurally barred"); Justus v. Murray, 897 F.2d 709, 714 (4th Cir. 1990) (before ineffective assistance of counsel claim may be raised as cause in federal habeas, it must first be exhausted in state court and not be procedurally defaulted).

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<sup>2</sup>Significantly, different attorneys represented Petitioner during his state district court proceedings and on direct appeal. Thus, Petitioner had the opportunity to consult with new counsel during his appeal to ascertain whether counsel in his criminal proceedings performed adequately and to develop facts relating to his counsel's performance. Although Petitioner claims appellate counsel refused to discuss and failed to raise the defaulted claims on direct appeal (see #2 at 13-14), nonetheless the countervailing concerns present where ineffective assistance of counsel claims are procedurally defaulted after a criminal defendant has been represented by the same counsel at trial and on direct appeal are not present in this case. See Brecheen v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994).

However, because ineffective assistance of appellate counsel can be considered cause to excuse a procedural default in state court and out of an abundance of caution, this Court will also review Petitioner's claim that ineffective assistance of appellate counsel constitutes cause in this case. See #28. To prove ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694. Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel. See, e.g., Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992).

In attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument that could be made. See Jones v. Barnes, 463 U.S. 745, 754 (1983). A petitioner, however, may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker.

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

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

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

In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, "viewed as of the time of counsel's conduct," Strickland, 466 U.S. at 690, and may not use hindsight to second-guess his strategy choices, see Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993). Counsel is not required to forecast changes in the governing law. See, e.g., Horne v. Trickey, 895 F.2d 498, 500 (8th Cir. 1990) (ineffectiveness not established by claim that "counsel should have realized that the Supreme Court was planning a significant change rises to the level of constitutional ineffectiveness").

In evaluating the prejudice component of the Strickland test, a court must determine whether, absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The outcome determination, unlike the performance determination, may be made with the benefit of hindsight. See Fretwell, 113 S. Ct. at 844. To establish prejudice in the appellate context, a petitioner must demonstrate that "there was a 'reasonable probability' that [his] claim would have been successful before the [state's highest court]." Claudio, 982 F.2d at 803 (footnote omitted).

After reviewing the record in this case, the Court concludes that appellate counsel's failure to argue on appeal Petitioner's claims numbered 2, 4, 5, 7 and 11 does not fall below the standard of reasonably effective assistance. These claims, as discussed in more detail below are for the most

part frivolous, and Petitioner has failed to establish that the ignored issues were more likely to result in a reversal or new trial than the issues actually raised on appeal. See Gray v. Gray, 800 F.2d 644, 647 (7th Cir. 1986).

1. *Petitioner's claim that he was denied his right to be sentenced by the jury lacks merit*

In Oklahoma, a defendant's right to have a jury assess punishment is a matter of statute. See Okla.. Stat. tit. 22, §§ 926 and 927. Section 927, in effect at the time Petitioner was sentenced, provides as follows:

Where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, the court shall assess and declare the punishment and render the judgment accordingly.

Okla. Stat. tit. 22, § 927. The Oklahoma Court of Criminal Appeals has found this statute to be constitutional. See Swart v. State, 720 P.2d 1265, 1267-68 (Okla. Crim. App. 1986) (citing Burt v. State, 77 P.2d 580 (Okla. Crim. App. 1938)). In this case, the jury reached a verdict on the question of Petitioner's guilt at 6:25 p.m. (#23, Ex. D at 879). Thereafter, the jury began deliberating on the issue of punishment. The Allen instruction was given to the jury at 8:35 p.m. (#23, Ex. D at 876-878). The jury continued to deliberate until 3:05 a.m., when they announced they were hopelessly deadlocked on the issue of sentencing. (#23, Ex. D at 894-95). Clearly, the jury was afforded ample opportunity to resolve the issue but nonetheless remained deadlocked. Section 927 authorized the trial judge in this case, where the jury failed to agree on the punishment to be inflicted, to sentence Petitioner. See also Dean v. State, 778 P.2d 476 (Okla. Crim. App. 1989). Therefore, Petitioner's claim 2 would have been unavailing on appeal and appellate counsel did not provide ineffective assistance in failing to raise it.

2. *Assistance provided to Petitioner by trial counsel was not constitutionally ineffective*

Petitioner's claims of ineffective assistance of trial counsel (denominated as claim 4) are unsupported and/or without merit. As stated supra, under Strickland, 466 U.S. at 687, a habeas petitioner claiming ineffective assistance of counsel must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694. In this case, Petitioner claims that his trial counsel failed to pursue any meaningful pretrial investigation of facts; failed to conduct any meaningful pretrial discussion with the petitioner concerning the offense charged, possible defenses, availability of trial strategy; failed to provide petitioner with any competent advice as to the elements of the offense, the state's burden of proof; failed to examine or inspect the contraband made the basis of the state's prosecution; failed to seek or discuss securing an expert for the purpose of conducting an independent examination and testing of any contraband made the basis of the state's prosecution; and failed to competently advise petitioner of his right to trial by jury, the function of the jury process, of his right to trial before a jury, and to have the jury fix punishment "without court interference (sic) by the judge." See #28 at 1. However, Petitioner fails to identify any facts helpful to his defense which his trial counsel could have discovered had he engaged in more pretrial investigation and fails to identify the "contraband" his counsel failed to examine or test. As a result, those allegations are conclusory. Furthermore, the Court has reviewed the record supplied by the parties in light of Petitioner's allegations that his counsel provided ineffective assistance and concludes that the performance of Petitioner's trial counsel did not fall below an objective standard of reasonableness. In fact, in light of the evidence presented at trial, it seems trial counsel in this case should be

commended since Petitioner was charged with first degree murder and convicted of first degree manslaughter. Therefore, appellate counsel did not provide ineffective assistance of counsel in failing to raise the claim of ineffective assistance of trial counsel on appeal.

3. *Petitioner's Brady claim lacks merit*

In his claim numbered 5, Petitioner asserts that the prosecution failed to produce evidence favorable to the petitioner in violation of the 5th and 14th Amendments and Brady v. Maryland, 373 U.S. 83 (1963). To succeed on a Brady claim, Petitioner must prove that 1) the prosecutor suppressed or withheld evidence 2) which was favorable and 3) material to the defense. Moore v. Illinois, 408 U.S. 786 (1972); Fero v. Kerby, 39 F.3d 1462, 1472 (10th Cir.1994); United States v. DeLuna, 10 F.3d 1529, 1534 (10th Cir.1993). The primary consideration under Brady is fairness. Thus, the claim is meritorious "only if 'the omission deprived the defendant of a fair trial.'" Ballinger v. Kerby, 3 F.3d 1371, 1377 (10th Cir.1993) (Kelly, J., dissenting) (quoting United States v. Agurs, 427 U.S. 97, 108 (1976). As to the materiality element, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985) (Blackmun, J. joined by O'Connor, J.); United States v. Robinson, 39 F.3d 1115, 1118 (10th Cir.1994). A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

In the instant case, Petitioner alleges that the focus of the prosecution's case was that Petitioner shot the victim as he was running away from Petitioner. Petitioner claims that the veracity of this accusation could be called into doubt had the prosecution produced the T-shirt worn by the

victim at the time of the shooting. However, at trial the medical examiner testified concerning the condition of the victim's body following the shooting, including the trajectory of the bullets causing the wounds. Thus, even if the prosecution suppressed or withheld the victim's T-shirt, any additional evidence provided by the T-shirt would have been merely cumulative and would not have altered the outcome of the trial. The Court finds Petitioner's Brady claim to be without merit and appellate counsel's failure to raise it on appeal does not constitute ineffective assistance of counsel.

4. *Jury instructions did not render Petitioner's trial fundamentally unfair*

As his seventh ground of error, Petitioner alleges that unconstitutional juror instructions deprived him of a fair and impartial trial. In determining whether appellate counsel's failure to raise this claim on direct appeal should excuse Petitioner's procedural default, this Court examines only "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)); Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir.) (quoting Brinlee v. Crisp, 608 F.2d 839, 854 (10th Cir. 1979)).

In this case, Petitioner complains that he was not present "at the choosing of the instructions;" instructions 4 and 5 contain language constituting "plain and reversable [sic]" error; instruction 15 (Flight) is unconstitutional; the instruction on first degree murder was erroneous since the state failed to prove malice aforethought; instructions 30 (punishment for first degree murder) and 32 (first degree manslaughter) were erroneous; instruction 40 (justifiable homicide) was inapplicable; the court erred when it refused to instruct on self-defense; instruction 45 (non-aggressor may defend himself) did not give a full and proper reading of the law; and instruction 47 (mutual combat) should

not have been given (#29). As to Petitioner's assertion that he was entitled to be present to select instructions, the Court has been unable to find authority supporting Petitioner's claim. Furthermore, Petitioner was represented by counsel who was present and representing Petitioner's interests when the instructions were selected. Thus, Petitioner's claim is without merit. As to Petitioner's remaining challenges to the jury instructions, Petitioner fails to provide any support for his contentions. He fails to cite allegedly erroneous language or to otherwise inform the Court why certain instructions were erroneous or inapplicable to his case. As a result, the Court finds Petitioner's challenges to the jury instructions are conclusory and lack merit and appellate counsel did not provide ineffective assistance in failing to raise this claim on appeal.

5. *Petitioner's speedy trial claim is without merit*

Petitioner's eleventh ground of error is that he was denied his federal right to a speedy trial. In support of this claim, Petitioner states that eleven (11) months passed between his arrest and the commencement of his trial. However, Petitioner focuses his complaint on the fact that his trial was delayed for one week due to the death of a close friend of the prosecutor. Petitioner also states that he "lost three (3) crucial witnesses because of this delay . . . ." (#2 at 38). "A Sixth Amendment speedy trial claim is assessed by balancing the length of the delay, the reason for the delay, whether the defendant asserted his right to a speedy trial, and whether the delay prejudiced the defendant." Castro v. Ward, 138 F.3d 810, 819 (10th Cir. 1998) (citations omitted). Although no single factor is dispositive, if the period of delay is "presumptively prejudicial," there is no need to inquire into the other factors. Id. There is no bright-line threshold time period automatically determined to be "presumptively prejudicial." Id. However, the eleven month period alleged in this case approaches

the one-year period requiring closer examination. See Doggett v. United States, 505 U.S. 647, 652 n.1 (1992); Barker v. Wingo, 407 U.S. 514 (1972). Petitioner cites one example of his counsel's entry of an objection to the granting of the one-week continuance necessitated by the death of the prosecutor's close friend. It seems, therefore, Petitioner did assert his right to a speedy trial. In addition, Petitioner was not responsible for the one-week delay of which he complains. However, Petitioner fails to provide evidence that he suffered prejudice as a result of the delay. Prejudice is assessed primarily by considering the three interests which the right to a speedy trial is designed to protect: 1) preventing oppressive pretrial incarceration, 2) minimizing petitioner's anxiety and concern; and 3) limiting the possibility that petitioner's defense will be impaired. See Barker, 407 U.S. at 532. Petitioner has not alleged that he suffered undue pressures, beyond those normally resulting from pending criminal charges, while awaiting trial. See United States v. Dirden, 38 F.3d 131, 1138 (10th Cir. 1994); see also United States v. Santiago-Becerril, 130 F.3d 11, 23 (1st Cir. 1997) (considerable anxiety normally results from pending criminal charges; however, in determining prejudice from delay, only undue pressures are considered). Although Petitioner attributes the loss of three witnesses to the alleged delay, the Court finds Petitioner's statements to be conclusory and unsupported in the record. Petitioner offers nothing to link the absence of the witnesses to the delay or to support otherwise his contention that he suffered prejudice as a direct result of the delay. Having carefully weighed the factors, the Court concludes that the alleged eleven-month delay between Petitioner's arrest and his trial did not deprive him of his constitutional right to a speedy trial and his appellate counsel did not provide ineffective assistance in failing to raise this claim on direct appeal.

Even if any of Petitioner's claims would have been successful on direct appeal, the Court

notes that the failure to raise a particular issue on appeal is not in and of itself indicative of ineffective assistance of appellate counsel. The U.S. Supreme Court has recognized that appellate counsel serves best by winnowing out weaker arguments and focusing upon stronger central claims. Jones v. Barnes, 463 U.S. 745, 751-52. Petitioner's appellate counsel followed to the letter the Supreme Court's suggestion in Jones. It appears he focused Petitioner's appellate claims on his best arguments under the law and the facts of this case. Therefore, appellate counsel's decision not to present all possible issues on direct appeal did not deny Petitioner the effective assistance of counsel and does not constitute cause sufficient to excuse Petitioner's procedural default in state court.

Petitioner's only other means of gaining federal habeas review of his procedurally barred claims is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). Petitioner, however, does not claim that he is actually innocent of the crime underlying his criminal conviction. Therefore, Petitioner has failed to establish that a fundamental miscarriage of justice will occur if his these claims are not considered in this habeas corpus proceeding.

The Court concludes that Petitioner has failed to demonstrate cause and prejudice or a fundamental miscarriage of justice and his claims numbered 2, 4, 5, 7 and 11 are procedurally barred from federal habeas corpus review.

**C. Petitioner's remaining claims (numbered 1, 3, 6, 8, 9 and 10) must be denied**

As stated supra, the pre-AEDPA standards of review apply in this case. Under those standards, the determination by a state court of competent jurisdiction after a hearing on the merits of a factual issue will be presumed to be correct, unless the petitioner demonstrates that the state

courts failed to resolve the claims on the merits. See, Wright v. West, 505 U.S. 277, 300-306 (1992) (White, J., concurring); Ramirez v. Rodriguez, 467 F.2d 822 (10th Cir. 1972). In contrast to the deferential standard of review for a state court's factual findings, this Court reviews issues of law and issues of mixed law and fact *de novo* under pre-AEDPA standards. Wright, 505 U.S. at 300-301.

*1. Trial court's consideration of "victim impact statement" was not fundamental error*

In his first claim, Petitioner contends that the trial court's consideration of a Victim's Impact Statement ("VIS") constitutes fundamental error. Respondent asserts that this allegation of error raises an issue of state law and is, therefore, not cognizable in a habeas corpus proceeding.

The transcript from the sentencing hearing held in this case reveals that on the morning of the sentencing hearing, the trial court judge found a copy of the VIS on his desk when he arrived in his office. The statement, provided by the mother of the victim, described the impact of the victim's death on her life and requested that the judge sentence Petitioner to life imprisonment without the possibility of parole. See #23, Ex. C. After ascertaining that defense counsel had not received a copy of the statement, the trial court judge made a copy and provided it to defense counsel upon his arrival at the courthouse. As to whether or not he considered the information contained in the VIS, the trial court judge stated that "I have read it, whether I have considered it may appear in the final analysis." See # 23, Ex. B at 13.

In Payne v. Tennessee, 501 U.S. 808 (1991), decided approximately three (3) months prior to Petitioner's trial, the Supreme Court authorized states to allow victim impact evidence as a measure of harm to be admitted in the guilt phase of a capital case. Furthermore, the Supreme Court found that the Eighth Amendment erects no per se bar to the admission of victim impact evidence

or prosecutorial argument on that topic. Id. at 827. Significantly, the Supreme Court also recognized that only where such evidence or argument is unfairly prejudicial may a court prevent its use through the Due Process Clause of the Fourteenth Amendment. Id. at 825 (citing Darden v. Wainwright, 477 U.S. 168, 179-183 (1986)). In the instant case, the trial court judge sentenced Petitioner to fifty (50) years imprisonment, not to life imprisonment without the possibility of parole as urged by the victim's mother in the VIS. Petitioner in this case has failed to show that such evidence and argument were unfairly prejudicial and has therefore failed to meet the standard as articulated in Payne.

The Court concludes that Petitioner's constitutional rights were not violated by the trial court judge's reading of the VIS prior to conducting Petitioner's sentencing hearing.

2. *Petitioner's sentence was not unconstitutional*

In his third claim for habeas corpus relief, Petitioner alleges that he was improperly sentenced by the trial court's consideration of his prior convictions. The Amended Information filed in the trial court indicates Petitioner had six (6) prior felony convictions during the ten (10) year period preceding the conviction entered in Osage County: Tulsa County Case Nos. CRF-85-2027, Knowingly Concealing Stolen Property, and CRF-85-2028, Escape; Okmulgee County Case Nos. CRF-86-56 and CRF-86-57, Knowingly Concealing Stolen Property; and Tulsa County Case Nos. CRF-87-975 and CRF-87-1246, Knowingly Concealing Stolen Property. Petitioner entered pleas of guilty in each case. Petitioner now claims that CRF-85-2027 and CRF-85-2028 were subsequently reversed and that "all the cases were the same." Therefore, Petitioner argues his sentence was improperly enhanced.

In support of his position, Petitioner attaches a copy of an Order entered in Tulsa County District Court, Case No. CRF-85-2027, stating that:

The Court of Criminal Appeals of the State of Oklahoma in case Swart vs. State, having declared the sentencing statute utilized in this case unconstitutional, this Judgment and Sentence is hereby vacated and superceded by the Amended Judgment and Sentence entered and filed in this case.

(#27, Ex. E). Although this Order indicates that one of Petitioner's sentences was vacated and superceded by an amended sentence, it does not indicate that two of his convictions were reversed as argued by Petitioner. Furthermore, Petitioner offers no evidence to support his contention that "all the cases were the same." The Court finds no evidence to support Petitioner's claim that his sentence was improperly enhanced in violation of the constitution.

Petitioner also alleges that the trial court failed to instruct the jury that he had committed only one prior felony. "Habeas proceedings may not be used to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense...." Brinlee v. Crisp, 608 F.2d 839, 854 (10th Cir.1979). Here, petitioner alleges that the trial court improperly instructed the jury regarding the number of his prior felony convictions. However, Petitioner himself admitted his prior felony convictions at trial. See #2, Tr. Tran. at 750-53. The Judgements and Sentences from Petitioner's prior convictions were entered into evidence without objection from the defense. See #2, Tr. Tran. at 753. Thus, there was no reason for the court to include an additional instruction. See Hall v. State, 753 P.2d 372, 374 (Okla.Crim.App.1988) (trial court properly instructed jury that minimum sentence was twenty years when defendant admitted at trial to two previous felony convictions). Therefore, the trial court's allegedly erroneous instruction could not have rendered

petitioner's trial fundamentally unfair and his conviction will not be set aside.

3. *Alleged improper conduct of trial judge did not prejudice Petitioner*

As his sixth proposition of error, Petitioner alleges that the trial judge made prejudicial remarks and behaved improperly during the jury's deliberations on sentencing. Petitioner states that after the jury found Petitioner guilty of first degree manslaughter but while sentencing deliberations continued, the trial judge threw "his pen from the bench and show[ed] disgust and turn[ed] red" in front of the jury. Petitioner believes these actions "led the jury to arrive at a premature close to their deliberations in violation of statutory rights to be sentenced." (#27 at 7). Respondent argues that nothing in the record supports Petitioner's contention that the trial judge threw his pen, apparently in disgust.

This Court must consider whether the state trial judge's behavior, assuming Petitioner's allegations to be true, rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution. Gayle v. Scully, 779 F.2d 802, 806 (2d Cir.1985); McBee v. Grant, 763 F.2d 811, 818 (6th Cir.1985). Although trial judges have wide latitude in conducting their trials, they must carefully preserve " 'an attitude of impartiality' " and scrupulously avoid " 'giving the jury an impression that the court believes the defendant is guilty.' " United States v. Scott, 26 F.3d 1458, 1464 (8th Cir.1994) (quoting United States v. Gleason, 766 F.2d 1239, 1243 (8th Cir.1985)). In this case, the judicial conduct Petitioner complains of occurred during the jury's deliberations on sentencing, after the jury had returned a finding of guilty of manslaughter. After reviewing the record provided by the parties, the Court finds that the gestures of the trial judge were not so prejudicial as to violate due process. See Scott, 26 F.3d at 1464-65 (finding that the

combination of the trial judge's telling the jury that a comment by defense counsel was "inappropriate," appearing "agitated" with defendant, and criticizing the defendant's response to a question on cross-examination, did not constitute judicial misconduct). Furthermore, the fact that the jury remained deadlocked on the issue of punishment indicates that any inappropriate conduct by the trial judge had little if any effect on the jurors.

Petitioner also complains that the trial judge abused his discretion by giving the Allen instruction. Significantly, however, Petitioner's counsel requested the Allen instruction after the jury deliberated more than two (2) hours on the issue of punishment. Also, there is no evidence Petitioner suffered any prejudice as a result of the giving of the instruction since the jury remained deadlocked on the punishment issue. The Court concludes that Petitioner's claim of judicial misconduct is meritless.

4. *Allegations of prosecutorial misconduct are without merit*

As his eighth claim of error, Petitioner complains that the prosecutor engaged in misconduct which "contaminat[ed] the jurors mind relating to symphaty [sic]." A claim of prosecutorial misconduct is not sufficient to justify habeas relief unless the conduct results in a trial "so fundamentally unfair as to deny [the petitioner] due process." Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974). In evaluating whether a prosecutor's remarks effectively denied petitioner due process, "we must take notice of all the surrounding circumstances, including the strength of the state's case." Coleman v. Brown, 802 F.2d 1227, 1237 (10th Cir. 1986). Furthermore, a showing which might call for application of supervisory powers is not sufficient "for not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a

'failure to observe that fundamental fairness essential to every concept of justice.'" Fero v. Kerby, 39 F.3d 1462, 1473 (10th Cir. 1994) (citations omitted).

In this case, the state produced overwhelming evidence to support Petitioner's manslaughter conviction. Petitioner claims that the prosecutor made an improper remark concerning the suffering of the victim's family during his closing argument and that the trial judge failed to admonish the jury after sustaining the defense's objection to the remark. After reviewing the record, the Court finds that the remark complained of and the lack of an admonishment by the trial judge did not deny due process and does not constitute an infirmity of constitutional proportions.

Next, Petitioner complains that at the preliminary hearing the prosecutor "mislead the judge, and put the petitioner at a double jeopardy risk and the judge went along with the plot" when charging Petitioner with First Degree Murder. See #27 at 9. However, Petitioner fails to inform the Court how the information provided at the preliminary hearing was untruthful or designed to mislead the judge or to otherwise provide any support for this claim. Furthermore, as noted by Respondent, the jury did not convict Petitioner of First Degree Murder, but instead convicted him of Manslaughter. As a result, the Court finds that Petitioner's claim is meritless as no error of constitutional proportion occurred.

Petitioner also complains that the prosecutor used "illegall [sic] harpoons" during his questioning of Petitioner at trial resulting in admission of "fabricated . . . lies" which "contaminated the jurys [sic] mind." #27 at 10. The line of questioning concerned Petitioner's past history of fights and arrests, including a fight at the Osage County Jail. #23, Ex. D at 756. However, prior to the prosecutor's questions concerning the jailhouse fight, Petitioner had admitted his involvement in the fight during direct examination by defense counsel. #23, Ex. D at 748. It appears, therefore, that

Petitioner's complaint concerning the admission of "fabricated . . . lies" lacks merit and that the challenged conduct by the prosecutor does not rise to the level of constitutional misconduct.

5. *Petitioner's evidentiary challenges are not grounds for habeas corpus relief*

As his ninth and tenth grounds of error, Petitioner complains that the trial court erroneously allowed into evidence testimony of one of the police officers without having subjected the officer's testimony to an *in camera* hearing as well as a statement made by Petitioner during custodial interrogation. Questions concerning the admissibility of evidence in a state criminal proceeding are beyond habeas corpus review; these are a matter of state law and federal habeas actions do not lie for mere errors of state law. Estelle v. McGuire, 502 U.S. 62, 67 (1991); Fero v. Kerby, 39 F.3d 1462, 1474 (10th Cir.1994). The sole focus of this Court is to determine whether the state denied Petitioner his rights under the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); see Herrera v. Collins, 113 S.Ct. 853, 859 (1993); Andrade v. McCotter, 805 F.2d 1190, 1193 (5th Cir.1986) (in reviewing state court evidentiary rulings, the federal habeas court's role is limited to determining whether a trial judge's error is so extreme that it constituted denial of fundamental fairness under the Due Process Clause).

Petitioner alleges that the improperly admitted testimony by Officer Griggs concerned statements he<sup>3</sup> made regarding why "petitioner brought the gun to the scene." (#2 at 36). Petitioner cites to page 510 of the trial transcript. However, page 510 contains no reference to statements by

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<sup>3</sup>Although Petitioner complains that the trial court improperly allowed Officer Griggs to testify as to "certain statements made by the petitioner during a 'custodial interrogation'" (#27 at 15), the focus of the debate concerning Officer Griggs' testimony during the trial was inconsistency in statements made by witness Lawrence Carter concerning the source of the gun used in the shooting.

either Petitioner or witness Lawrence Carter concerning the gun. Petitioner was not denied fundamental fairness by the trial court's ruling concerning admission of Officer Griggs's testimony.

Petitioner also alleges that the trial court improperly admitted the testimony of Officer Smith concerning a statement made by Petitioner prior to his initial interrogation.<sup>4</sup> However, as stated above, the trial court's evidentiary ruling is a matter of state law and is not a ground for habeas relief absent a showing that the error is so extreme as to deny due process. In this case, where the evidence that Petitioner had shot the victim was overwhelming, the Court finds that Petitioner has not demonstrated that the admission of such testimony affected the fundamental fairness of his trial and thus is not entitled to federal habeas relief on this claim.

Finding no constitutional infirmities in the evidentiary rulings complained of by Petitioner, the Court finds the ninth and tenth claims of error to be without merit.

### *CONCLUSION*

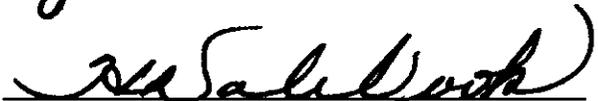
Petitioner's claims number 2, 4, 5, 7 and 11 are procedurally barred from federal habeas corpus review. Petitioner's remaining claims, numbered 1, 3, 6, 8, 9 and 10 are without merit. Therefore, after carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States and his petition for writ of habeas corpus should be denied.

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<sup>4</sup>During the direct examination of Officer Smith, the officer testified that Petitioner had stated ". . . the M\_\_\_\_-F\_\_\_\_ that had said he had shot him had hit him in the ear with his knuckle." (#2, Tran. at 418). The trial judge ruled that "said statement was a voluntary statement, not in response to any inquiry made by one of the officers while the Defendant was in custody and I find that it is admissible." (#2, Tran. at 420).

**ACCORDINGLY, IT IS HEREBY ORDERED** that the petition for a writ of habeas corpus is **denied**.

SO ORDERED THIS ~~7<sup>th</sup>~~ day of July, 1998.

  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE

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

**FILED**  
JUL - 6 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MULK RAJ DASS, )  
)  
Plaintiff, )  
)  
vs. )  
)  
JERRY BAINES, U.S. Probation )  
Officer; and CHRISTI WILLIAMS, )  
Chief Probation Officer, )  
)  
Defendants. )

No. 98-CV-131 B (E) ✓

ENTERED ON DOCKET

DATE JUL 7 1998

**ORDER**

Plaintiff, a federal prisoner, is currently confined in the Metropolitan Detention Center in Brooklyn, New York, but was previously confined in the Federal Correctional Institute in Oakdale, Louisiana when this action was instituted. Plaintiff originally filed this action in the United States District Court for the Western District of Louisiana. However, that court determined venue was not proper, and pursuant to 28 U.S.C. § 1406, transferred the above-captioned case to the Northern District of Oklahoma. The court record indicates Plaintiff has paid the \$150.00 filing fee to commence this action against Jerry Baines and Christi Williams in their official capacities as United States Probation Officers for the Northern District of Oklahoma.

In this pro se complaint "under the Civil Rights Act, 42 U.S.C. § 1983," Plaintiff alleges Defendants "in their capacity as United States probation officers testified at the bond hearing ... on the 5th of May, 1995," pursuant to an Indictment returned by the grand jury sitting in Tulsa, Oklahoma. Plaintiff contends the Defendants testified on the following issues: involvement of Plaintiff in numerous fraudulent schemes; Plaintiff's failure to pay restitution; check kiting and bank concerns; non-payment of fine; bond in California; and Plaintiff's immigration status. Plaintiff

asserts that Defendant Baines "knowingly, intelligently and voluntarily lied on material facts . . . he was successful in causing the Plaintiff to be unduly held and subjected him to very cruel conditions of incarceration at Tulsa County Jail, which have caused a permanent damage to the Plaintiff's health and large financial losses as a result of incarceration caused by the action of the defendant." Plaintiff further alleges that Defendant Baines' actions violated his "first, fifth, sixth, eighth, and fourteenth Amendments Rights of the United States Constitution." Plaintiff seeks monetary damages, sanctions against Defendants, and a jury trial in this matter. (Docket #1).

### ANALYSIS

Since Plaintiff is proceeding pro se, the Court must liberally construe his pleading. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). While pro se complaints are held to less stringent pleading requirements, it is not the proper function of the court to assume the role of advocate. The broad reading of the plaintiff's complaint does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based. Id. A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff. Id. at 1109.

Nevertheless, pursuant to Fed. R. Civ. P. 12(b)(6), the Court shall, on its own motion, dismiss Plaintiff's complaint. While dismissals under Rule 12(b)(6) typically follow a motion to dismiss, a court may dismiss sua sponte where it is patently obvious that the plaintiff cannot prevail on the facts alleged, and allowing an opportunity to amend would be futile. Hall, 935 F.2d at 1109-10. The Court concludes that Plaintiff cannot prevail on the facts alleged as it is clear from the face of the complaint, as discussed below, that Plaintiff's claims against these Defendants are not brought

"under color of state law," are barred by the two-year statute of limitations, and Defendants are immune from suit. See Fratus v. Deland, 49 F.3d 673, 674-75 (10th Cir. 1995) (district court may consider affirmative defense sua sponte when the defense is "obvious from the face of the complaint" and "[n]o further factual record [is] required to be developed").

CLAIMS UNDER COLOR OF STATE LAW, 42 U.S.C. 1983

42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient, a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law "of any State or Territory." Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 113 S.Ct. 1160, 1163 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

Mr. Baines and Ms. Williams, as federal probation officials, cannot act under color of state law as required under section 1983. See Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (the state action test requires: (1) that the deprivation be caused by the exercise of a right or privilege created by the state or by a person for whom the state is responsible, and (2) that the actor must be

someone who is a state actor). Plaintiff has not alleged that the federal officials in this case acted under anything other than federal law, and as a result, section 1983 does not apply to his suit. Therefore, Plaintiff's claims against Assistant U.S. Probation Officer Baines and U.S. Chief Probation Officer Williams could be dismissed on that basis.

However, this Court recognizes the general principle of affording pro se litigants' pleadings liberal construction. See Estelle v. Gamble, 429 U.S. 97, 106 (1976). Therefore, although Plaintiff does not cite Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), as the basis for jurisdiction, the Court liberally construes the complaint as a Bivens action and finds the invocation of jurisdiction satisfactory.

#### STATUTE OF LIMITATIONS

It is well-established that "a Bivens action, like an action brought pursuant to 42 U.S.C. § 1983, is subject to the statute of limitations of the general personal injury statute in the state where the action arose." Industrial Constructors Corp. v. U.S. Bureau of Reclamation, 15 F.3d 963, 968 (10th Cir. 1994). The applicable statute of limitations for civil rights actions under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another." Okla. Stat. tit. 12, § 95 (Third); Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988). However, federal law, not state law, controls the issue of when a federal cause of action accrues. Industrial Constructors Corp., 15 F.3d at 968-69 (citing Baker v. Board of Regents of the State of Kansas, 991 F.2d 628, 632 (10<sup>th</sup> Cir. 1987)). The statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action. Id. at 969 (citations omitted).

The Court finds that Plaintiff's claims accrued May 5, 1995, when Defendant Baines testified at Plaintiff's bond hearing. On that date, Plaintiff knew or had reason to know of the existence and cause of the injury forming the basis of this lawsuit. Therefore, Plaintiff's action would be time-barred if brought after May 5, 1997. See Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989) (the State of Oklahoma has no tolling provision for civil lawsuits filed by prisoners). Plaintiff filed the instant lawsuit on December 12, 1997. Clearly, Plaintiff has failed to meet the statutory two year filing requirement. Therefore, Plaintiff's lawsuit filed on December 12, 1997, is untimely since the applicable limitations period is two (2) years.

#### ABSOLUTE IMMUNITY

When the challenged activities of a federal probation officer are intimately associated with the judicial phase of the criminal process, he or she is absolutely immune from a civil suit for damages. Tripathi v. United States Immigration and Naturalization Serv., 784 F.2d 345, 347-48 (10<sup>th</sup> Cir. 1986); see also Hughes v. Chesser, 731 F.2d 1489, 1490 (11<sup>th</sup> Cir. 1984) (granting absolute 42 U.S.C. § 1983 immunity); Spaulding v. Nielsen, 599 F.2d 728, 729 (5<sup>th</sup> Cir. 1979) (granting absolute immunity to federal probation officers); Burkes v. Callion, 433 F.2d 318, 319 (9<sup>th</sup> Cir. 1970). In this case, Plaintiff's claims must be dismissed because the challenged actions involved testimony given by Defendant Baines at the bond hearing held in Plaintiff's criminal case. Therefore, Defendants are shielded by absolute immunity. Under these circumstances, and unlike qualified immunity, the *sua sponte* dismissal of a suit is proper where it is obvious from the plaintiff's allegations that the defendant is absolutely immune from suit. See McKinney v. Oklahoma Dept. of Human Services, 925 F.2d 363, 365 (10<sup>th</sup> Cir. 1991) (upholding *sua sponte* dismissal because it was patently obvious

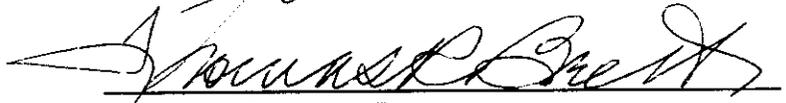
that no claim was stated in the complaint and no amendment could cure the defect); Pugh v. Parish of St. Tammany, 875 F.2d 436, 438 (5<sup>th</sup> Cir. 1989) (upholding *sua sponte* dismissal of § 1983 claim because defendants were absolutely immune from suit).

### CONCLUSION

For the above-stated reasons, the Court concludes that Plaintiff has failed to state a claim upon which relief can be granted and the Complaint should be dismissed with prejudice.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Plaintiff's Complaint is **dismissed with prejudice** pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Any pending motion is **denied as moot**.

SO ORDERED THIS 6<sup>th</sup> day of July, 1998.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

IN RE: )  
)  
PHILLIP GALE HILL and KIMBERLY GAIL HILL, )  
)  
Debtors. )  
)  
GENE MARITAN, )  
)  
Appellant, )  
)  
vs. )  
)  
KENNETH V. TODD, )  
)  
Appellee. )

**FILED**

**JUL 6 - 1998**

**Phil Lombardi, Clerk  
U.S. DISTRICT COURT**

Case No. 96-C-750-E(J)

ENTERED ON DOCKET

DATE JUL 7 1998

**REPORT AND RECOMMENDATION**

Maritan appeals the imposition by the Bankruptcy Court of sanctions of \$2,000 against Mr. Kenneth Todd, the attorney for Philip and Kimberly Hill. Maritan contends that the Bankruptcy Court abused its discretion and entered clearly erroneous findings in imposing only a \$2,000 sanction which was to be paid over a one year period.

**I. FACTS AND PROCEDURAL HISTORY**

The Bankruptcy proceeding which was pending in the Bankruptcy Court was ultimately dismissed by the Bankruptcy Judge. The Hill bankruptcy is not appealed by either of the parties. Instead, Maritan appeals the decision of the Bankruptcy Judge with respect to the amount of sanctions to be awarded against the Hill's attorney, Mr. Todd, for his actions in the Hill bankruptcy proceeding.

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Based on the conduct of Mr. Todd, who represented the Debtors Mr. and Mrs. Hill in the bankruptcy case filed in the Bankruptcy Court, Maritan filed a motion for sanctions pursuant to Rule 9011, the Bankruptcy equivalent of "Rule 11." A hearing on Maritan's motion for sanctions was held in the Bankruptcy Court on March 18, 1996. By telephone hearing on March 25, 1996, the Bankruptcy Court informed the parties of the Court's decision. The Court concluded that Mr. Todd violated Rule 9011. The Court noted that Mr. Todd "does a very good job in this court for his clients. He's a strong advocate for people who need his advocacy . . . ." Hearing Transcript dated March 25, 1996, filed June 25, 1996, at 6. The Court concluded that Maritan had "over-litigated" the case.<sup>1/</sup> The Court decided to impose sanctions "not to transfer the fees that Mr. Maritan incurred . . . . [but] to impose a sanction on Mr. Todd to deter this type of what I call over-advocacy on his part for a client that he was really trying to help." Hearing Transcript dated March 25, 1996, filed June 25, 1996, at 7-8. The Court noted that "Mr. Todd is not a rich man and he's going to have to budget this [sanction]." Hearing Transcript dated March 25, 1996, filed June 25, 1996, at 8. The Court observed that the sanction should serve as a deterrent and not "destroy, or hurt, or put [Mr. Todd] out of practice." Hearing Transcript dated March 25, 1996, filed June 25, 1996, at 8. The Bankruptcy Court imposed a sanction of \$2,000 and gave Mr. Todd 12 months in which to pay the sanction.

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<sup>1/</sup> Maritan incurred over \$25,000 in attorneys fees.

Maritan filed a notice to appeal the decision of the Bankruptcy Court on April 8, 1996. The Bankruptcy Court entered findings of fact and conclusions of law on April 23, 1996.

## **II. ANALYSIS**

### **STANDARD OF REVIEW**

The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. Conclusions of law are reviewed *de novo*. Phillips v. White 25 F.3d 931, 933 (10th Cir.1994); Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988). "When reviewing factual findings, an appellate court is not to weigh the evidence or reverse the finding because it would have decided the case differently.

Alleged violations of Rule 11 sanctions are reviewed under an abuse-of-discretion standard. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990); Rex Montis Silver Co. v. Stoltengerg, 87 F.3d 435, 438 (1996).

### **FACTORS TO CONSIDER IN A RULE 9011 SANCTION**

The Tenth Circuit Court of Appeals has delineated three factors for a court to consider in determining the amount of Bankruptcy Rule 9011 sanctions.

(1) the opposing party's reasonable expenses incurred as a result of the violation, including reasonable attorney fees; (2) the minimum amount necessary to adequately deter future misconduct; and (3) the offender's ability to pay. In addition, a court "may consider factors such as the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling the type

of litigation involved, and other factors as deemed appropriate in individual circumstances."

Rex Montis Silver Co. v. Stoltenberg, 87 F.3d at 440, *citing* White v. General Motors Corp., 908 F.2d 675, 684-85 (10th Cir. 1990).

In this case, the Bankruptcy Court, during the telephone hearing, provided numerous reasons for assessing a \$2,000 sanction. The Court noted that Maritan's fees were in excess of what the Court considered reasonable under the circumstances. The Court concluded that \$2,000 would serve as a deterrent to future conduct but would not force Mr. Todd out of business. The Court observed that Mr. Todd was not an exceedingly wealthy individual.<sup>2/</sup> Each of these factors are factors delineated by the Tenth Circuit Court of Appeals for consideration in assessing sanctions.

In addition, the Bankruptcy Court noted that Mr. Todd had previously done a very good job before the court, that Mr. Todd had handled numerous cases, that the court believed that Mr. Todd was a strong advocate, and that this was a case of "over-advocacy" as opposed to ill-will or malice. These factors have additionally been outlined by the courts as factors for consideration in the imposition of a Rule 9011 sanction.

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<sup>2/</sup> The Bankruptcy Court noted, during the telephone hearing, that Mr. Todd was not wealthy. See Hearing Transcript dated March 25, 1996, filed June 25, 1996, at 8 ("Mr. Todd is not a rich man and he's going to have to budget this."). Maritan asserts, in Maritan's Brief on Appeal, that the Bankruptcy Court did not rely on Mr. Todd's financial condition until the entry of the Bankruptcy Court of the Findings of Fact and Conclusions of Law. Maritan asserts that this was improper because the Findings were entered after Maritan filed its appeal and therefore the Bankruptcy Court did not have jurisdiction to enter the findings. The entry of the Bankruptcy Court of Findings and Conclusions after an appeal has been filed causes some concern. However, the Magistrate Judge does not address this issue because, as noted, the Bankruptcy Court stated, in the hearing prior to the filing by Maritan of its appeal, that the Court had considered the financial status of Mr. Todd.

In this case, the Bankruptcy Court considered the numerous factors and concluded that imposing a \$2,000 sanction was appropriate. The Bankruptcy Court's conclusions are not an abuse of its discretion. The Magistrate Judge therefore recommends that this Court affirm the decision of the Bankruptcy Court.

### **CONCLUSION**

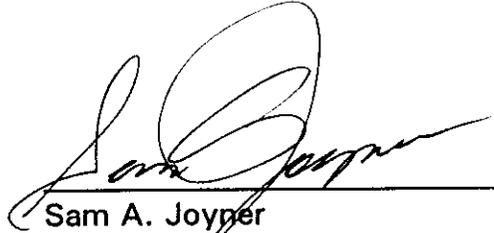
The United States Magistrate Judge recommends that the decision of the Bankruptcy Court be **AFFIRMED**.

### **OBJECTIONS**

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

**THE FAILURE TO FILE WRITTEN OBJECTIONS TO THIS REPORT AND RECOMMENDATION MAY BAR THE PARTY FAILING TO OBJECT FROM APPEALING ANY OF THE FACTUAL OR LEGAL FINDINGS IN THIS REPORT AND RECOMMENDATION THAT ARE ULTIMATELY ACCEPTED OR ADOPTED BY THE DISTRICT COURT. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).**

Dated this 6th day of July 1998.



Sam A. Joyner  
United States Magistrate Judge

**CERTIFICATE OF SERVICE**

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

7th Day of July, 1998.  
C. Portillo, Deputy Clerk.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

JUL - 6 1998 *ap*

UNITED STATES OF AMERICA, )

Plaintiff, )

v. )

MARSHA K. CARR aka Marsha K. Baccus; )  
ASSOCIATES NATIONAL MORTGAGE )  
CORPORATION; )  
CHARLES F. CURRY COMPANY; )  
TULSA MUNICIPAL EMPLOYEES FEDERAL )  
CREDIT UNION; )  
COUNTY TREASURER, Osage County, )  
Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Osage County, Oklahoma, )  
STATE OF OKLAHOMA *ex rel.* )  
Oklahoma Tax Commission, )

Defendants. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE JUL 7 1998

CIVIL ACTION NO. 96-C-0209-B ✓

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 6<sup>th</sup> day of July, 1998.

The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, appear by John S. Boggs, Jr., Assistant District Attorney, Osage County, Oklahoma; that the Defendants, Associates National Mortgage Corporation and Charles F. Curry Company, appear not, having previously filed their Disclaimer; that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, appears not, having previously filed its Disclaimer; that the Defendants, Marsha K. Carr aka Marsha K. Baccus and Tulsa Municipal Employees Federal Credit Union, appear not, but make default.

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The Court being fully advised and having examined the court file finds that the Defendant, Marsha K. Carr aka Marsha K. Baccus, was served by certified mail, restricted delivery, return receipt requested, on April 10, 1997; that the Defendant, Tulsa Municipal Employees Federal Credit Union, executed a Waiver of Service of Summons on March 18, 1996; that the Defendant, County Treasurer, Osage County, Oklahoma, was served by certified mail, return receipt requested, on March 18, 1996; that the Defendant, Board of County Commissioners, Osage County, Oklahoma, was served by certified mail, return receipt requested, on March 19, 1996; that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, was served by certified mail, return receipt requested, on April 10, 1997.

It appears that the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, filed their Answer on March 20, 1996; that the Defendants, Associates National Mortgage Corporation and Charles F. Curry Company, filed their Answer and Disclaimer through their attorney Gary D. Baer on April 4, 1996; that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, filed its Disclaimer through its attorney Kim D. Ashley on May 16, 1997; and that the Defendants, Marsha K. Carr aka Marsha K. Baccus and Tulsa Municipal Employees Federal Credit Union, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on September 4, 1987, Jimmie Lee Carr and Marsha Kaye Carr filed their voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 87-2431. On March 12, 1990, the United States Bankruptcy Court for the Northern District of Oklahoma dismissed the case and the Final Decree was filed on November 8, 1990.

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

Lot Fourteen (14), Block Six (6), COUNTRY CLUB HEIGHTS, Blocks Five (5), to Eleven (11), inclusive an Addition to Tulsa, Osage County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that this a suit brought for the further purpose of judicially determining the death of Jimmie L. Carr and judicially terminating the joint tenancy of Jimmie L. Carr and Marsha K. Carr.

The Court further finds that Jimmie L. Carr is also known as Jimmie Lee Carr (hereinafter referred to by either of these names) and Marsha K. Carr is also known as Marsha K. Baccus (hereinafter referred to by either of these names). Jimmie L. Carr and Marsha K. Carr became the record owners of the real property involved in this action by virtue of that certain General Warranty Deed dated January 17, 1979, from Vincent Balfour Brown and Jean Brown, husband and wife, to Jimmie L. Carr and Marsha K. Carr, husband and wife, as joint tenants, and not as tenants in common, on the death of one the survivor, the heirs and assigns of the survivor, to take the entire fee simple title, which General Warranty Deed was filed of record on January 24, 1979, in Book 553, Page 479, in the records of the County Clerk of Osage County, Oklahoma.

The Court further finds that Jimmie Lee Carr died on August 26, 1996 in the City of Tulsa, Tulsa County, Oklahoma. Upon the death of Jimmie Lee Carr, the subject property vested in his surviving joint tenant, Marsha K. Carr, by operation of law. Certificate of Death No. 020741 issued by the Oklahoma State Department of Health certifies Jimmie Lee Carr's death.

The Court further finds that Jimmie L. Carr, now deceased, and Marsha K. Carr executed and delivered to Charles F. Curry Company their mortgage note in the amount of \$25,750.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Jimmie L. Carr, now deceased, and Marsha K. Carr, who were then husband and wife, executed and delivered to Charles F. Curry Company a mortgage dated January 17, 1979, covering the above-described property. Said mortgage was recorded on January 24, 1979, in Book 553, Page 480, in the records of Osage County, Oklahoma.

The Court further finds that on May 16, 1990, Charles F. Curry Company assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was erroneously recorded in the Tulsa County Clerk records, Tulsa County, Oklahoma, on May 24, 1990, in Book 5255, Page 449.

The Court further finds that on June 1, 1990, Jimmie L. Carr entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on December 1, 1990, June 1, 1991 and August 1, 1992.

The Court further finds that Jimmie L. Carr aka Jimmie Lee Carr, now deceased, and Marsha K. Carr aka Marsha K. Baccus made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$23,154.78, plus administrative

charges in the amount of \$1,983.55, plus accrued interest in the amount of \$13,204.43 as of April 1, 1995, plus interest accruing thereafter at the rate of 9.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that Plaintiff, United States of America, is entitled to a judicial determination of the death of Jimmie L. Carr aka Jimmie Lee Carr and to a judicial termination of the joint tenancy of Jimmie L. Carr and Marsha K. Carr.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have liens on the property which is the subject matter of this action by virtue of personal property taxes in the total amount of \$245.35 plus penalties and fees (\$32.65 - 1986; \$36.72 - 1987; \$37.45 - 1988; \$36.84 - 1989; \$40.55 - 1990; \$41.17 - 1992; \$19.97 - 1993). Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, Associates National Mortgage Corporation, Charles F. Curry Company, and State of Oklahoma *ex rel.* Oklahoma Tax Commission, disclaim any right, title or interest in the subject real property.

The Court further finds that the Defendants, Marsha K. Carr aka Marsha K. Baccus and Tulsa Municipal Employees Federal Credit Union, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the death of Jimmie L. Carr aka Jimmie Lee Carr be and the same hereby is judicially determined to have occurred on August 26, 1996 in the City of Tulsa, Tulsa County, Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the joint tenancy of Jimmie L. Carr and Marsha K. Carr in the above-described real property be and the same is judicially terminated as of the date of the death of Jimmie L. Carr on August 26, 1996.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, on behalf of the Secretary of Housing and Urban Development, have and recover judgment *in rem* against the Defendant, Marsha K. Carr aka Marsha K. Baccus, in the principal sum of \$23,154.78, plus administrative charges in the amount of \$1,983.55, plus accrued interest in the amount of \$13,204.43 as of April 1, 1995, plus interest accruing thereafter at the rate of 9.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.413 percent per annum until fully paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have and recover judgment by virtue of personal property taxes (\$32.65 - 1986; \$36.72 - 1987; \$37.45 - 1988; \$36.84 - 1989; \$40.55 - 1990; \$41.17 - 1992; \$19.97 - 1993) in the total amount of \$245.35 plus penalties and fees.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Marsha K. Carr aka Marsha K. Baccus, Associates National Mortgage Corporation, Charles F. Curry Company, Tulsa Municipal Employees Federal Credit Union, and State of Oklahoma *ex rel.* Oklahoma Tax Commission, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

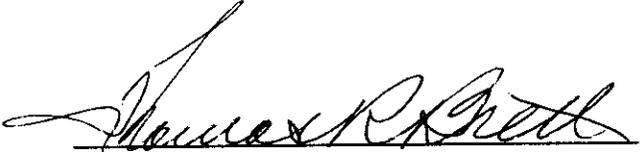
**Third:**

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

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

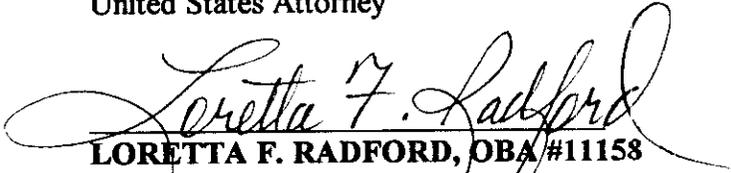
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

  
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

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

  
JOHN S. BOGGS, JR., OBA #0920  
Assistant District Attorney  
Osage County Courthouse  
Pawhuska, Oklahoma 74056  
(918) 287-1510  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Osage County, Oklahoma

Judgment of Foreclosure  
Case No. 96-C-0209-B (Carr)

LFR:css

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

**FILED**

JUL 6 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

KAREN NELSON IRREVOCABLE TRUST, by )  
Trustees, BEVERLY VOGEL and MIKE )  
WILLIAMSON, )

Plaintiff, )

vs. )

MASSACHUSETTS MUTUAL LIFE )  
INSURANCE COMPANY, a foreign )  
corporation, )

Defendants. )

Case No. 95-C-904-E

ENTERED ON DOCKET

DATE JUL 6 1998

**ORDER FOR DISMISSAL**

This matter comes on for hearing on the joint Stipulation of the Plaintiff, Karen Nelson Irrevocable Trust, by trustees, Beverly Vogel and Mike Williamson, and Defendant, Massachusetts Mutual Life Insurance Company, for a dismissal with prejudice of the above captioned cause. The Court, being fully advised, having reviewed the Stipulation, finds that the above entitled cause should be dismissed with prejudice to the filing of a future action as to Defendant, Massachusetts Mutual Life Insurance Company, pursuant to said Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause against Defendant, Massachusetts Mutual Life Insurance Company, be and is hereby dismissed with prejudice to the filing of a future action against said Defendant, the parties to bear their own respective costs.

Dated this 6<sup>th</sup> day of July 1998.

  
UNITED STATES DISTRICT COURT JUDGE

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

FILED

JUL - 6 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BURLINGTON NORTHERN AND SANTA )  
FE RAILROAD COMPANY, )

Plaintiff, )

vs. )

BINGHAM SAND AND GRAVEL, INC. )  
and BINGHAM TRANSPORTATION, )  
INC., )

Defendant. )

Case No. 98-CV-248-B(E)

ENTERED ON DOCKET

DATE JUL 7 1998

ORDER

Now on this 6<sup>th</sup> day of July, comes on for hearing Motion to Consolidate (Docket # 3) filed in the above styled case and also in Case No. 97-CV-1026-H (M) and Motion to Dismiss Third Party Complaint (Docket #4) and the Court, being fully advised, finds as follows:

Motion to Consolidate shall be denied. Plaintiff sought to consolidate this action with another case filed in the Northern District of Oklahoma before the Honorable Sven Holmes. Judge Holmes remanded the related action to the Oklahoma State District Court of Ottawa County for failure to establish the jurisdictional amount. A Motion to Reconsider was filed along with the Motion to Consolidate in Case No. 97-CV-1026-H (M) and the Court entered an Order denying Motion to Reconsider on May 5, 1998, thereby divesting this Court of jurisdiction to consolidate. Accordingly, Motion to Consolidate is denied.

Plaintiff Burlington Northern and Santa Fe Railroad Company ("Burlington") and James O. Davidson ("Davidson"), ("Movants"), filed Motion to Dismiss Third Party Complaint

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(Docket # 4) in which they urge dismissal of the third party complaint filed against Davidson on the ground that its sole purpose in being filed is to defeat diversity as both Davidson and defendant Bingham are residents of the state of Kansas. Movants urge that Burlington is liable for any damages caused by Davidson, an employee of Burlington, under the doctrine of respondeat superior. and that Davidson is not a necessary party to this action, citing Fed.R.Civ.P. 19(a) in support. The rule states, in pertinent part:

"a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties..." (emphasis added).

Movants assert that joinder of Davidson deprives this Court of jurisdiction and is therefore improper. The only authority presented for this proposition is Fed.R.Civ.P.19(a).

Defendant and Third Party Plaintiff counter that Fed.R. Civ.P. 14 governs third-party practice, that they are entitled to bring the third-party action and that Movants do not have an absolute right to jurisdiction in the Northern District of Oklahoma. They cite, also as their only authority, Fed.R. Civ.P. 14 , which provides in pertinent part:

"At any time after commencement of the action a defending party, as a Third-Party Plaintiff, may cause a Summons and Complaint to be served upon a person not a party to the action who is or may be liable to the Third-Party Plaintiff...." (emphasis added).

Where a court has before it a dispute brought by one injured by the tort of another or others, jointly and severally liable tortfeasors have not generally been held to be indispensable parties to a diversity action and may be dismissed by the court in order to maintain diversity jurisdiction. *South Carolina Elec. & Gas Co. v. Ranger Const. Co., Inc.*, 539 F. Supp. 578 (D.C.S.C.1982).

Further, what appears at first blush to be a conflict between the two federal rules cited

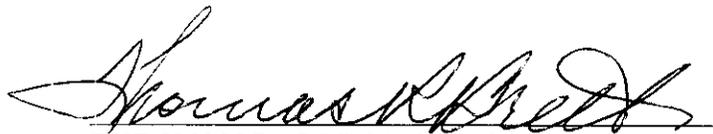
may be resolved by reference to the language of the rules themselves. Rule 19(a) contains the mandatory "shall" while Rule 14 contains the permissive "may".

In this case, allowing the third-party complaint would defeat diversity, a result prohibited by Rule 19(a). Further, complete relief can be had without the presence of the third party.

The only argument which favors Defendant and Third-Party Plaintiff's position in this case is that consolidation in state court could serve judicial economy. This, however, is speculative in that there is no assurance that the state court actions would be consolidated where one case has been pending for some time and the other not yet filed. Additionally, this Court has no evidence before it with which to evaluate whether other factors would need to be considered by a state court judge in determining the issue of consolidation, such as prejudice to the parties.

Finally, the Court must take issue with the position taken that neither Burlington nor Davidson have an absolute right to be in this Court. That absolute right is guaranteed by 28 U.S.C. §1332 where the prerequisites for diversity actions are met. Absent joinder of the third party action herein, those prerequisites have not been challenged in this action.

IT IS THEREFORE ORDERED that Motion to Dismiss (Docket #4) is granted and Motion to Consolidate (Docket # 3) is denied.

  
THE HONORABLE THOMAS R BRETT  
UNITED STATES DISTRICT JUDGE



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

**FILED**

JUL 2 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JAMES W. HENDRICKSON,

Plaintiff,

v.

AMR AIRLINE GROUP, INC., a Delaware  
corporation, AMERICAN AIRLINES, INC., a  
Delaware corporation, and JIM G. ZINK,  
Managing Director, Facilities & Maintenance  
Engineering,

Defendants.

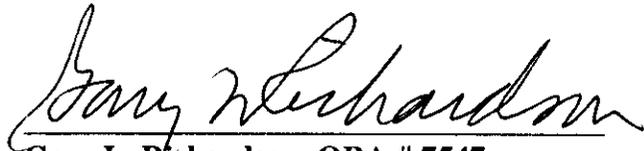
Case No. 96 CV 962 BU ✓

ENTERED ON DOCKET

DATE JUL 06 1998

**DISMISSAL WITH PREJUDICE**

COMES NOW the Plaintiff, James Hendrickson, by and through his counsel of record,  
Gary L. Richardson, of the law firm of Richardson & Ward, and hereby dismisses WITH  
PREJUDICE all of his claims against the Defendant AMR Airline Group, Inc.



Gary L. Richardson, OBA # 7547  
RICHARDSON & WARD  
6846 South Canton, Suite 200  
Tulsa, Oklahoma 74136  
(918) 492-7674 Telephone  
(918) 493-1925 Facsimile

Attorney for James W. Hendrickson

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clj

**CERTIFICATE OF MAILING**

This is to certify that on the 2nd day of July, 1998, the undersigned did cause a true and correct copy of the above and foregoing instrument to be mailed with proper postage prepaid thereon to:

David R. Cordell  
CONNER & WINTERS  
3700 First Place Tower  
15 East Fifth Street  
Tulsa, Oklahoma 74103-4344

  
\_\_\_\_\_  
FOR RICHARDSON & WARD

JCD/jo/6/17/98

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

**FILED**

JUL 2 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LEAH D. MILLS, )

Plaintiff, )

vs. )

MARK DAVID TALLEY, )

Defendant. )

Case No.: 97-C-1132-H

ENTERED ON DOCKET

DATE JUL 06 1998

**DISMISSAL WITH PREJUDICE BY STIPULATION**

COME NOW all attorneys of record, representing all parties herein, and pursuant to Rule 41 of the Federal Rules of Civil Procedure, and by stipulation, agree to the dismissal of the above-styled and numbered lawsuit, with prejudice to the plaintiff's right of refileing the same, as all issues of law and fact have been fully compromised and settled.

  
\_\_\_\_\_  
BRENT MILLS  
Attorney for Plaintiff

  
\_\_\_\_\_  
JAMES C. DANIEL  
Attorney for Defendant

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED  
JUL - 1 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FOUR CORNERS BOAT DOCK )  
AND MARINAS, INC. )

Plaintiffs, )

vs. )

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

Defendants. )

Case No. 97CV608 K (W)

ENTERED ON DOCKET

DATE JUL 3 1998

ORDER OF DISMISSAL WITH PREJUDICE OF DEFENDANTS  
TRANSCONTINENTAL INSURANCE CO. AND MEECO MARINAS, INC.

NOW ON this 1 day of July, 1998, the above-styled and numbered cause coming on for hearing before the undersigned Judge of the United States District Court in and for the Northern District of Oklahoma, upon the Stipulation for Dismissal of Plaintiff and Defendant Transcontinental Insurance Co. herein; and the Court, having examined the pleadings and being well and fully advised in the premises, is of the opinion that said cause should be dismissed against Defendants Transcontinental Insurance Co. and Meeco Marinas, Inc. with prejudice to its refiling.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-styled and numbered cause against Defendants Transcontinental Insurance Co. and Meeco Marinas, Inc. be and the same is hereby dismissed with prejudice to its refiling.

  
UNITED STATES DISTRICT JUDGE

923

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

**FILED**  
JUL - 1 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CHERYL WILLIAMS,

Plaintiff,

v.

KIMBERLY-CLARK CORPORATION,

Defendants.

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CASE NO. 97-CV-807-K (J) ✓

ENTERED ON DOCKET

DATE JUL 1 1998

**ORDER DISMISSING CASE WITH PREJUDICE**

The parties having stipulated to the dismissal of this cause with prejudice to the refileing thereof, the Court hereby orders that this action should be dismissed with prejudice to the refileing thereof. IT IS SO ORDERED.

Dated this 1 day of July, 1998.

*Terry C. Kern*  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

*R. Scott Scroggs*  
R. Scott Scroggs  
NIX & SCROGGS  
601 South Boulder, Suite 610  
Tulsa, Oklahoma 74119  
(918) 587-34193  
(918) 587-3491 (fax)

*Bryant S. McFall*  
Bryant S. McFall  
McFALL LAW FIRM  
460 Preston Commons  
8117 Preston Road  
Dallas, Texas 75225  
214-987-3800  
214-987-3927 (fax)

ATTORNEYS FOR PLAINTIFF

ATTORNEYS FOR DEFENDANT

107

*Dr*

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUL 01 1998

*PL*

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Robbie K. Twibell, )  
 )  
 Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 96CV677K ✓

ENTERED ON DOCKET  
DATE JUL 02 1998

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 1<sup>st</sup> day of July, 1998.

UNITED STATES OF AMERICA

Stephen C. Lewis  
United States Attorney

*Loretta F. Radford*

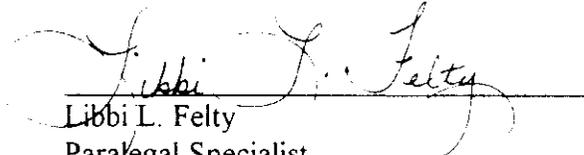
LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
333 W. 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

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CLJ

CERTIFICATE OF SERVICE

This is to certify that on the 1<sup>st</sup> day of July, 1998, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Robbie K. Twibell, 7805 S. 78th E. Ave., Tulsa, OK 74133.

  
\_\_\_\_\_  
Libbi L. Felty  
Paralegal Specialist

jm  
6-29-98

**FILED**  
JUL 1 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
v. )  
)  
THE SUM OF ONE THOUSAND )  
FOUR HUNDRED FORTY AND )  
NO/100 DOLLARS (\$1,440.00) IN )  
UNITED STATES CURRENCY, et al., )  
)  
Defendant. )

CIVIL ACTION NO. 96-CV-934-B

ENTERED ON DOCKET  
DATE 7-2-98

**PARTIAL JUDGMENT OF FORFEITURE AS TO DEFENDANT**  
**1986 BLACK PONTIAC FIREBIRD**

This cause having come before this Court upon the plaintiff's Motion for Partial Judgment of Forfeiture by Default as to the defendant 1986 Black Pontiac Firebird, VIN # 1G2FW87H6GL202504 as to all entities and/or persons interested in the defendant currency, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 11th day of October, 1996, alleging that the defendant vehicle is subject to forfeiture pursuant to 21 U.S.C. §§ 881(a)(4) and (a)(6), because it was property involved in transaction or attempted transactions in violation of Title 21 or is property traceable thereto, and/or because it is property which constitutes or derived from proceeds traceable to a violation of Title 21 of the United States Code, and subject to seizure and forfeiture to the United States.

Warrant of Arrest and Notice In Rem was issued on the 17th day of October, 1996, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant vehicle and for publication of notice of arrest and seizure once a week for three

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consecutive weeks in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, 8545 East 41st Street, Tulsa, Oklahoma, a newspaper of general circulation in the district in which this action is pending and in which the defendant vehicle was located, and further providing that the United States Marshals Service personally serve the defendant vehicle and all known potential owners thereof with a copy of the Complaint for Forfeiture In Rem and Warrant of Arrest and Notice In Rem, and that immediately upon the arrest and seizure of the defendant vehicle the United States Marshals Service take custody of the defendant vehicle and retain the same in its possession until the further order of this Court.

On the 7th day of February, 1997, the United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant vehicle.

Charles Jamison, Steve Washburn, John Grice, and Ulina Jamison were determined to be the only potential claimants in this action with possible standing to file a claim to the defendant vehicle. The United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant vehicle as follows:

Charles Jamison, served January 16, 1997, by serving him personally;

Steve Washburn, served November 29, 1996, by serving him personally;

John Grice, served by serving his sister, Ulina Jamison, November 26, 1996 as duly authorized representative;

Ulina Jamison, served November 26, 1996, by serving her personally;

Ulina Jamison, as duly authorized representative for John Grice filed an answer and claim as to the defendant vehicle, on December 16, 1996.

USMS 285 reflecting the service upon the defendant vehicle and all known potential

claimants is on file herein.

All persons or entities interested in the defendant vehicle were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No other persons or entities upon whom service was effected more than thirty (30) days ago have filed a Claim, Answer, or other response or defense herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant vehicle was located, on February 27, March 6 and 13, 1997. Proof of Publication was filed June 16, 1997.

No other claims in respect to the defendant vehicle have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant vehicle, and the time for presenting claims and answers, or other pleadings, has expired.

The plaintiff, the United States of America, and the claimant, Ulina Jamison, as duly authorized representative for John Grice, entered into a Stipulation for Forfeiture, of the 1986 Black Pontiac Firebird and payment of the amount of Four Hundred Fifty Dollars from the net proceeds of the sale of the defendant vehicle to Ulina Jamison, on behalf of John Grice, as the duly authorized representative for John Grice. The Stipulation was filed herein on June 3, 1998.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant vehicle:

One 1986 Black Pontiac Firebird, VIN # 1G2FW87H6GL202504

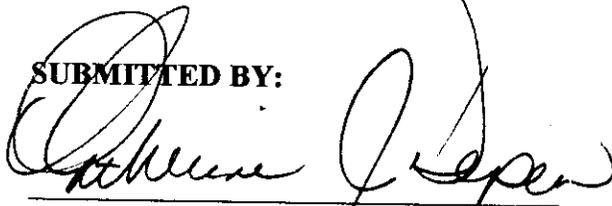
be, and it hereby is, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that payment of Four Hundred Fifty Dollars from the net proceeds of the sale of the defendant vehicle shall be made by the United States Marshal to Ulina Jamison, on behalf of John Grice, as duly authorized representative for John Grice by mailing, delivering, or otherwise releasing it to her.

Entered this 1<sup>st</sup> day of July, 1998.

  
:THOMAS R. BRETT  
Judge of the United States District Court for the  
Northern District of Oklahoma

**SUBMITTED BY:**

  
CATHERINE J. DEPEW  
Assistant United States Attorney

N:\UDD\JOHNSON\FORFEITUSA\FEHOMEJAMISON\JUDGMENT.STI

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

FORD MOTOR CREDIT COMPANY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MARK H. SCHLICHTER; )  
 DONNA SCHLICHTER; and )  
 THOMAS E. GARNER, )  
 )  
 Defendants. )

No. 97-CV-719-K

**FILED**  
JUL 01 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE JUL 02 1998

**NOTICE OF DISMISSAL WITHOUT PREJUDICE**

TO: MARK H. SCHLICHTER  
DONNA SCHLICHTER  
25 Brandywine Circle  
Brownsburg, Indiana 46112

THOMAS E. GARNER  
1754 Queensbridge Dr.  
Indianapolis, IN 46219

PLEASE TAKE NOTICE that the Plaintiff, Ford Motor Credit Company, discontinues the above-entitled action and dismisses it without prejudice.

Dated this 1<sup>st</sup> day of July, 1998.

**FORD MOTOR CREDIT COMPANY**

By Thomas G. Marsh  
Thomas G. Marsh (OBA #5706)  
David T. Marsh (OBA #14505)  
**MARSH & MARSH, P.C.**  
15 W. Sixth, Suite 2626  
Tulsa, Oklahoma 74119-5420  
(918) 587-0141  
Attorneys for Plaintiff,  
Ford Motor Credit Company

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

FILED

JUN 29 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

HARRY D. FLOYD,  
SSN: 448-50-4486,

Plaintiff,

v.

KENNETH S. APFEL,  
Commissioner of the Social Security  
Administration,

Defendant.

CASE NO. 97-CV-321-M

ENTERED ON DOCKET

DATE JUL 01 1998

JUDGMENT

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

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**F I L E D**

JUN 29 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

HARRY D. FLOYD

448-50-4486

Plaintiff,

vs.

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,

Defendant.

Case No. 97-CV-321-M

ENTERED ON DOCKET

DATE JUL 01 1998

ORDER

Plaintiff, Harry D. Floyd, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>1</sup> In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might

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<sup>1</sup> Plaintiff's March 16, 1994, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held March 12, 1996. By decision dated April 4, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on January 31, 1997. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born May 17, 1948, and was 47 years old at the time of the hearing. He has a bachelor's degree in zoology. In the past he has worked as a paper mill machine operator and plant cleaner. He was previously denied benefits by an ALJ decision dated June 4, 1993, which was not appealed. He claims to be unable to work as a result of back pain, limited mobility, heart problems and mental problems.

The ALJ determined that although Plaintiff is not able to return to his past relevant work, he retains the residual functional capacity to perform a full range of sedentary work limited to only simple repetitive work with little interaction with the public and co-workers. [R. 17]. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: posed an inaccurate and incomplete hypothetical question to the vocational expert; and failed to adequately discuss his mental impairments, pain, and limited mobility.

Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, the ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). Plaintiff objects to the hypothetical question posed by the ALJ because the ALJ asked the vocational expert to assume Plaintiff could perform sedentary work without any recitation of the Plaintiff's non-exertional impairments. He also claims the hypothetical fails to accurately explain his mental impairments.

In the ALJ's hypothetical he asked the vocational expert to assume that a 47 year old man could perform sedentary work as defined in the regulations. Sedentary work:

involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 404.1567(a). The Court finds that the determination that Plaintiff is able to perform the exertional demands of sedentary work is supported by substantial evidence.

To support the finding concerning Plaintiff's ability to perform sedentary work, the ALJ relied upon Plaintiff's testimony that he can sit a long time, but has to move in his chair. [R. 42]. Although the ALJ did not discuss every aspect of the medical record, the Court notes that the record contains additional support for the ALJ's finding. Plaintiff testified he can lift only 5 pounds in each hand, however, the medical record discloses that he actually performs activities that require much more lifting. On February 3, 1995, Plaintiff reported to his chiropractor that he was taking care of a cow barn, shoveling manure and throwing hay [R. 292]; on February 23 he reported that he took the transmission out of his car the previous day [R. 291]. Although these activities reportedly caused him pain, on February 25, 1995, he reported that he felt better than he has in a long time. [R. 292]. On July 13, 1994, he reported that he had been doing yard work, gardening and carrying feed which made his back tender. [R. 296]. On September 20, 1993, he reported hurting his low back shoveling manure, but on the 24th reported that he felt better than he has in 8 years. [R. 293]. The documentation of Plaintiff's performance of these strenuous activities supports the ALJ's finding that Plaintiff can perform work at the sedentary level and even suggests an ability to perform work at a level greater than the sedentary level found by the ALJ.

The Court finds no error in the ALJ's failure to include limitations related to carpal tunnel syndrome in the hypothetical question. Carpal tunnel syndrome on the left side was diagnosed on January 22, 1992. [R. 281]. The diagnosis pre-dates the June 4, 1993, onset date for the current benefit application. Since that time there are no medical records indicating significant complaints related to that diagnosis or treatment for it. The ALJ acknowledged this, as follows: "The claimant's allegations of carpal tunnel syndrome in the left hand are unsupported as there are no medical records indicating treatment." [R. 16]. A claimant bears the burden of demonstrating the existence of a medically severe impairment which "significantly limits" "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1520(c), 404.1521(b). *Gossett v. Bowen*, 862 F.2d 802, 804 (10th Cir. 1988). The mere presence of a medical condition is not enough, there must be evidence that the condition impacts the claimant's ability to do basic work activities. There is no evidence in the record to suggest that the carpal tunnel diagnosed in 1992 has had such an effect on Plaintiff.

Without elaborating, Plaintiff stated that the ALJ failed to adequately discuss his pain and limited mobility. However, the Court observes that the ALJ noted the absence of objective medical evidence concerning rib pain; the absence of any documented problems with the use of his upper or lower extremities; and the lack of evidence that Plaintiff takes medication for severe pain. The Court finds that this discussion is sufficient.

The Court finds that the ALJ included in the hypothetical question the non-exertional limitations that are supported by the record. The ALJ found that the Plaintiff's ability to perform the full range of sedentary work is limited to performing only simple repetitive work with little interaction with the public and coworkers due to depressive symptoms. [R. 17]. This finding takes into account the ALJ's finding that Plaintiff has marked difficulties in maintaining social functioning and that he has deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner. [R. 22].

Plaintiff argues that the case should be remanded because the ALJ failed to discuss the evidence he considered in reaching the conclusions he expressed on the Psychiatric Review Technique Form ("PRT"). The Tenth Circuit has ruled that "there must be competent evidence in the record to support the conclusion recorded on the [PRT] form and the ALJ must discuss in his opinion the evidence he considered in reaching the conclusions expressed on the form." *Washington v. Shalala*, 37 F.3d 1437, 1442 (10th Cir. 1994) (quoting *Woody v. Secretary of Health & Human Servs.*, 859 F.2d 1156, 1159 (3rd Cir. 1988)). Concerning his conclusions on the PRT, the ALJ noted:

In the opinion of his treating mental health source, the claimant is capable of working; he is able to comprehend and carry out simple instructions on an independent basis. . . . The medical evidence shows that the claimant has a moderate limitations in his activities of daily living in that he has difficulty in completing his activities of daily living. The claimant has a marked limitation in dealing with people, other than his family, even though he says that friends come to see him. The claimant's concentration is often

limited, according to the mental evidence. There is no evidence that the claimant's mental impairment has ever resulted in deterioration or decompensation in work or a work-like setting. The claimant, according to the mental evidence can perform work.

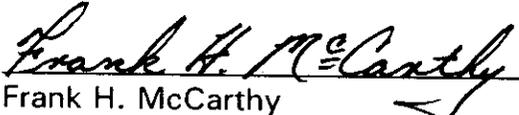
[R. 17]. Elsewhere in the decision, the ALJ noted that Plaintiff was treated at the Grand Lake Mental Health Center from July 14, 1994, to December 27, 1994; that in September 1994, he was diagnosed with cannabis abuse and a psychotic disorder; that he did not handle daily activities well, had little contact with others except his family; and that he had poor concentration and memory. [R. 14]. Although the ALJ could have expanded his discussion or been more specific in relating the evidence to the PRT, the Court finds that the ALJ adequately discussed the evidence he considered in reaching the conclusions expressed on the PRT form.

Plaintiff also argues that the decision must be remanded because the findings recorded on the PRT form are more disabling than the limitations the ALJ included in the hypothetical. This Court disagrees. The criteria on the PRT indicate the level of severity of a claimant's functional limitations in the specified category: activities of daily living; social functioning; concentration persistence and pace; and deterioration or decompensation in work or work-like settings. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00C. The PRT is used to determine whether a claimant's mental impairment is of a level of severity such that he could not reasonable be expected to engage in work. *Id* at § 12.00A. The limitations specified by the ALJ in the hypothetical question serve a different function. The regulations specify that the RFC will complement the criteria on the PRT by "requiring consideration of an expanded list of

work-related capacities." *Id.* Thus the limitations in the hypothetical address the Plaintiff's mental residual functional capacity by specifically relating the severity of Plaintiff's condition to his ability to perform work-related activities. The Court sees the difference between the PRT and the hypothetical question, not a an inconsistency, but as the natural consequence of the different purposes those evaluations serve.

The Court finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 29<sup>th</sup> day of June, 1998.

  
Frank H. McCarthy  
United States Magistrate Judge

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

FILED

JUN 29 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BEVERLY A. DOBY,  
SSN: 448-62-6383,

Plaintiff,

v.

KENNETH S. APFEL,  
Commissioner of the Social Security  
Administration,

Defendant.

CASE NO. 97-CV-631-M

ENTERED ON DOCKET

DATE JUL 01 1998

**JUDGMENT**

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

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

(12)

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

BEVERLY A. DOBY,  
SSN: 448-62-6383,

PLAINTIFF,

vs.

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

DEFENDANT.

JUN 29 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE No. 97-CV-631-M

ENTERED ON DOCKET  
DATE JUL 01 1998

ORDER

Plaintiff, Beverly A. Doby, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>2</sup> In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by

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<sup>1</sup> Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Kenneth S. Apfel should be substituted for John J. Callahan as defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

<sup>2</sup> Plaintiff's January 17, 1995, applications for Supplemental Security Income and Disability Insurance benefits were denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held January 11, 1996. By decision dated January 30, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 17, 1997. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

(11)

substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born August 4, 1967, and was 28 years old at the time of the hearing. [R. 41, 81]. She claims to have been unable to work since March 1989 due to chest pain, pelvic cysts, colon problems and stomach pain. [R. 137].

The ALJ determined that Plaintiff has severe impairments consisting of irritable bowel syndrome but that she retained the residual functional capacity (RFC) to perform work-related activities except for work involving lifting over 10 pounds frequently or 20 pounds occasionally; the performance of detailed or complex job instructions; more than minimal contact with the public or coworkers; or maintaining attention and concentration for extended periods of time; and that is performed in a high-stress

environment. [R.30]. He determined that Plaintiff's past relevant work (PRW) as a microfilm cataloger, maid inspector, and hand packaging clerk did not require performance of work related activities precluded by those limitations and found that Plaintiff was not disabled as defined by the Social Security Act. [R. 30]. The case was thus decided at step four of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff contends the ALJ erred in his evaluation of Plaintiff's credibility, that he failed to properly develop the record and that he mistook Plaintiff's failed work attempts as past relevant work (PRW) thereby committing reversible error in his finding at step four.

For the reasons discussed below, the Court affirms the decision of the Commissioner.

#### Credibility Analysis

Plaintiff claims the ALJ erred in his evaluation of Plaintiff's credibility. She claims the ALJ did not follow the requirements and duties of SSR 96-7p in his decision and asserts that he failed to develop the record.<sup>3</sup> Plaintiff states: "the hard, cold

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<sup>3</sup> The quote inserted by Plaintiff in her brief which she attributes to SSR 96-7p is language taken directly from SSR 95-5p which was superseded by SSR 96-7p on July 2, 1996. Although the portion quoted is no longer in effect, the basic premise: the ALJ's duty to consider daily activities, location, duration, frequency and intensity of claimant's pain, the factors that precipitate and aggravate the symptoms, the type, dosage, effectiveness and side effects of medication taken to alleviate pain, treatment other than medication received for relief of pain, other measures taken for the relief of pain and any other factors concerning claimant's functional limitations and restrictions due to pain in addition to his personal observations of the claimant, remains and is clarified in the superseding regulation.

objective medical evidence in this case speaks for itself and cannot be denied." [Plaintiff's Brief at p. 3].

The record shows Plaintiff has been complaining of low abdominal pain since as early as 1989. [R. 307]. She was treated for these complaints and intermittent chest pain as well as vaginal and urinary tract infections with medication by David Haggard, M.D. through January 1993. [R. 306-307]. In February 1993, Dr. Haggard diagnosed spastic colon and recommended Plaintiff see a gastroenterologist. [R. 305]. An endoscopy was performed by Eric L. Cottrill, M.D. on January 10, 1994. [R. 170]. The biopsy revealed mild chronic gastritis and gastroesophageal reflux with distal esophagitis. [R. 168]. Dr. Cottrill placed Plaintiff on a high bulk fiber diet and prescribed Prilosec and Bentyl.<sup>4</sup> Dr. Haggard continued to see Plaintiff through January 1995 for various complaints. [R. 190, 205]. During this time, Dr. Haggard consulted with Dr. Bob Melichar who suggested placing Plaintiff on a 24-hour PH monitor. [R. 201]. The monitor revealed total reflux time within normal limits but noted that there was a correlation between chest pain and burning symptomology with the decrease in PH. [R. 213]. A gastroenterology report by Barry Eisen, M.D. on March 31, 1994, reported positive "Bernstein" and "Tensilon" tests reflective of esophageal chest pain. [R. 209]. In April 1994, Dr. Haggard reported that Plaintiff's stomach pain was resolved with medication but her chest pain persisted. [R. 200]. Side effects from the

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<sup>4</sup> *Prilosec* and *Bentyl*, as described in the *Physicians' Desk Reference*, 49<sup>th</sup> Ed. 1995, p. 546 and 1395, respectively, are indicated for treatment of active duodenal ulcer and functional bowel/irritable bowel syndrome.

Procardia, which had been prescribed for the chest pain, were reported. Dr. Haggard considered Darvocet or Ativan as alternatives to the Procardia.<sup>5</sup> *Id.* On June 9, 1994, Dr. Haggard recorded that Plaintiff's chest pain had improved but that Plaintiff was again having stomach pain, particularly at night when lying down. [R. 198]. Medication side effects were again reported. Dr. Haggard adjusted the dosage of medication stating: "[s]he seems to be okay most of the time with her medication." [R. 198]. In July 1994, Dr. Haggard reported that Plaintiff's reflux esophagitis had improved and instructed her to continue the medications. [R. 197]. A cyst just outside the vaginal area was reported as well as allergic rhinitis. Dr. Haggard referred Plaintiff to a general surgeon for removal of the cyst and to an allergist for treatment of the rhinitis. *Id.* On August 2, 1994, Dr. Haggard reported that Plaintiff's chest pain had gotten worse after she stopped taking the Procardia. [R. 196]. He restarted the medication noting that a treadmill test might be considered but "we already do have a well-established GI etiology." *Id.*

In October 1994, a chest x-ray indicated right lower lobe pneumonia. [R. 217]. Dr. Haggard prescribed erythromycin. [R. 195]. A repeat chest x-ray two weeks later showed the pneumonia had resolved although Plaintiff was still having some pleuritic chest pain. [R. 194].

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<sup>5</sup> *Procardia* is usually indicated for management of angina; *Darvocet* for mild to moderate pain and *Ativan* for temporary treatment of anxiety, *Physicians' Desk Reference*, 49<sup>th</sup> Ed. 1995, p. 1906, 1320, 2646.

On August 28, 1995, Dr. Barry Eisen noted Plaintiff's continuing complaints of burning in the chest, usually postprandial worse at night while lying down. He suspected reflux and stated he "would like to see her respond a little more clearly to an H2 blocker before referring her for possible anti-reflux procedure." [R. 332]. Plaintiff was advised to continue medication "a while longer" on September 7, 1995. *Id.* On September 29, 1995, Dr. Eisen reported that Plaintiff "apparently has some sort of intolerance to the medications and quits taking them." He again noted his suspicion of a reflux-related disease but did not recommend proceeding with a laparoscopic anti-reflux procedure based on the fact that some of her studies were somewhat questionable. [R. 334]. He recommended an EGD (endoscopy), which was done on October 2, 1995. [R. 333, 334]. The endoscopy report revealed mild esophagitis and mild gastritis. [R. 333].

Records from Luis Gorospe, M.D. indicate Plaintiff's vaginal cyst was treated with antibiotics and heat from July 1994 through October 1994. [R. 240, 238, 248]. Removal of the cyst was accomplished on October 26, 1994 and follow-up notes indicate full recovery from the surgery. [R. 235, 237]. Another cyst was found and removed in November 1994, again with full recovery reported. [R. 234-235]. On December 15, 1994, Dr. Gorospe removed another pubic area cyst and, on December 27, 1994, was asked by Plaintiff to write a note "that she cannot return to work until this Saturday 12/31/94." [R. 230]. Dr. Gorospe recommended Plaintiff take Tylenol as needed for pain during the recovery period. [R. 232]. Another sebaceous cyst was reported on January 19, 1995, which was removed January 20, 1995. [R. 224, 229].

On November 3, 1995, Plaintiff was examined by David B. Dean, M.D. for the Disability Determination Unit. [R. 265-269]. He diagnosed: 1) irritable bowel syndrome, under poor medical control; 2) intermittent partial small bowel obstruction, secondary to adhesions, with resultant lower abdominal cramping pain, constipation, and bloating, refractory to medical care; and 3) peptic ulcer disease, by history, without complication, under fair medical control. [R. 267]. His "Medical Assessment of Ability to Do Work-Related Activities (Physical)" placed no physical restrictions on Plaintiff's ability to sit, stand or walk, use of feet and hands for repetitive movements, bending, squatting, crawling, climbing and reaching and no environmental restrictions. He determined Plaintiff was able to continuously lift and carry up to 5 pounds, frequently lift and carry 6-10 pounds, occasionally lift and carry 11-20 pounds, infrequently lift and carry 21 to 25 pounds and never able lift or carry over 26 pounds. [R. 268-269].

In December 1995, Plaintiff complained of chronic diarrhea, abdominal cramps and occasional rectal bleeding to Dr. Haresh Ajmera. [R. 297-300]. A colonoscopy was normal and medication was prescribed. *Id.* Plaintiff's medications form, presented to the ALJ at the hearing, listed Trazodone, Hyoscyanmine, Paxil, Erthromycin, Procardia and Levisner as current medications prescribed by Dr. Ajmera. [R. 302].

Contrary to Plaintiff's assertions, the ALJ properly considered Plaintiff's allegations of pain by reviewing her medical treatment, the effectiveness of her medications, her testimony regarding her daily activities and the consistency of her complaints of pain with the objective medical evidence. As the ALJ determined,

Plaintiff's medical evidence does not support a determination of disabling pain and Plaintiff's testimony alone cannot establish the existence of disabling pain. *Musgrave*, 966 F.2d at 1376. There is no medical evidence that Plaintiff's esophagitis has interfered in any functional way with her ability to work. None of Plaintiff's treating physicians reported that Plaintiff's pain was so constant and severe that Plaintiff could not work. Conversely, Dr. Gorospe noted in his treatment records on two occasions that Plaintiff was working. [R. 229, 230]. Subjective complaints of pain may not be disregarded solely because no objective evidence exists to support such claims. *Byron v. Heckler*, 742 F.2d 1232 (10th Cir. 1984). However, the medical records must be consistent with the nonmedical testimony as to the severity of the pain. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). And, as the ALJ properly determined, while Plaintiff does experience some pain, an inability to work pain-free is not sufficient reason to hold that she is disabled. *Gossett v. Bowen*, 862 F.2d 802, 807 (10th Cir. 1988). Plaintiff is correct that she need not prove she is bedridden or completely helpless to be found disabled.<sup>6</sup> However, in this case, the ALJ properly noted that Plaintiff's daily activities and the medical evidence established that her pain was not so severe as to preclude any substantial gainful employment. [R. 27]. *Talley*, 908 F.2d p. 587. The record shows that Plaintiff's esophagitis and gastritis are controllable with medication and her pelvic cysts are routinely removed immediately upon discovery. Side effects of medication, while reported by treating physicians,

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<sup>6</sup> Plaintiff cites *Thomas v. Sullivan*, 876 F.2d 666, 669 (8th Cir. 1989) and inserts what appears to be a quote from another case which cites *Thomas* in its discussion of this issue.

were not so severe that the medications were discontinued or that alternative methods of treatment were pursued.<sup>7</sup>

As to development of the record, Plaintiff stated in her brief that the objective medical evidence in this case "speaks for itself." The Court agrees and finds the record contains sufficient evidence to support the ALJ's determination that Plaintiff's pain is not disabling.

The ALJ considered the entire case record, including the objective medical evidence, Plaintiff's own statements about her symptoms and statements and other information provided by treating and examining physicians and other persons about the symptoms and how they affect Plaintiff, in light of the factors contained in *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987). The Court finds the ALJ's credibility determination was properly based upon substantial evidence. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts.

#### The Step Four Finding

Plaintiff contends the ALJ erred when he determined that she could return to her past relevant work because "she has never had 'past relevant work' to which she could return." [Plaintiff's Brief, p. 4].

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<sup>7</sup> The ALJ focused on Plaintiff's complaint of nausea caused by medication and stated there is no evidence that Plaintiff had mentioned this side effect to her treating physician. [R. 28]. However, the Court notes there is one reference of nausea in the record which apparently was remedied by an adjustment in medication. [R. 199]. This mistake does not constitute reversible error as the record supports the finding of the ALJ that Plaintiff's complaints of side effects from medication, along with her complaints of pain, were not fully credible. *Diaz v. Secretary of HHS*, 898 F.2d 774, 777 (10th Cir. 1990).

Plaintiff listed her jobs at Dataplex, Kamco and Residence Inn as 5 day-per-week jobs on the Vocational Report form. [R. 126]. Plaintiff performed her duties at those jobs as microfilm cataloger, hand packaging clerk and maid inspector, respectively. [R. 64-67]. Plaintiff stated on the Work Activity Report that her job at Kamco Candy Factory was four days per week at 10-12 hours per day. [R. 131]. Plaintiff testified that she started working temporary jobs in 1992 so that she would not have to worry about getting fired if she chose not to work on days that she didn't "feel good." [R. 53]. Plaintiff also testified that she worked part time at the Residence Inn Motel in 1990 because she was also trying to go to school during that time. [R. 44]. Part-time work may be considered substantial gainful activity. See 20 C.F.R. § 416.972(a). For the relevant period, earnings averaging more than \$300 per month create a presumption that a person engaged in substantial gainful activity. *Id.* § 416.974(b)(2)(vi); see also *Josefowicz v. Heckler*, 811 F.2d 1352, 1356 (10th Cir. 1987)(eight months of work was long enough to meet the requirements of SSR 82-62 and does not qualify as brief or sporadic activity).

Plaintiff contends that she could work only temporary part time jobs because of her pain. This argument leads directly back to her complaints of disabling pain, which the ALJ found to be not credible. Plaintiff also asserts the ALJ's statement that "she has never worked consistently even before she alleges that she became unable to work" equates to a finding of no past relevant work or substantial gainful activity in her entire life. [R. 9]. However, that comment was included in the ALJ's discussion of the factors he considered in determining Plaintiff's credibility. [R. 27]. The ALJ

noted that even prior to the time Plaintiff asserted her disability began, she had not worked consistently. This, again, is part and parcel of the ALJ's credibility determination. The fact that Plaintiff worked part-time, standing alone, is not enough to mandate a conclusion that she was not engaged in substantial gainful activity. Work activity is considered gainful "if it is the kind of work usually done for pay or profit, whether or not a profit is realized." 20 C.F.R. §404.1572(b). Substantial work activity "involves doing significant physical or mental activities." *Id.*

Other than the explanation of job requirements for the retail store that Plaintiff completed, [R. 130], there is no evidence that Plaintiff worked under such a special environment or under such accommodating circumstances to overcome the presumption that she engaged in substantial gainful activity. The retail job was not among the jobs listed as past relevant work which the ALJ determined Plaintiff could perform. Likewise, apart from Plaintiff's testimony, there is no evidence in the record that Plaintiff's condition required excessive absenteeism from her jobs. Finding nothing in the record to the contrary, the Court concludes that there is substantial evidence to support the finding of the ALJ that Plaintiff's jobs as microfilm cataloger, maid inspector and packaging clerk constitute work activity that is both substantial and gainful. The Court's review of the record finds no evidence to rebut the presumption of substantial gainful activity. The ALJ's conclusion that Plaintiff's past work qualified as substantial gainful activity is supported by substantial evidence.

The Court also finds that, even if Plaintiff could establish that she was incapable of performing her past relevant work, there is sufficient evidence in the record

establishing that, even with Plaintiff's current impairments, there are a significant number of other jobs in the national economy which she is capable of performing. That is, there is sufficient evidence in the record for the Commissioner to carry his burden at step five of the sequential evaluation process. The vocational expert identified three other jobs totaling 111,000 positions in the national economy that Plaintiff could perform with the limitations set forth by the ALJ. This is sufficient to carry the Commissioner's burden at step five. *Berna v. Chater*, 101 F.3d 631, 633 (10th Cir. 1996). The ALJ's alternative step five finding is not challenged by Plaintiff. *Id.*, citing: *Murrell v. Shalala*, 43 F.3d 1388, 1389-90 (10th Cir. 1994)("Since the unchallenged [rationale] is, by itself, a sufficient basis for the denial of benefits, [Plaintiff's] success on appeal is foreclosed – regardless of the merits of the arguments relating to [the challenged alternative].")

#### Mental Issues

Plaintiff claims the ALJ failed to evaluate the effects of her mental limitations in accordance with the regulations and SSR 85-15. She argues the ALJ's finding that she has "several moderate mental limitations" can be assumed to meet the criteria of SSR 85-15 which justifies a finding of disability when a "substantial loss of ability" to meet the basic work-related activities would severely limit the potential occupational base. [R. 10-11]. The Court disagrees with Plaintiff's contention. Plaintiff points to no medical evidence in the record to support her contention that her mental limitations resulted in substantial loss of ability to meet any of the basic work-related activities. It is well settled that subjective complaints alone are not sufficient to establish

disability. *Thompson v. Sullivan*, 987 F.2d 1482, 1488 (10<sup>th</sup> Cir. 1993). The only medical evidence in the record regarding Plaintiff's mental complaints, besides Plaintiff's testimony, is one note taken by Plaintiff's treating physician that she had reported to him an attempt to commit suicide. [R. 305]. There is no record of the treatment Plaintiff supposedly received at a hospital for this suicide attempt. *Id.* Again, the finding rests solely upon the ALJ's credibility determination which the Court concludes is supported by the record. Despite the lack of objective medical evidence, the ALJ found some mental limitations in Plaintiff's ability to perform work related activities. He attached a Psychiatric Review Technique Form ("PRTF") to his decision in accordance with 20 CFR §§ 404.1520a, 416.920a. Therefore, the Court finds the ALJ did not fail to evaluate the effects of her mental limitations, as alleged by Plaintiff. The Court also finds Defendant's argument that Plaintiff effectively waived this issue is without merit. The Court finds the ALJ's assessment of Plaintiff's mental limitations and his determination that those limitations did not preclude substantial gainful employment is supported by the evidence.

#### The Vocational Expert's Testimony

Plaintiff complains the ALJ forgot or ignored the testimony of the Vocational Expert (VE) that, assuming Plaintiff's testimony to be fully credible and substantially verified by medical evidence, she could not return to her past work or any other work on a full time basis. The hypothetical to which Plaintiff refers was one presented by her attorney after the ALJ had presented his hypothetical questions. In his decision denying benefits, the ALJ relied upon the VE's responses to his hypothetical questions

containing those restrictions the ALJ ultimately found to be supported by the record as a whole. In posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). The VE's response to a hypothetical that includes allegations not supported by substantial evidence is not binding on the ALJ. *Id.* The Court finds that the restrictions expressed by the ALJ in the hypothetical posed to the vocational expert and upon which the disability determination is based, are supported by substantial evidence. The Court finds that the ALJ's hypothetical questions to the vocational expert and his reliance upon the vocational expert's testimony in his decision were proper and in accordance with established legal standards.

#### Conclusion

The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 29<sup>th</sup> day of June, 1998.

  
FRANK H. MCCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUN 30 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JAMES R. GARRISON,  
SSN: 440-56-0095,

Plaintiff,

v.

KENNETH S. APFEL,  
Commissioner of the Social Security  
Administration,

Defendant.

CASE NO. 97-CV-510-M

ENTERED ON DOCKET  
DATE JUL 01 1998

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated  
this 30<sup>th</sup> day of JUNE, 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**F I L E D**

JUN 30 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JAMES R. GARRISON,  
440-56-0095 Plaintiff,

vs.

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,

Defendant.

Case No. 97-CV-510-M ✓

ENTERED ON DOCKET  
DATE JUL 01 1998

ORDER

Plaintiff, James R. Garrison, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>1</sup> In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might

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<sup>1</sup> Plaintiff's October 14, 1994, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held March 26, 1996. By decision dated April 24, 1996 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 24, 1997. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born June 28, 1951, and was 44 years old at the time of the hearing. He completed the 10th grade and has worked as a heating and air conditioning mechanic and service technician. He claims that he was unable to work between December 1993 and January 1995 which is the time between the onset of left hip pain and his recovery from hip replacement surgery. The ALJ determined that although Plaintiff could no longer perform his past relevant work, he retained the capacity to perform the full range of light work reduced by an inability to do work which requires repetitive pushing or pulling of leg controls, crouching, climbing ladders, exposure to vibration or temperature extremes, or more than occasional stooping, bending, kneeling, balancing, or climbing stairs. [R. 18]. Based on the testimony of a vocational expert, the ALJ concluded that there are a significant number of jobs in the regional and national economy that he could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining

whether a claimant is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence and requests that the Commissioner's decision be reversed and the case remanded for payment of back benefits for a closed period from December 1993 to January. Specifically, Plaintiff argues that the ALJ: (1) failed to properly analyze the medical record with respect to the Listings; (2) failed to consider Plaintiff's need to use crutches or a cane during the relevant time frame; and (3) failed to accord the appropriate weight to Plaintiff's treating physician. For the reasons expressed below, the Court holds that the existing record and findings will not support the denial of benefits on the ALJ's stated rationale and, therefore the case must be reversed and remanded.

The record reflects that in 1986, Plaintiff had a surgical replacement of his right hip due to avascular necrosis which is bone cell death caused by a deficient blood supply. *Dorland's Illustrated Medical Dictionary* 1103 (28th ed. 1994). On December 10, 1993, he developed problems with his left hip following an on-the-job injury to his hip and knee. The radiologist interpreting a bone scan performed December 29, 1993, reported that the findings were "suspicious for an occult impaction fracture."<sup>2</sup> [R. 133]. On December 30, 1993, Plaintiff's orthopedic surgeon, James O. Keenan, M.D., reported that he suspected Plaintiff had avascular necrosis on the left hip. [R. 155].

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<sup>2</sup> An impacted fracture is a "fracture in which one fragment is firmly driven into the other. *Dorland's Illustrated Medical Dictionary* 662 (28th ed. 1994).

An MRI performed January 3, 1994, revealed early changes of avascular necrosis of the left femoral head. [R. 130]. On January 6, 1994, Dr. Keenan advised Plaintiff of the need for core decompression and bone graft surgery and told him "[h]e also should be on crutches now and will be on crutches for six months post surgery." [R. 155].

Dr. Keenan's note of July 12, 1994, states:

James Garrison has avascular necrosis of the left femoral head. He was advised to have surgery January 6, 1994, but because of administrative problems, has not been able to schedule. He now has what may be some early collapse and I have referred him for a tomogram of the hip. Pending results of this, he will be scheduled for core decompression, grafting and simulator versus hemiarthroplasty.

[R. 154]. On September 26, 1994, Plaintiff underwent left total hip arthroplasty surgery. [R. 152]. The discharge instructions are not part of the record, but Dr. Keenan's October 6, 1994, office note reflects that Plaintiff was to have "protected weightbearing." *Id.* On November 3, 1994, Dr. Keenan noted he gave Plaintiff permission to "advance to a cane and may advance away from the cane when he walks without a limp." which indicates that Plaintiff was on crutches until that time. *Id.* On December 15, 1994, the doctor reported Plaintiff was walking without support. [R. 151]. Effective January 3, 1995, Dr. Keenan released Plaintiff to return to work. However, Plaintiff was restricted from lifting over 30 pounds and prohibited from squatting or climbing a ladder. [R. 151, 172].

The Listing of Impairments describe, for each of the major body systems, impairments which are considered severe enough to prevent a person from performing any gainful activity. Listing 1.11 requires the following:

Fracture of the femur, tibia, tarsal bone of pelvis with solid union not evident on X-ray and not clinically solid, when such determination is feasible, and return to full weightbearing status did not occur or is not expected to occur within 12 months of onset.

20 C.F.R. Pt. 404, Subpt. P, App.1. An ALJ is required to determine whether a claimant's impairment is equivalent to one of the listed impairments. *Clifton v. Chater*, 79 F.3d 1007, 1009 (10th Cir. 1996).

Concerning the listings, the ALJ stated:

Although the claimant's impairments are "severe" by Social Security definition, they, either singularly or in combination, do not meet or equal the severity of any impairment listed in Appendix 1 to Subpart P, Regulations No. 4. Disability, therefore, cannot be established under 20 CFR 404.1520(d).

[R. 14]. Despite the fact that the record contains significant medical evidence suggesting that Listing 1.11 may be applicable for the period from December, 1993 to January, 1995, the ALJ did not identify the relevant listing, discuss the specific medical evidence related thereto, or discuss the rationale for the determination that Plaintiff's impairments do not meet or equal a listed impairment.

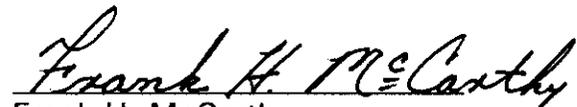
The ALJ's approach is clearly contrary to the mandate of the Social Security Act which requires the Commissioner to make findings of fact based on the evidence and to discuss the evidence, stating the reasons for any unfavorable decision. Where, as here, the ALJ's decision contains findings not accompanied by specific weighing of the evidence the Court cannot assess whether relevant evidence adequately supports the ALJ's conclusion that Plaintiff's impairments do not meet or equal a listed impairment,

or whether the correct legal standards were applied to arrive at that conclusion. *Clifton*, 79 F.3d at 1009. Therefore, this case must be remanded for the ALJ to reevaluate the case with respect to Listing 1.11 and to set out his reasons for his determination that Plaintiff's impairments do not meet or equal a listed impairment, should he arrive at that conclusion on remand.

Plaintiff's other assignments of error are well taken. However, the Court views them as being related to the ALJ's failure to adequately address the medical evidence related to Listing 1.11 for the period between December 1993 and January 1995. However, since the Court has concluded that the case must be remanded, the Court declines to engage in an extensive discussion of Plaintiff's remaining allegations.

The Commissioner's denial decision is REVERSED and the case REMANDED for further proceedings in accordance with this order.

SO ORDERED this 30<sup>th</sup> day of June, 1998.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUN 30 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

PANSY K. MARSHALL,  
SSN: 446-48-2999,

Plaintiff,

v.

KENNETH S. APFEL,  
Commissioner of the Social Security  
Administration,

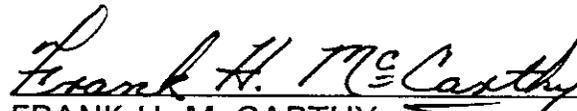
Defendant.

CASE NO. 97-CV-454-M

ENTERED ON DOCKET  
DATE JUL 01 1998

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 30<sup>th</sup> day of JUNE, 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

(15)

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

PANSY K. MARSHALL,  
446-48-2999

Plaintiff,

vs.

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,

Defendant.

Case No. 97-CV-454-M

FILED

JUN 30 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE JUL 01 1998

ORDER

Plaintiff, Pansy K. Marshall, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>1</sup> In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less

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<sup>1</sup> Plaintiff's February 24, 1995, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held April 17, 1996. By decision dated April 24, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 14, 1997. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born July 5, 1948, and was 47 years old at the time of the hearing. She has a high school education and formerly worked as a filing and photocopy clerk. She claims to have been unable to work since February 10, 1995, as a result of arthritis of the right hip, chronic back strain, and difficulty using her hands. The ALJ determined that Plaintiff's impairments limit her to light work activity. He found that Plaintiff is not disabled because she is capable of returning to her past work as a copying and file clerk as that work does not require the performance of activities precluded by her limitations. The case was thus decided at step four of the five-step evaluative sequence for determining whether Plaintiff is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to consider her

manipulative impairment; (2) failed to perform a proper pain and credibility analysis; (3) failed to link the findings on the Psychiatric Review Technique Form ("PRT") to substantial evidence; (4) failed to order a consultative examination; and (5) failed to inquire into the demands of her past work and make findings concerning those demands.

Plaintiff testified that her right side was paralyzed in 1967 but she has used her left hand to do her job. [R. 43]. She stated that she can use her left hand for repetitive motions, but that it gets tired. [R. 47]. She can use her right hand to lift weight with help from her left hand. *Id.* The medical records contain no reference to any paralysis of Plaintiff's left hand and arm.

According to the medical record, in December 1994 Plaintiff developed Bell's Palsy which affects the face, not the hands.<sup>2</sup> [R. 123]. On January 20, 1995, the doctor's noted Plaintiff's complaint that her eye watered and twitched. He observed that she was unable to form lips to whistle but that she was able to close her eye. [R. 112]. By January 25, the doctor noted that Plaintiff's face palsy was better, and by February 8, 1995, the Bell's palsy was resolving. [R. 110-11]. On February 24, 1995, Doctor Campbell completed an Oklahoma Employment Security Commission form entitled "Medical Statement of Ability to Work" and recorded that Plaintiff had been

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<sup>2</sup> Bell's palsy is unilateral paralysis of sudden onset, due to lesion of the facial nerve and resulting in characteristic distortion of the face. *Dorland's Illustrated Medical Dictionary* 1217 (28th ed. 1994).

unable to work since she became affected, but that full recovery was anticipated. [R. 123].

Plaintiff's treating physician, Dr. Chubb, attempted to complete a "Medical Assessment of Ability To Do Work-Related Activities (Physical)" form which requested an assessment of Plaintiff's ability to use her hands. Rather than complete the blanks provided on the form, Dr. Chubb gave the following narrative description of his assessment:

Patient weighs 206.9# and is 5'1" tall. Her knees & left hand hurt. She itches at night. She has high blood pressure. Her movements are grossly normal. There's no obvious deformity or limitation of motion. She takes Captopril, a diuretic, and ibuprofen. There is no objective way to complete this form with accuracy.

[R. 124-25]. In the space provided to list the objective medical findings that support his assessment, Dr. Chubb wrote: "Hypertension, Obesity, Mild osteoarthritis, Family history of Diabetes (M & F both) she probably is, too, but this hasn't been checked yet." *Id.* Dr. Chubb included the following remark: "These aren't much, but who will hire her and give her health insurance !???" *Id.*

In view of the absence of any medical evidence of limitation in the use of her hands, and Dr. Chubb's failure to identify any limitation, the Court finds that the ALJ did not err in failing to consider a manipulative impairment.

There is no support for Plaintiff's claim that the ALJ failed to apply the appropriate standards in the evaluation of her pain and credibility. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in

determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 95-5p and appropriately applied the evidence to those guidelines. The ALJ noted discrepancies between Plaintiff's claims and the medical record; that Plaintiff's treating sources have placed no limitations on her activities; that she takes only ibuprofen for pain; and Dr. Chubb's assessment of her ability to do work. [R. 20-21]. The Court rejects Plaintiff's suggestion that her long work history should outweigh the other factors the ALJ considered in weighing her credibility. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the legal standards established by the Commissioner and the courts.

Plaintiff argues that the case should be remanded because the ALJ failed to discuss the evidence he considered in reaching the conclusions he expressed on the Psychiatric Review Technique Form ("PRT"). The Tenth Circuit has ruled that "there must be competent evidence in the record to support the conclusion recorded on the [PRT] form and the ALJ must discuss in his opinion the evidence he considered in reaching the conclusions expressed on the form." *Washington v. Shalala*, 37 F.3d 1437, 1442 (10th Cir. 1994) (quoting *Woody v. Secretary of Health & Human Servs.*, 859 F.2d 1156, 1159 (3rd Cir. 1988)). Concerning his conclusions on the PRT, the ALJ noted:

[T]he claimant testified that she has emotional problems due to family deaths and divorce and was prescribed antidepressant medication the day before the hearing after reporting depression and sleep difficulties to her treating source. The claimant was not referred to a mental health specialist and has not sought psychiatric treatment on her own. The Administrative Law Judge finds that the claimant has experienced slight limitations in her activities of daily living and slight difficulties in maintaining social functioning. The claimant seldom experiences deficiencies of concentration, persistence, or pace, and has never had episodes of deterioration or decompensation. The Administrative Law Judge finds that the claimant's depression is mild and situational, and would not have any effect on her ability to perform work-related activities.

[R. 19]. Elsewhere in the decision, the ALJ noted that Plaintiff testified that she has emotional problems due to the death of a child, parents, a divorce, that she has memory problems and is on antidepressant medication. [R. 18]. He also noted that the record does not reflect that she ever reported memory problems to her treating sources. [R. 20]. Although the ALJ could have expanded his discussion to include the information that Plaintiff's divorce took place in 1976, her mother's death occurred in 1979, and she worked continually between 1972 and 1995, the Court finds that the ALJ adequately discussed the evidence he considered in reaching the conclusions expressed on the PRT form.

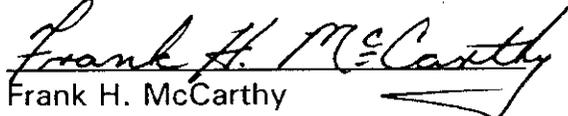
Plaintiff asserts that the ALJ erred in failing to order a consultative medical examination. "[T]he ALJ should order a consultative exam when evidence in the record establishes the reasonable possibility of the existence of a disability and the result of the consultative exam could reasonably be expected to be of material assistance in resolving the issue of disability." *Hawkins v. Chater*, 113 F.3d 1162,

1169 (10th Cir. 1997) However, the record contains no evidence to suggest that a consultative examination would have produced material information. There is no direct conflict in the medical evidence requiring resolution; the medical evidence in the record is not inconclusive; and additional tests are not required to explain a diagnosis already contained in the record. *See Id. at 1166.* The Court finds that the ALJ did not err in failing to order a consultative examination.

There is no merit to Plaintiff's claim that the ALJ failed to inquire into the demands of her past work. His discussion of the walking, lifting, standing, sitting, bending and reaching demands is found at page 21 of the record along with citation to the *Dictionary of Occupational Titles* section for Plaintiff's former position.

The Court finds there is substantial evidence in the record to support the ALJ's decision and that the ALJ performed the proper analysis. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 30<sup>th</sup> day of June, 1998.

  
Frank H. McCarthy  
United States Magistrate Judge

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

**FILED**

JUN 30 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MULK RAJ DASS, )  
)  
Plaintiff, )  
)  
vs. )  
)  
KENNETH P. SNOKE, Assistant )  
United States Attorney; and )  
STEPHEN LEWIS, United States )  
District Attorney, )  
)  
Defendants. )

No. 98-CV-130 BU (J)

ENTERED ON DOCKET

DATE JUL 01 1998

**ORDER**

Plaintiff, a federal prisoner, is currently confined in the Metropolitan Detention Center in Brooklyn, New York, but was previously confined in the Federal Correctional Institute in Oakdale, Louisiana when this action was instituted. Plaintiff originally filed this action in the United States District Court for the Western District of Louisiana. However, that court determined venue was not proper, and pursuant to 28 U.S.C. § 1406, transferred the case to the Northern District of Oklahoma. The court record indicates Plaintiff has paid the \$150.00 filing fee to commence this action, filed pursuant to 42 U.S.C. § 1983, against an Assistant U.S. Attorney and the U.S. Attorney for the Northern District of Oklahoma, in their official capacities.

In this pro se complaint, filed "under the Civil Rights Act, 42 U.S.C. § 1983," Plaintiff alleges that Defendants testified "in their capacity as Assistant United States Attorney and United States Attorney represented the interests of the U.S. government" in his criminal case resulting from an Indictment returned by the grand jury sitting in Tulsa, Oklahoma. Plaintiff contends the

2

Defendants' testimony at his May 5, 1995, bond hearing was "nonfactual and damaging" with regard to the following: an outstanding arrest warrant against Plaintiff in London, England; a bond posted in a California case; that Plaintiff was an economic danger to society and a flight risk; and improprieties in Plaintiff's immigration status. Plaintiff asserts Defendants "knowingly, intelligently and voluntarily mis-represented material facts to the Court which resulted in his incarceration at the Tulsa County Jail. The harsh conditions at the County Jail have caused permanent damage to the Plaintiff's health and substantial irreversible financial losses due to the malicious [sic] actions of the defendants." Plaintiff further alleges that Defendants acted in violation of his "first, fifth, sixth, eighth, and fourteenth Amendments Rights of the United States Constitution." Plaintiff seeks monetary damages and a "full Jury Trial" in this matter. (Docket #1).

### ANALYSIS

Since Plaintiff is proceeding pro se, the Court must liberally construe his pleading. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). While pro se complaints are held to less stringent pleading requirements, it is not the proper function of the court to assume the role of advocate. The broad reading of the plaintiff's complaint does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based. Id. A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff. Id. at 1109.

Nevertheless, pursuant to Fed. R. Civ. P. 12(b)(6), the Court shall, on its own motion, dismiss Plaintiff's complaint. While dismissals under Rule 12(b)(6) typically follow a motion to dismiss, a court may dismiss sua sponte where it is patently obvious that the plaintiff cannot prevail on the

facts alleged, and allowing an opportunity to amend would be futile. Hall, 935 F.2d at 1109-10.

The Court concludes that Plaintiff cannot prevail on the facts alleged as it is clear from the face of the complaint that Plaintiff's claims against the individual Defendants are not brought "under color of state law," are barred by the two-year statute of limitations, and Defendants are immune from suit. See Fratus v. Deland, 49 F.3d 673, 674-75 (10th Cir. 1995) (district court may consider affirmative defense sua sponte when the defense is "obvious from the face of the complaint" and "[n]o further factual record [is] required to be developed").

CLAIMS UNDER COLOR OF STATE LAW, 42 U.S.C. 1983

42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient, a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law "of any State or Territory." Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 113 S.Ct. 1160, 1163 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

Mr. Lewis and Mr. Snoke, as federal officials, cannot act under color of state law as required

under section 1983. See Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (the state action test requires: (1) that the deprivation be caused by the exercise of a right or privilege created by the state or by a person for whom the state is responsible, and (2) that the actor must be someone who is a state actor). Plaintiff has not alleged that the federal officials in this case acted under anything other than federal law, and as a result, section 1983 does not apply to his suit. Therefore, Plaintiff's claims against Assistant U.S. Attorney Snoke and U.S. Attorney Lewis could be dismissed on that basis.

However, this Court recognizes the general principle of affording pro se litigants' pleadings liberal construction. See Estelle v. Gamble, 429 U.S. 97, 106 (1976). Therefore, although Plaintiff does not cite Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), as the basis for jurisdiction, the Court liberally construes the complaint as a Bivens action and finds the invocation of jurisdiction satisfactory.

#### STATUTE OF LIMITATIONS

It is well-established that "a Bivens action, like an action brought pursuant to 42 U.S.C. § 1983, is subject to the statute of limitations of the general personal injury statute in the state where the action arose." Industrial Constructors Corp. v. U.S. Bureau of Reclamation, 15 F.3d 963, 968 (10th Cir. 1994). The applicable statute of limitations for civil rights actions under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another." Okla. Stat. tit. 12, § 95 (Third); Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988). However, federal law, not state law, controls the issue of when a federal cause of action accrues. Industrial Constructors Corp., 15 F.3d at 968-69 (citing Baker v. Board of Regents of the State of Kansas, 991 F.2d 628, 632 (10<sup>th</sup> Cir. 1987)). The statute of limitations begins to run when the plaintiff knows or has reason to

know of the existence and cause of the injury which is the basis of his action. Id. at 969 (citations omitted).

The Court finds that Plaintiff's claims accrued May 5, 1995, when Defendants testified at Plaintiff's bond hearing. On that date, Plaintiff knew or had reason to know of the existence and cause of the injury forming the basis of this lawsuit. Therefore, Plaintiff's action would be time-barred if brought after May 5, 1997. See Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989) (the State of Oklahoma has no tolling provision for civil lawsuits filed by prisoners). Plaintiff filed the instant lawsuit on December 12, 1997. Clearly, Plaintiff has failed to meet the statutory two year filing requirement. Therefore, Plaintiff's lawsuit filed on December 12, 1997, is untimely since the applicable limitations period is two (2) years.

#### ABSOLUTE IMMUNITY

In addition, Plaintiff's claims must be dismissed because as U.S. Attorneys, these Defendants are shielded by absolute immunity while acting within the course of their duties in initiating prosecution and presenting the government's case. Tripathi v. United States Immigration and Naturalization Serv., 784 F.2d 345, 347 (10<sup>th</sup> Cir. 1986); see also Imbler v. Pachtman, 424 U.S. 409, 427-31 (1976) (42 U.S.C. § 1983 case against prosecutor); Dohaish v. Tooley, 670 F.2d 934, 938 (10<sup>th</sup> Cir. 1982) (42 U.S.C. § 1983 case against prosecutor); Butz v. Economou, 438 U.S. 478, 498-99 and nn. 25 and 26 (1978) (immunity available to federal defendants equivalent to that available to state defendants). All of Plaintiff's allegations against the Defendants involved the initiation of the government's case against Plaintiff. Under these circumstances, and unlike qualified immunity, the *sua sponte* dismissal of a suit is proper where it is obvious from the plaintiff's

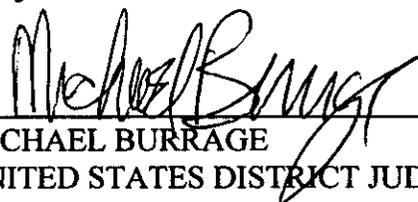
allegations that the defendant is absolutely immune from suit. See McKinney v. Oklahoma Dept. of Human Services, 925 F.2d 363, 365 (10<sup>th</sup> Cir. 1991) (upholding *sua sponte* dismissal because it was patently obvious that no claim was stated in the complaint and no amendment could cure the defect); Pugh v. Parish of St. Tammany, 875 F.2d 436, 438 (5<sup>th</sup> Cir. 1989) (upholding *sua sponte* dismissal of § 1983 claim because defendants were absolutely immune from suit). As a result, the Court concludes that Plaintiff's complaint should be dismissed.

### CONCLUSION

For the above-stated reasons, the Court concludes that Plaintiff has failed to state a claim upon which relief can be granted and the Complaint should be dismissed with prejudice.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Plaintiff's Complaint is **dismissed with prejudice** pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Any pending motion is **denied as moot**.

SO ORDERED THIS 30<sup>th</sup> day of June, 1998.

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

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

**FILED**

JUN 30 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RADCO, INC., an Oklahoma corporation, )

Plaintiff, )

vs. )

CUSTOM CONTROLS CORPORATION, )  
an Oklahoma corporation; and )  
PETROSIN PRODUCTS PTE LTD, a )  
Singapore entity, doing )  
business in the United States )  
as RELLAIRE, LTD., )

Defendants. )

Case No. 98CVO 422BU(E)

ENTERED ON DOCKET

DATE JUL 01 1998

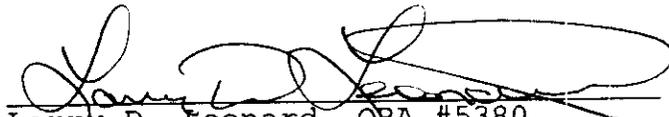
ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 30<sup>th</sup> day of June, 1998, this matter coming on before me the undersigned United States District Judge and having received the Joint Motion for Dismissal, finds as follows:

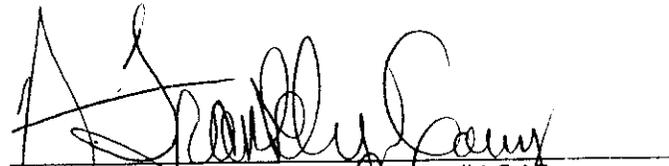
That each of the parties thereto has entered into a settlement agreement. Pursuant to the terms of the settlement agreement, this action is now DISMISSED WITH PREJUDICE insofar as and only insofar as the Plaintiff's cause of action against the Defendant, Custom Controls Corporation, and the Plaintiff shall be forever barred from pursuing this matter further against the Defendant. Each party shall bear its or their own attorneys' fees and costs incurred in this action.

  
United States District Judge

APPROVED AS TO FORM AND CONTENT:



Larry D. Leonard, OBA #5380  
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(918) 747-9654  
Attorneys for Plaintiff,  
Custom Controls Corporation



ENTERED ON DOCKET

DATE 7-1-98

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

**FILED**

JUN 30 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARY SHIRLEY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 OKLAHOMA FIXTURE COMPANY, )  
 )  
 )  
 Defendant. )

No. 96-C-974-K

**FINDINGS OF FACT**  
**AND**  
**CONCLUSIONS OF LAW**

The above-styled case was tried to the Court without a jury on March 18, 1998. Post-trial briefing was completed April 6, 1998. After considering the pleadings, the testimony and exhibits admitted at trial, all of the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following Findings of Fact, Conclusions of Law and Judgment, in accordance with Rule 52 F.R.Cv.P., as follows:

**FINDINGS OF FACT**

1. This was tried as an action brought by the plaintiff Mary Shirley against defendant for discrimination under the Americans with Disabilities Act ("ADA") and for retaliatory discharge under Oklahoma workers' compensation law.

2. On July 22, 1986, plaintiff was employed as a trainee carpenter by Oklahoma Fixture Company ("OFC"), a manufacturer of

retail store fixtures and architectural millwork.

3. Plaintiff completed a four year apprenticeship program and was then made a "B Class" carpenter.

4. Plaintiff began complaining about pain in her wrist in March, 1994. Plaintiff told her foreman, Jay Hamilton, who told plaintiff to see Susan Utter, OFC's benefits and workers' compensation director. Plaintiff was treated by Dr. Dewitt. Utter acknowledged receiving a report from Dr. Dewitt.

5. Plaintiff filed a workers' compensation claim regarding her wrist on March 22, 1995. The claim had not been resolved at the time of trial, but the workers' compensation court entered an interim order of temporary total disability payments.

6. Plaintiff began experiencing problems with her left foot in July, 1994.

7. Plaintiff went to see Dr. Dunitz, who prescribed anti-inflammatory drugs and a surgical shoe. He also determined that she should remain off work until September, 1994. Plaintiff delivered to OFC's nurse a note to that effect from Dr. Dunitz.

8. After her return, plaintiff again complained about foot pain and was referred on October 5, 1994 to Dr. Francis, who prescribed a removable cast, ultrasound therapy and anti-inflammatory drugs. Dr. Francis determined that Shirley's foot ailments stemmed from a congenital "accessory bone" and took her off work from October 5, 1994 until October 19, 1994. According to Dr. Francis' letter of November 11, 1994 (Plaintiff's Exhibit 3), plaintiff upon her return was permitted to work only 8 hours per

day, but was required to work six days a week rather than five. Plaintiff's pain returned. Dr. Francis prescribed additional therapy. Dr. Francis states in the letter that "I believe that this discomfort is caused by or aggravated by the patient's work." Plaintiff testified that Utter acknowledged receipt of the Dr. Francis letter. (As the Court ruled at trial, the Utter statement is not hearsay pursuant to Rule 801(d)(2)(A) & (D) F.R.Evid.).

9. According to plaintiff, on January 19, 1995 she then met with Utter to discuss plaintiff's condition.

10. Utter told plaintiff that the company was not responsible for the problems arising from the accessory bone, but agreed to pay plaintiff for the time she was off work from August 5, 1994 until October 19, 1994 under temporary total disability for aggravation of a pre-existing condition.

11. Plaintiff again complained about the problems with her foot on February 9, 1995, and a few days later went to see a doctor who took her off work.

10. Plaintiff claims that she called Ms. Utter at this time and told her that plaintiff wanted to file a workers' compensation claim. Ms. Utter, according to plaintiff, said that Utter would not file such a claim on plaintiff's behalf because Utter did not believe the company was responsible for congenital conditions.

11. Ms. Utter, however, did encourage plaintiff to take advantage of the company's new short term disability insurance benefits. Plaintiff followed this advice and filled out an application, stating on it that her foot problems were not job-

related.

12. On March 22, 1995, Dr. Francis released plaintiff to return to work without any restrictions. Plaintiff took the release to the company's nurse, Martha Bruce, who informed her that she should report to the office of Bob Stringer, OFC's human resources director at the time.

13. Stringer informed plaintiff that because she had not worked on 180 calendar days in the previous twelve months, she was being terminated pursuant to Article 5.5 of the collective bargaining agreement which provided:

Any employee shall lose his seniority rights under the following conditions:

\*\*\*

F. With the exception of lay-off, if he has performed no work for the Company for a period of one hundred eighty (180) calendar days in a twelve (12) month period (the 180 calendar days does not mean consecutive days) without regard for the reason the employee has performed no work for the Company for such period.

14. The decision to terminate plaintiff on March 22, 1995 had been made prior to this meeting by Mark Cavins, OFC's Vice President for Production and part owner.

15. After she was terminated, plaintiff went to a workers' compensation attorney who filed claims on her behalf, alleging injuries to her hands, wrists, shoulders and left foot. The claims were filed March 25, 1995.

16. On May 16, 1996, the Workers' Compensation court determined that the injury to plaintiff's left foot was actually an on-the-job injury and ruled her to be eligible for temporary total

disability benefits from October 19, 1994, and on February 11, 1995 to the date of the court's order and for up to 52 weeks thereafter. (These dates appear overlapping, but have been quoted from the order of the Workers' Compensation Court).

17. On March 27, 1995, plaintiff filed a grievance over her termination that was submitted to binding arbitration. The arbitrator ruled in favor of plaintiff, holding that the 180-day limit on missed work should not include days when OFC's plant was closed or vacation days when no work could be done. Defendant sought to vacate the arbitrator's award through a lawsuit in this Court. Judge Thomas R. Brett of this Court denied the request to vacate the arbitrator's award, and Judge Brett's decision was affirmed by the Tenth Circuit Court of Appeals (No. 97-5009). Following the appellate decision, defendant advised plaintiff that she should return to work within five working days of the date of the letter or within three working days of having been fully released by a physician.

18. Plaintiff has not returned to work since March 22, 1995, asserting that she is physically unable to do so because of her foot ailments.

19. At the conclusion of the evidence, plaintiff conceded defendant's motion for judgment as a matter of law as to plaintiff's ADA claim. The Court denied defendant's motion as to the state-law retaliatory discharge claim.

To the extent that any of these Findings of Fact constitute Conclusions of Law, they should be so considered.

### CONCLUSIONS OF LAW

1. This is a civil action arising under the Oklahoma Workers' Compensation Act, 85 O.S. §§1-9. The Court has subject matter jurisdiction under 28 U.S.C. 1367, that is, supplemental jurisdiction of a state law claim.

2. The Court has personal jurisdiction over the parties and venue is proper.

3. In a case of alleged retaliation, the plaintiff must first make a prima facie case by showing (1) employment, (2) on-the-job injury, (3) medical treatment which put the employer on notice that treatment had been rendered for a work-related injury and (4) consequent termination. Blackwell v. Shelter Mut. Ins. Co., 109 F.3d 1550, 1554 (10<sup>th</sup> Cir.1997). Once the plaintiff has established a prima facie case, the burden shifts to the employer to articulate a legitimate non-discriminatory reason for its action. Finally, if the employer satisfies this burden, the plaintiff must then demonstrate that her termination was significantly motivated by retaliation for her exercise of statutory rights, or by proving the proffered reason is pretextual. Id.

4. Defendant argues that plaintiff has failed to establish a prima facie case because it is undisputed that she filed no workers' compensation claims until after she was terminated. The Court disagrees. The testimony established that plaintiff made

inquiry of Utter regarding such a filing, but that Utter refused to file a workers' compensation claim on plaintiff's behalf.<sup>1</sup> Clearly, the employer had adequate notice of the medical treatment undertaken, as Blackwell requires. Plaintiff also presented sufficient evidence of Utter's hostility to any workers' compensation claim relating to plaintiff's foot to establish "consequent termination".

5. Defendant has met its burden of articulating an appropriate non-discriminatory reason for its action. Defendant relied upon its interpretation of the collective bargaining agreement in the discharge decision.

6. Moving to the third stage of the inquiry, the Court concludes the reasons offered by defendant were a pretext for its true retaliatory motive. Plaintiff was discharged immediately upon her return to work. While temporal proximity alone is not dispositive, it is a factor which the Court may consider. Wallace v. Halliburton Co., 850 P.2d 1056, 1059 (Okla.1993). Utter had refused to file a workers' compensation claim on plaintiff's behalf.<sup>2</sup> Further, defendant's interpretation of the collective bargaining agreement was rejected by the arbitrator. Defendant makes much of the fact that Judge Brett did not find the interpretation to have been made in such "bad faith" as to warrant

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<sup>1</sup>Utter did not testify at trial.

<sup>2</sup>Under the circumstances, the Court does not take as any sort of admission the fact that plaintiff checked the box regarding "non-work related" injury on the short-term disability form. Utter had already told plaintiff that Utter did not consider the injury work-related.

an award of attorney fees to plaintiff's union in the previous litigation. This ruling in no way binds this Court from making its ruling in a different context. This Court concludes that an interpretation which permits the discharge of an employee for "missing work" on a vacation day when the plant was closed is sufficiently dubious that, coupled with the timing of the discharge, the inference of pretext should be drawn. It is also significant that the plaintiff was the first employee to be discharged under this interpretation. In sum, plaintiff has met its ultimate burden of proving retaliatory discharge under 85 O.S. §5(A)(1).

7. Plaintiff also asserts a claim under 85 O.S. §5(A)(2), which prohibits an employee's discharge "during a period of temporary total disability solely on the basis of absence from work". The Court rejects this claim. While no case law has yet interpreted this provision, the Court concludes that the phrase "temporary total disability" implies an adjudication by the workers' compensation court. No such adjudication had taken place at the time of plaintiff's discharge. Adopting plaintiff's argument herein would expose employers to a form of ex post facto liability.

8. Regarding damages, it is established that mental anguish damages may be recovered when an employee is discharged in violation of the Oklahoma Workers' Compensation Act. Mantha v. Liquid Carbonic Industries, 839 P.2d 200, 205 (Okla.Ct.App.1992). Plaintiff testified in a largely general way regarding inability to

sleep, depression, stress and the impact on her family. Testifying to the same effect was plaintiff's husband. Defendant argues that this testimony lacks sufficient specificity to justify any award. The Court disagrees. Even discounting much of the testimony as vague, the Court finds plaintiff established genuine injury in the amount of \$10,000.00.

9. Plaintiff also seeks punitive damages, which are allowable in retaliatory discharge cases. Mantha, 839 P.2d at 205; 85 O.S. §6. However, the Court finds that plaintiff has failed to establish that defendant acted with "reckless and wanton disregard of another's rights", id., and will therefore award no punitive damages.

10. Plaintiff has, appropriately, not made a request for attorney fees. Such an award is not proper in an action of this type. Wallace, 850 P.2d at 1060-61 (Okla.1993).

To the extent that any of these Conclusions of Law constitute Findings of Fact, they should be so considered.

It is the Order of the Court that judgment be entered in favor of the plaintiff and against the defendant.

ORDERED this 30 day of June, 1998.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

DATE 7-1-98

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

KELA MARIE GREGORY, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KARIN GARLAND, individually and )  
 in her official capacity as Court )  
 Clerk of Mayes County, Oklahoma; )  
 REGINA HARRIS, individually and in )  
 her official capacity as Deputy )  
 Court Clerk of Mayes County, )  
 Oklahoma; HAROLD BERRY, )  
 individually and in his official )  
 capacity as Sheriff of Mayes )  
 County, Oklahoma; CARL SLOAN, )  
 individually and in his official )  
 capacity as Jail Administrator of )  
 Mayes County, Oklahoma; and BOARD )  
 OF COUNTY COMMISSIONERS OF MAYES )  
 COUNTY, OKLAHOMA, )  
 )  
 Defendants. )

Case No. 96-CV-1171-E

**FILED** 17  
JUN 30 1998

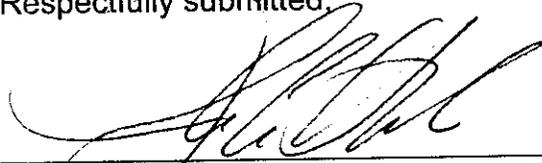
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JOINT STIPULATION OF DISMISSAL**

The Plaintiff Kela Marie Gregory and the Defendants Karin Garland, individually and in her official capacity as Court Clerk of Mayes County, Oklahoma; Regina Conn, individually and in her official capacity as Deputy Court Clerk of Mayes County, Oklahoma; Harold Berry, individually and in his official capacity as Sheriff of Mayes County, Oklahoma; and Board of County Commissioners of Mayes County jointly stipulate that the above-referenced case be dismissed with prejudice pursuant to Fed. R. Civ. P. 41 (a)(1) to the refiling thereof.

maury  
c/mbel  
c/s.

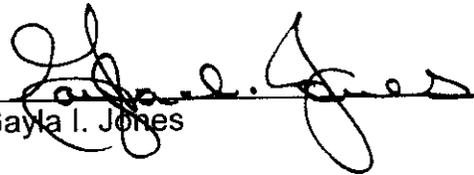
Respectfully submitted,



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John Harlan  
Harlan & Associates, P.C.  
P.O. Box 1326  
Sapulpa, OK 74067  
Phone: (918) 227-2590  
Fax: (918) 227-1914

ATTORNEY FOR PLAINTIFF



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Gayla I. Jones

COLLINS, ZORN, JONES & WAGNER, P.C.  
429 N.E. 50th Street, Second Floor  
Oklahoma City, OK 73105-1815  
Phone: (405) 524-2070  
Fax: (405) 524-2078

ATTORNEY FOR DEFENDANTS

ENTERED ON DOCKET

DATE 7-1-98

5/2

UNITED STATES DISTRICT COURT **FILED**

FOR THE NORTHERN DISTRICT OF OKLAHOMA JUN 30 1998

FOUR CORNERS BOAT DOCK )  
 AND MARINAS, INC. )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 TRANSCONTINENTAL INSURANCE )  
 CO., a CNA INSURANCE CO., )  
 a New York Corporation )  
 and MEECO MARINAS, INC., )  
 )  
 Defendants. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97CV608 K (W)

**STIPULATION FOR DISMISSAL WITH PREJUDICE OF DEFENDANTS  
TRANSCONTINENTAL INSURANCE CO. AND MEECO MARINAS, INC.**

COMES NOW Plaintiff, Four Corners Boat Dock and Marinas, Inc., by and through its attorney of record, Kenneth L. Brune, of the firm Brune & Neff, joining with Defendant, Transcontinental Insurance Co., by and through its attorney of record, Gerald E. Durbin, II, of the firm Durbin, Larimore & Bialick, and submit the following stipulation to the Court for an Order of Dismissal of the Defendants Transcontinental Insurance Co. and Meeco Marinas, Inc. from the above-captioned matter.

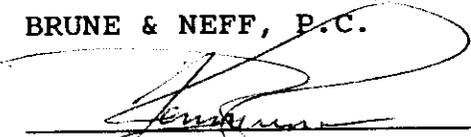
It is stipulated and agreed by and between the parties that the Court may enter an Order dismissing Defendants Transcontinental Insurance Co. and Meeco Marinas, Inc. from the above-captioned matter with prejudice against the filing of a future action thereon, for the reason that the parties have entered into a compromise settlement, whereby Defendant Transcontinental Insurance Co. paid to Plaintiff the sum of Sixty Five Thousand and

manf  
c/m/c  
C/T.

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No/100 Dollars (\$65,000.00), and obtained a full, final and complete release of any and all claims of Plaintiff.

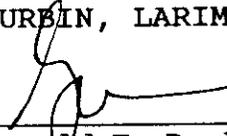
BRUNE & NEFF, P.C.

By: 

Kenneth L. Brune, Esq.  
401 South Boston, Suite 230  
Tulsa, Oklahoma 74103  
Attorney for Plaintiffs

and

DURBIN, LARIMORE & BIALICK

By: 

Gerald E. Durbin, II, OBA #2553  
920 North Harvey  
Oklahoma City, OK 73102-2610  
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Facsimile: (405) 235-0551  
Attorney for Defendant  
Transcontinental Insurance Co.

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