

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

F I L E D

JUL 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NORRIS WAUQUA,

Petitioner,

vs.

RON CHAMPION,
Warden,

Respondent.

No. 99-CV-0226-B(E)

ENTERED ON DOCKET
JUL 30 1999

ORDER

Comes on for consideration Petitioner's Objections to Magistrate's Report and Recommendation (Docket # 12) in which the Magistrate recommends the action be transferred to the Western District of Oklahoma. Petitioner objects to the Magistrate's conclusion that Petitioner's Petition was filed under 28 U.S.C. § 2254 and that a Petition brought under that section cannot be filed to challenge the validity of Petitioner's conviction and sentence. Petitioner does not, however, object to the recommended transfer and in fact concurs that the Western District is an appropriate forum even though he does not agree with the Magistrate's characterization of the issues.

The Court has conducted a *de novo* review of the record and concludes that all issues now before this Court should be decided by the United States District Court for the Western District of Oklahoma which previously addressed a prior writ of habeas

corpus brought under §2254 by Petitioner.

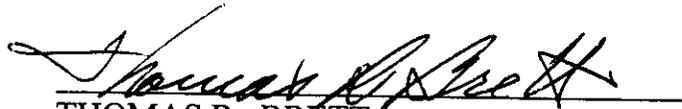
Title 28 U.S.C. §2241(d) provides that when “an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.”

In this instance, Petitioner is incarcerated at Dick Conner Correctional Center in Hominy, Oklahoma, within the Northern District of Oklahoma. He was convicted in Cotton County, Oklahoma, within the Western District of Oklahoma. A previous application for writ of habeas corpus brought pursuant to §2254 was determined by the Western District of Oklahoma and its decision was affirmed by the Tenth Circuit Court of Appeals. The Western District is therefore the appropriate forum to determine if the issues raised herein have already been determined in the prior proceeding and whether there is merit to any constitutional issues now newly raised.

Witnesses and evidence in support of Petitioner’s claim are most likely to be located in the Western District of Oklahoma thereby making it the most convenient forum.

IT IS THEREFORE ORDERED THAT this matter be transferred to the Western
District of Oklahoma.

IT IS SO ORDERED this 27th day of July, 1999.

A handwritten signature in black ink, appearing to read "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

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

FILED

JUL 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARVIN SUMMERFIELD and)
DAVID CORNSILK,)
)
)
 Plaintiffs,)
)
 v.)
)
 MARK MCCOLLOUGH, ET AL.,)
)
)
 Defendants.)

Case No. 98-CV-0328-B(EA) /

ENTERED ON DOCKET

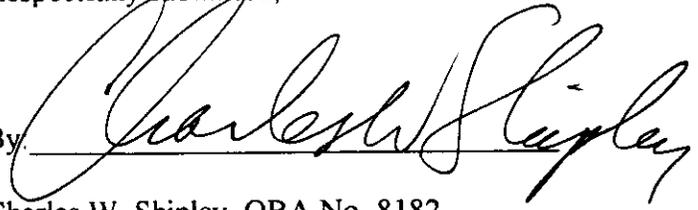
JUL 30 1999

**PLAINTIFFS'
DISMISSAL WITHOUT PREJUDICE
OF DEFENDANT LISA FINLEY**

COME NOW the Plaintiffs Marvin Summerfield and David Cornsilk and they hereby dismiss
Defendant Lisa Finley, without prejudice, in the above-referenced action.

Respectfully submitted,

By



Charles W. Shipley, OBA No. 8182
Mark B. Jennings, OBA No. 10082
Jamie Taylor Boyd, OBA No. 13659
SHIPLEY, JENNINGS & CHAMPLIN, P.C.
201 West Fifth Street, Suite 400
Tulsa, Oklahoma 74103
(918) 582-1720

ATTORNEYS FOR THE PLAINTIFFS
MARVIN SUMMERFIELD & DAVID
CORNSILK

dl

25

ck

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 30th day of July, 1999, a true and correct copy of the above document was mailed to the following:

Lee I. Levinson, Esq.
Ronald C. Kaufman, Esq.
Bodenhamer & Levinson
5310 E. 31st St., Suite 1100
Tulsa, OK 74135

Robert S. Lafferrandre, Esq.
Pierce, Couch, et al.
1109 N. Francis Avenue
P.O. Box 26350
Oklahoma City, OK 73126-0350

Jason Wagner, Esq.
Collins, Zorn, Jones & Wagner
429 N.E. 50th Street, 2nd Floor
Oklahoma City, OK 73105-1815

Janice Walters Purcell, Esq.
Diana Fishinghawk, Esq.
Cherokee Nation
Law & Justice Office
P.O. Box 948
Tahlequah, OK 74465

Mike McBride, Esq.
G. Steven Stidham, Esq.
Sneed Lang, P.C.
2 West 2nd Street, Suite 2300
Tulsa, Oklahoma 74103-3136

John B. Hayes, Esq.
Hayes & Magrini
P.O. Box 60140
Oklahoma City, OK 73146-0140

Frank Sullivan Jr., Esq.
105 N. Oak St.
P.O. Box 768
Sallisaw, OK 74955-0768

Keith A. Ward, Esq.
John K. Dubiel, Esq.
Richardson & Ward
6846 South Canton, Suite 200
Tulsa, OK 74136

Phil Richards, Esq.
9 East 4th Street, Suite 910
Tulsa, OK 74103

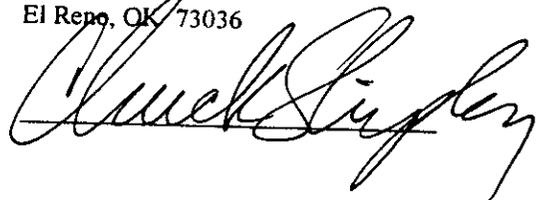
Tim K. Baker, Esq.
Baker & Baker
303 W. Keetoowah
Tahlequah, OK 74464

Lloyd E. Cole, Jr., Esq.
120 W. Division Street
Stilwell, OK 74960

Joseph H. Paulk, Esq.
Jones, Givens, Gotcher & Bogan
15 E. 5th Street, Suite 3800
Tulsa, OK 74103

Kenneth M. Smith, Esq.
Riggs, Abney, Neal, Turpen, et al.
4554 S. Harvard, Suite 200
Tulsa, OK 74135

Joel Thompson - FPC El Reno
#03574
P.O. Box 1500
El Reno, OK 73036



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

LUKE ROBINSON,)
)
 Petitioner,)
)
 vs.)
)
 STEVEN KAISER, Warden,)
)
 Respondent.)

ENTERED ON DOCKET

DATE JUL 30 1999

Case No. 99-CV-0133-K (E) ✓

FILED

JUL 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #7) entered on May 26, 1999, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that Respondent's motion to dismiss (#3) be granted and the petition for writ of habeas corpus (#1) be dismissed as barred by the § 2244(d) statute of limitations. On June 3, 1999, Petitioner, represented by counsel in this matter, filed his objection to the Report (#8).

In accordance with Rule 8(b) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Petitioner has objected, and concludes that, for the reasons discussed below, the Report should be adopted and affirmed.

BACKGROUND

In her Report, the Magistrate Judge concludes that Petitioner's challenged state conviction became final prior to the April 24, 1996 enactment of the Antiterrorism and Effective Death Penalty

Act (“AEDPA”). As a result, the one-year grace period applies to this case. See Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, absent a tolling event, Petitioner had until April 23, 1997 to file a timely federal habeas corpus petition.

However, as recognized by the Magistrate Judge, Petitioner filed an application for post-conviction relief in the state trial court on April 22, 1997, the day before his federal habeas corpus deadline.¹ As a result, the one-year limitations period was tolled, or suspended, during the pendency of his properly filed state post-conviction proceedings. 28 U.S.C. § 2244(d)(2); Hoggro, 150 F.3d at 1226. On February 18, 1998, the Oklahoma Court of Criminal Appeals issued its order affirming the state trial court’s denial of post-conviction relief. At that point, Petitioner’s limitations clock again began to run and he had the time remaining in his limitations period to file his federal petition. The time remaining in Petitioner’s limitation period was two (2) days. Therefore, Petitioner had to file his petition on or before February 20, 1998 to comply with the § 2244(d) limitations period. See Judkins v. Hargett, No. 98-6113, 1998 WL 883332 (10th Cir. Dec. 18, 1998) (affirming dismissal of habeas corpus petition where Petitioner failed to meet deadline, extended by one (1) day due to Petitioner’s filing of a state application for post-conviction relief on April 23, 1997). Nonetheless, in spite of the urgency surrounding the limitations issue, Petitioner waited almost a full year before filing the instant federal petition on February 17, 1999.

Based on these facts, the Magistrate Judge determined that the petition was not filed within the one-year limitations period imposed by 28 U.S.C. § 2244(d). As a result, the Magistrate Judge

¹On April 17, 1997, Petitioner, represented by his current counsel, filed a petition for writ of habeas corpus in this district court, Case No. 97-CV-352-H. In that petition, Petitioner stated that he had not yet exhausted state remedies as to at least two issues but that the issues were being raised “simultaneously” with the federal action in an application for post-conviction relief. Because it plainly appeared from the face of the petition that Petitioner had not exhausted state remedies as to each of his claims, the “mixed” petition filed in Case No. 97-CV-352-H was dismissed without prejudice on May 16, 1997. See Rose v. Lundy, 455 U.S. 509, 510 (1982); 28 U.S.C. § 2254(b).

recommends that Respondent's motion to dismiss be granted and that the petition be dismissed as barred by the statute of limitations

Petitioner objects to the Magistrate Judge's conclusions, alleging that (1) the Report presents a factual issue appropriate for hearing, (2) the AEDPA should not apply in this case, (3) the Hoggro decision should not be applied retroactively in this case, and (4) this Court should equitably toll the statute of limitations.

DISCUSSION

After reviewing the record, the Report, and Petitioner's objections to the Report, the Court agrees with the Magistrate Judge's conclusions and finds that the instant petition was not timely filed. As his first objection, Petitioner argues that the Report creates a factual issue appropriate for a hearing. The specific issue identified by Petitioner's counsel concerns the date he received the decision of the Oklahoma Court of Criminal Appeals affirming the denial of post-conviction relief. Petitioner's counsel claims he received the Order on February 20, 1998, or two days after its February 18, 1998 entry. Petitioner contends that by that point in time, it would have been impossible to file a timely federal habeas petition under the time constraints imposed in the Report.

However, the Court finds that no hearing is required because the date counsel received the state appellate court's decision does not affect the conclusion in this case. The urgency present under these facts is directly attributable to Petitioner's delays in pursuing his claims. As discussed in the Report, in spite of the April 24, 1996 enactment of the AEDPA, Petitioner waited almost two (2) years after the conclusion of his direct appeal and a full year after AEDPA's enactment to seek post-conviction relief. Petitioner asserts that because there is no limitations period for seeking post-

conviction relief in the state courts of Oklahoma, his two year delay was not unreasonable. However, because the AEDPA imposed a limitations period on seeking federal habeas corpus relief and the exhaustion of state remedies is a mandatory prerequisite to challenging a state conviction in federal court, a prisoner simply cannot delay the exhaustion process. Petitioner's counsel also asserts that during the two year delay in this case, his client was without resources to hire an attorney and that "once he retained counsel, he actively pursued relief in the court system, whether state court or federal court." Again, however, the Court is not persuaded by Petitioner's argument. Petitioner was not required to hire counsel before filing either a post-conviction application in state court or a habeas corpus petition in federal court. In order to comply with the AEDPA's limitations period, Petitioner could have commenced both his state and federal actions *pro se* then amended his pleadings to cure any deficiencies after retaining counsel.

As his second objection, Petitioner argues that application of the AEDPA to this case is unconstitutional because it violates the Suspension Clause, U.S. Const., art. I, § 9, clause 2. However, the Court must reject Petitioner's argument. The Tenth Circuit Court of Appeals has addressed the constitutionality of the AEDPA's limitations period and has held that, absent extraordinary circumstances not present in this case, the one-year limitation on filing a first habeas petition does not violate the Constitution's Suspension Clause. Miller v. Marr, 141 F.3d 976, 977-78 (10th Cir.), *cert. denied*, -- U.S. --, 119 S.Ct. 210, 142 L.Ed.2d 173 (1998). Therefore, the Court rejects Petitioner's argument that application of the AEDPA to this case violates the Suspension Clause.

As his third objection, Petitioner, citing Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998), argues that "it is unreasonable, and a violation of his Constitutional right to due process, to apply a

limitation period articulated in a decision that was rendered five months after the limitation period was to have expired.” Again, the Court finds no merit to Petitioner’s argument. The Hoggro decision is not the source of the limitations period applied in this case. As indicated in the Report, the AEDPA amended the habeas corpus statutes to provide for the first time a one-year statute of limitations. See 28 U.S.C. § 2244(d). As of April 24, 1996, the limitations period defined in 28 U.S.C. § 2244(d) became a consideration in each and every petition for writ of habeas corpus filed in the district courts. Furthermore, as to motions filed pursuant to 28 U.S.C. § 2255, the Tenth Circuit Court of Appeals recognized the retroactivity concerns associated with a literal application of the AEDPA, namely that habeas corpus relief would be precluded for any prisoner whose conviction became final more than one year before enactment of the AEDPA. As a result, on April 14, 1997, the Tenth Circuit issued its decision in United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), holding that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitations imposed by § 2255 did not begin to run until April 24, 1996. In other words, almost two years before Petitioner filed the instant petition, it was established that prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, were afforded a one-year grace period within which to file § 2255 motions. In Hoggro, the Tenth Circuit determined that § 2244(d)(2) applied to toll the grace period, recognized for § 2255 motions in Simmonds, in § 2254 cases.

The retroactivity concerns identified by Petitioner in his objections arise from application of the AEDPA itself, not application of the judicial decisions interpreting it. Counsel for Petitioner was clearly aware of the AEDPA as of April 17, 1997 when he filed the first habeas petition dismissed for failure to exhaust state remedies. Although the decisions discussed above may not have been

issued at that time, the AEDPA's amendments to the habeas corpus statutes were available to Petitioner's counsel and were in effect. In light of the ramifications of the new law, Petitioner should have made every effort to avoid any delay in pursuing his claims at both the state and federal level.

In his last objection to the Report, Petitioner argues that the statute of limitations should be equitably tolled in this case. In attempting to explain the one year delay in filing the instant petition after the conclusion of state post-conviction proceedings, counsel for petitioner again asserts that "after the Oklahoma Court of Criminal Appeals decision, Petitioner had to hire counsel to file a petition for writ of habeas corpus, and was unable to do so until early in 1999." (#8 at 5). Counsel goes on to state that "this is not just a matter of money. Had counsel known of the Hoggro decision prior to February, 1999, he would have advised Petitioner differently." Id. However, as discussed above, representation by an attorney is not a prerequisite to commencing a habeas corpus action. Furthermore, although counsel was involved in Petitioner's case since at least April, 1997, he offers no explanation for his unfamiliarity with Hoggro prior to February, 1999. Also, as discussed above, counsel had the plain language of § 2244(d) as well as the Tenth Circuit's Simmonds decision available well before Hoggro. Under the available law, it was clear that the AEDPA applied to Petitioner's case, that a judicially created "grace period" had been created for § 2255 motions and would probably apply to Petitioner's case, and that if § 2244(d)(2) applied to the "grace period," state court proceedings properly filed during the grace period tolled or suspended the running of the limitations period.

Petitioner also argues he should be allowed to proceed with the instant petition because his first federal petition was timely filed and "tolled" the running of the limitations period. Although his first federal habeas petition, filed six (6) days before the expiration of the limitations period, was

dismissed without prejudice as a "mixed" petition, Petitioner made no effort to return promptly to federal court after conclusion of post-conviction proceedings. Petitioner has not offered an explanation for the one-year delay between the conclusion of state post-conviction proceedings and the filing of the instant habeas corpus petition sufficient to justify equitable tolling of the limitations period. Contrary to counsel's apparent belief, nothing in the plain language of the statute suggests that the one-year period begins to run upon conclusion of state post-conviction proceedings.

The Court concludes Petitioner has failed to demonstrate extraordinary circumstances justifying equitable tolling. See Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618-19 (3d Cir.1998) (equitable tolling applies only where prisoner has diligently pursued claims but has in some "extraordinary way" been prevented from asserting rights). Therefore, the Court agrees with the Magistrate Judge's conclusion that Petitioner is not entitled to equitable tolling in this case. The petition for writ of habeas corpus should be dismissed with prejudice as barred by the statute of limitations.

CONCLUSION

The Court has reviewed de novo those portions of the Report to which the Petitioner has objected, see Rule 8(b), Rules Governing Section 2254 Cases, and 28 U.S.C. § 636(b)(1)(C), and concludes that the Report and Recommendation of the United States Magistrate Judge should be adopted and affirmed. Respondent's motion to dismiss should be granted and Petitioner's petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the United States Magistrate Judge (#7) is **adopted and affirmed.**
2. Respondent's motion to dismiss time barred petition (#3) is **granted.**
3. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#1) is **dismissed with prejudice.**

SO ORDERED THIS 29 day of July, 1999.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

F I L E D
JUL 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LUKE ROBINSON,)
)
 Petitioner,)
)
 vs.)
)
 STEVEN KAISER, Warden,)
)
 Respondent.)

Case No. 99-CV-0133-K (E) ✓

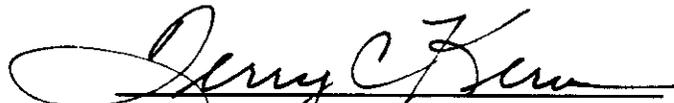
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DATE **JUL 30 1999**

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 Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

SO ORDERED THIS 29 day of July, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

F I L E D
JUL 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALTA L. HASTING,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner, Social Security
Administration,

Defendant.

NO. 96-CV-1192-M ✓

ENTERED ON DOCKET
DATE JUL 30 1999

ORDER

This case is hereby reversed and remanded in accordance with the 10th
Circuit Court of Appeals' ORDER AND JUDGMENT dated May 19, 1999 and filed in this
Court on July 19, 1999.

SO ORDERED this 29th day of July, 1999.

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

bp

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

JUL 29 1999

ALTA L. HASTING,)
)
) Plaintiff,)
)
) v.)
)
) KENNETH S. APFEL,)
) Commissioner of the Social Security)
) Administration,)
)
) Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

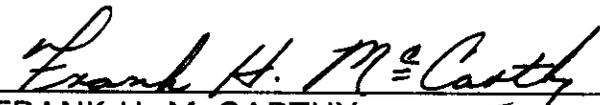
CASE NO. 96-CV-1192-M ✓

ENTERED ON DOCKET

DATE JUL 30 1999

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 29th day of JULY, 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

23

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

FILED

ROBERT W. KAPITAN,
SSN 110-60-8439,

Plaintiff,

vs.

KENNETH S. APFUL, Commissioner
Social Security Administration,
Defendant.

ENTERED ON DOCKET
DATE JUL 30 1999

JUL 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-1095-~~E~~^M (District Court)
Case No. 98-5124 (10th Circuit)

ORDER APPROVING PLAINTIFF'S ATTORNEY FEES
PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

ON this 29th day of JULY, 1999, before me, the undersigned United States Magistrate Judge, *Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act*, comes on for hearing. The Court FINDS that Plaintiff and Defendant filed a *Stipulation for Award of EAJA Attorney Fees*, pursuant to 28 U.S.C. §2412(d), wherein they have mutually agreed upon an attorney fee payable to Plaintiff's attorneys, Timothy M. White and Richmond J. Brownson, in the amount of \$ 8,455.87.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the Commissioner pay to Plaintiff's attorneys, Timothy M. White and Richmond J. Brownson, the sum of \$ 8,455.87, and Plaintiff's *Motion* is hereby dismissed.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

Approved as to Form and Content:

[Signature]
Cathryn McClanahan, Asst. US Attorney
Attorney for Defendant
US Courthouse, Suite 3460

[Signature]
Timothy M. White
Richmond J. Brownson
Attorneys for Plaintiff

25

333 W. Fourth Street
Tulsa, OK 74103
(918) 581-7463

2526 E. 71st Street, Suite A
Tulsa, OK 74136-5576
(918) 492-9335

MotionEAJAkapan1-i

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

F I L E D

JUL 29 1999

ROBERT W. KAPITAN,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner, Social Security
Administration,

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NO. 96-CV-1095-M ✓

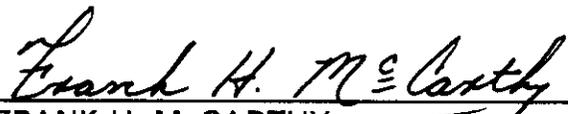
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DATE JUL 30 1999

ORDER

This case is hereby reversed and remanded in accordance with the 10th
Circuit Court of Appeals' ORDER AND JUDGMENT dated April 5, 1999 and filed in this
Court on June 1, 1999.

SO ORDERED this 29th day of July, 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

23

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

FILED

JUL 29 1999

ROBERT W. KAPITAN,
SSN: 110-60-8439,

Plaintiff,

v.

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

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 96-CV-1096-M ✓

ENTERED ON DOCKET

DATE JUL 30 1999

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 29th day of JULY, 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

24

MT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JOSE GOMEZ and)
SANDRA GOMEZ,)

JUL 30 1999 *SA*

Petitioners,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

-vs-)

Civil No. 99-MC-11H ✓

UNITED STATES OF AMERICA,)

Respondent.)

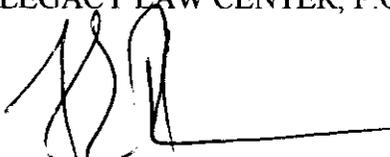
ENTERED ON DOCKET

DATE JUL 30 1999

DISMISSAL WITHOUT PREJUDICE

COMES NOW Plaintiffs, Jose Gomez and Sandra Gomez, by and through counsel, F. Eugene Hough, of LEGACY LAW CENTER P.C., and hereby dismiss the above action, without prejudice to refiling.

Respectfully submitted,
LEGACY LAW CENTER, P.C.



By:

F. Eugene Hough, OBA # 13065
6968 South Utica Avenue
Tulsa, Oklahoma 74136
(918) 488-0929
ATTORNEY FOR PLAINTIFFS

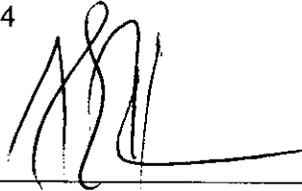
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C/S

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing document has been made upon the following by depositing a copy in the United States mail, postage prepaid, this 30 day of July, 1999.

Jeffrey S. Swyers, Trial Attorney
Civil Trial Section, Central Region
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044



F. Eugene Hough

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

MIKE BOYER,)
)
 Plaintiff,)
)
 vs.)
)
 LOCKHEED-MARTIN POSTAL)
 TECHNOLOGIES, INC., et al.,)
)
 Defendants.)

ENTERED ON DOCKET

DATE JUL 30 1999

No. 98-CV-919-K

F I L E D

JUL 29 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court is the motion of the defendants to enforce terms of the accepted offer and for other relief. As this litigation proceeded, a discovery dispute arose. Plaintiff filed a motion to compel, which was referred to Magistrate Judge McCarthy. Magistrate Judge McCarthy granted the motion to compel in an order filed March 24, 1999. In the order, he stated that attorney fees and expenses would not be awarded "at this time" but that plaintiff could file an application for such an award.

On May 21, 1999, pursuant to Rule 68 F.R.Cv.P., defendants delivered an offer of judgment to plaintiff "for the sum of Three Hundred Thousand Dollars (\$300,000.00), plus a reasonable attorney fee for the Plaintiff to be determined by the Court if the Parties are unable to agree on a reasonable amount." On June 4, 1999, plaintiff filed a motion for discovery sanctions on an issue distinct from his motion to compel. On June 7, 1999, plaintiff filed a notice of acceptance of the Rule 68 offer, an amended motion for discovery sanctions and a motion for attorney fees in

connection with the motion to compel. As with all discovery-related matters, the latter two motions were referred to Magistrate Judge McCarthy.

Defendants filed the present motion on June 15, 1999. Defendants argue that the acceptance of a Rule 68 offer completely concludes litigation on all issues. Therefore, defendants ask the Court to enforce the accepted offer and strike all other motions, or strike the accepted offer because there was no meeting of the minds. Under the facts of this case, the Court concludes it will do neither at this time.

The Court agrees with defendants that normally the offer and acceptance under rule 68 is intended to foreclose any further litigation. The offer and acceptance here specifically contemplated resolution of what constituted a reasonable attorney fee, and therefore that issue is not foreclosed. Additionally, in this case, issues of possible discovery sanctions remain outstanding. A possible award of attorney fees was acknowledged in Magistrate Judge McCarthy's order of March 24, 1999. As to the plaintiff's separate motion for discovery sanctions, this was filed June 4, 1999, only three days before his acceptance of the offer. In the Court's view this did not give defendants adequate time to withdraw or modify the offer in the interim.

The outstanding offer, as written, was accepted by plaintiff on June 7, 1999. The doctrine of rescission does not apply to a Rule 68 "contract". Webb v. James, 147 F.3d 617, 621 (7th Cir.1998). The Seventh Circuit went on to say that Rule 68

operates "automatically", requiring entry of judgment. Therefore, the Court will enter judgment at this time.

Regarding plaintiff's June 4, 1999 motion for sanctions, the Court declines to declare it moot or strike it. While the acceptance of a Rule 68 offer should ordinarily preclude such additional litigation as represented by a sanctions motion, the Court believes an exception is appropriate if a litigant's conduct has been so outrageous or contumacious that the Court's need to impose remedial measures overrides the principle of finality.

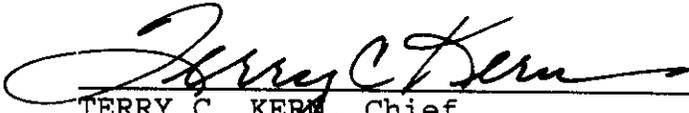
The referral to the Magistrate Judge of the pending motions for sanctions and attorney fees remains in effect. Magistrate Judge McCarthy has supervised discovery in the case and is in the best position to make an initial judgment as to conduct. As regards the June 4, 1999 motion for sanctions, which itself seeks an award of \$300,000 (equal to the Rule 68 offer accepted), if this Court ultimately determines that sanctions should be imposed because defendant's conduct rose to a certain level of impropriety, the Court will entertain a motion of defendant for relief from the judgment entered pursuant to the Rule 68 offer and acceptance.

It is the Order of the Court that the combined motion of the defendants to enforce the terms of the accepted offer, to retain jurisdiction, for protective order, or in the alternative to strike the accepted offer (#27) is hereby GRANTED in part and DENIED in

part. The motion is granted to the extent the accepted offer is enforced according to its terms. In all other respects, the motion is denied as described above.

The application of the plaintiff for leave to file suggested form of judgment (#34) is hereby DENIED. The Court has reviewed the suggested judgment submitted by the plaintiff and elects to enter its own form of judgment.

ORDERED this 29 day of July, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DARLA E. MELLOR,)
)
Plaintiff,)
)
vs.)
)
METROPOLITAN LIFE INSURANCE)
COMPANY, a foreign corporation,)
and SHERI WELLS,)
)
Defendants.)

Case No. 98-CV-690-BU

ENTERED ON DOCKET

DATE JUL 30 1999

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 29th day of July, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

JUL 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TWIN CITY FIRE INSURANCE COMPANY,)
a Connecticut corporation,)

Plaintiff,)

vs.)

No. 99-CV-0440H (M) J

CHEROKEE NATION, a public entity;)
REX EARL STARR, an individual;)
JENNIE L. BATTLES, an individual;)
LISA FINLEY, an individual; JOE)
BYRD, an individual; MARVIN)
SUMMERFIELD, an individual; ROBIN)
MAYES, an individual; DAVID)
CORNSILK, an individual; and CHARLIE)
ADDINGTON, an individual,)

Defendants.)

ENTERED ON DOCKET
DATE JUL 29 1999

NOTICE OF DISMISSAL WITHOUT PREJUDICE
OF DEFENDANT, ROBIN MAYES

COMES NOW the Plaintiff, Twin City Fire Insurance Company, and gives notice of its dismissal of Defendant, Robin Mayes, as Defendant Mayes has not filed an answer to the Plaintiff's cause of action. This Notice of Dismissal is filed because Robin Mayes is no longer a plaintiff in the underlying cause of action, Summerfield v. Mark McCollough; et al., U.S. District Court for the Northern District of Oklahoma, Case No. 98-CV-0328B(EA).

7

made
copy ret'd
CJS

Accordingly, Plaintiff, Twin City Fire Insurance Company, thereby dismisses its cause of action without prejudice against Defendant Robin Mayes.

Respectfully submitted,

HUCKABY, FLEMING, FRAILEY, CHAFFIN,
CORDELL, GREENWOOD & PERRYMAN, L.L.P.

BY:



Kent Fleming (OBA 2976)
Brently C. Olsson (OBA 12807)
1215 Classen Drive
P. O. Box 60130
Oklahoma City, OK 73146
(405)235-6648
(405)235-1533 (fax)
ATTORNEYS FOR PLAINTIFF,
TWIN CITY FIRE INSURANCE COMPANY

CERTIFICATE OF MAILING

I hereby certify that on this 28th day of July, 1999, I mailed a true and correct copy of the above and foregoing instrument by depositing the same in the United States Mail, to:

Charles W. Shipley
Mark B. Jennings
Jamie Taylor Boyd
Shipley, Jennings & Champlin, P.C.
201 West Fifth Street, Suite 400
Tulsa, OK 74103-4230
ATTORNEY FOR DAVID CORNSILK and ROBIN MAYES

Diana Bond Dry (Fishinghawk)
Law & Justice Division
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465
ATTORNEY FOR CHEROKEE NATION, REX EARL STARR,
JENNIE L. BATTLES, LISA FINLEY and JOE BYRD


Brently C. Olsson

MT
7-26-99

RECEIVED

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

JUL 22 1999

ENTERED ON DOCKET

JUL 29 1999

DATE

CIVIL ACTION NO. 99 CV 0143 H ✓

UNITED STATES OF AMERICA, ex rel.)
Railroad Retirement Board,)
Plaintiff,)

v.)

PATRICIA JANE DASEKE,)
Defendant.)

FILED

JUL 27 1999 *FA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF JUDGMENT

Pursuant to the terms of the Settlement Agreement entered into by the parties on July 27th, 1999, Judgment is hereby entered for the Plaintiff United States of America ex rel. the Railroad Retirement Board, and against the Defendant Patricia Jane Daseke, on Count 18, Unjust Enrichment, of the Complaint, in the amount of \$10,724.97. Judgment is hereby ordered to be paid without interest.

Counts One (1) through Seventeen (17) of the Complaint are dismissed with prejudice.

Both parties will bear their own costs of litigation and attorney fees.

IT IS SO ORDERED THIS 27th day of July, 1999.


UNITED STATES DISTRICT COURT JUDGE

UNITED STATES v. PATRICIA J. DASEKE
ORDER OF JUDGMENT, 99CV143 H
APPROVED AS TO FORM AND CONTENT:

Patricia Jane Daseke

PATRICIA JANE DASEKE

8519 EAST 31ST

TULSA OK 74103

918-622-8039

Defendant, Pro Se

Loretta F. Radford

LORETTA F. RADFORD, OBA 11158

Assistant United States Attorney

333 West 4th Street Suite 3460

Tulsa, OK 74103

918-581-7463 (Phone)

918-581-7675 (Facsimile)

Attorneys for the Plaintiff

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 TIMOTHY LEE NIPPER, TIMOTHY)
 LEE NIPPER as trustee for the)
 proprietor Property Trust, THOMAS)
 EUGENE NIPPER as trustee for the)
 Proprietor Property Trust, THOMAS)
 EUGENE NIPPER, as nominee of)
 Timothy Lee Nipper, and MELLON)
 MORTGAGE COMPANY as mortgagee,)
)
 Defendants.)

ENTERED ON DOCKET
DATE JUL 29 1999

No. 98-CV-526-K ✓

F I L E D
JUL 28 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the Plaintiff's Motion for Summary Judgment (#29). The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith, the Court finds in favor of the Plaintiff, the United States of America, and against the Defendants, Timothy Lee Nipper, Timothy Lee Nipper as Trustee for the Proprietor Property Trust, Thomas Eugene Nipper as Trustee for the Proprietor Property Trust, Thomas Eugene Nipper, as nominee of Timothy Lee Nipper, and Mellon Mortgage Company as Mortgagee, on this claim which arose out of the Defendants' federal tax liability obligations.

IT IS THEREFORE ORDERED, ADJUDGED, DECREED that the Plaintiff recover of the Defendants the sum of \$208,823.55, plus additional penalties, interest, and additions accruing after the dates of assessment. The United States is deemed to have federal tax liens in all of Timothy Lee

Nipper's property and rights in property; the real property should be foreclosed upon to help satisfy Timothy Lee Nipper's federal tax liabilities; the property should be sold and the proceeds should be paid to Mellon Mortgage and the United States.

ORDERED this 28 day of JULY, 1999.

A handwritten signature in black ink, reading "Terry C. Kern", written over a horizontal line.

**TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE**

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTHY LEE NIPPER, TIMOTHY
LEE NIPPER as trustee for the
proprietor Property Trust, THOMAS
EUGENE NIPPER as trustee for the
Proprietor Property Trust, THOMAS
EUGENE NIPPER, as nominee of
Timothy Lee Nipper, and MELLON
MORTGAGE COMPANY as mortgagee,

Defendants.

ENTERED ON DOCKET

DATE ~~JUL 29~~ 1999

No. 98-CV-526-K ✓ JUL 29 1999

FILED

JUL 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Plaintiff's Motion for Summary Judgment (#29). The United States has moved for summary judgment to reduce Timothy Nipper's federal income tax liabilities for the years 1981-1988 to judgment, and to foreclose federal tax liens on real property, the record owner of which is the Proprietor Property Trust. Despite being sent notices of the assessments and demands for payment of the assessed amounts, plus statutory accruals, Timothy Lee Nipper has refused to pay the amounts owed. The Notice of Deficiency was sent to Timothy Lee Nipper's last known address.

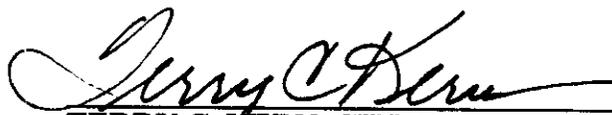
Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the

nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992). Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. Thomas v. Internat'l Business Machines, 48 F.3d 478, 485 (10th Cir. 1995).

The Plaintiff's Motion for Summary Judgment was filed on July 1, 1999. The Defendants failed to respond by the July 19 deadline, and that response is now more than a week overdue. In addition, the parties' discovery cut-off date, set for September 30, 1999, is steadily approaching. The Defendants have not presented to this Court any request for a continuance in which to file the response, nor have they offered good cause for the delay. According to *Local Rule 7.1.C*, the Court has the discretion to deem the matter confessed and enter the relief requested. The Court has nevertheless conducted an independent inquiry, and finds that the Plaintiff's Motion for Summary Judgment must be granted.

It is hereby ORDERED, the Plaintiff's Motion for Summary Judgment (#29) is GRANTED against all named Defendants herein. All other pending motions are declared MOOT.

ORDERED this 28 day of July, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

FILED

UNITED STATES OF AMERICA)
)
 Plaintiff,)
)
 v.)
)
 JIMMY M. SMITH; and)
 ROBERT D. MARSTERS as trustee of the)
 CROW-MARSTERS REVOCABLE LIVING)
 TRUST;)
)
 Defendants.)
)

JUL 28 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil No. 99CV0079BU(E)

ENTERED ON DOCKET
DATE JUL 29 1999

JUDGMENT

Having considered the United States' Motion for Summary Judgment, the Court enters the following judgment in favor of the United States and against defendant Jimmy Smith:

1. The following assessments against defendant Jimmy Smith for federal employment tax (FICA Form 941), federal unemployment tax (FUTA Form 940), individual federal income tax (Form 1040), and a penalty for failing to file correct information returns (26 U.S.C. § 6721) for the periods and amounts listed below, plus all penalties accruing under law after the dates of assessment and interest accruing after the given dates of assessment pursuant to 26 U.S.C. §§ 6601, 6621 and 6622 and 28 U.S.C. § 1961(c) until paid:

Type of Tax or Penalty	Period Ending	Date of Assessment	Unpaid Assessed Balance
941	March 31, 1992	June 7, 1993	\$10,775.32
941	June 30, 1992	June 7, 1993	\$7,425.75
941	September 30, 1992	December 21, 1992	\$16.00

Type of Tax or Penalty	Period Ending	Date of Assessment	Unpaid Assessed Balance
941	December 31, 1992	August 1, 1994	\$47,131.34
941	March 31, 1993	August 8, 1994	\$6,896.79
941	June 30, 1993	August 8, 1994	\$1,731.70
940	December 31, 1992	August 8, 1994	\$11,437.46
6721	December 31, 1992	July 17, 1995	\$20,590.84
1040	December 31, 1994	August 28, 1995	\$949.18

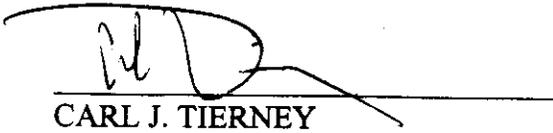
2. The federal tax liens which arose as of the dates of assessment of the taxes listed in paragraph 1, above, and the federal tax liens against defendant Jimmy Smith which arose the dates of assessment of the taxes reduced to judgment in *Velma L. Kirk v. United States*, Case No. 95-C-635-W (U.S.D.C. N.D.Ok.) attached to the one-half interest of defendant Jimmy Smith in the property described as:

Lot Twenty-One (21), Block Two (2), RIVERSIDE SOUTH, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Amended Plan thereof (commonly known as 5675 S. Boston Avenue, Tulsa, Oklahoma)

and that these tax liens are to be foreclosed, the property is to be sold, and one-half of the proceeds of the sale are to be applied to the federal tax liabilities of Jimmy Smith.


 MICHAEL BURRAGE
 UNITED STATES DISTRICT JUDGE

Judgment proposed by:



A handwritten signature in black ink, appearing to read 'Carl J. Tierney', is written over a horizontal line.

CARL J. TIERNEY

Trial Attorney

U.S. Department of Justice, Tax Division

P.O. Box 7238, Ben Franklin Station

Washington, D.C. 20044

Tel. (202) 514-6499

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

F I L E D

JUL 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RONALD MOORE,)
)
Plaintiff,)
)
vs.)
)
LINDA JONES and MILLARD JONES,)
)
Defendants.)

Case No. 98-CV-516-B

ENTERED ON DOCKET

JUL 29 1999

ORDER

In this matter where the parties appear pro se, the Court has for consideration Defendants' Motion to Dismiss converted to Summary Judgment (Docket #4), Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (combined with Supplement to Defendants' Motion to Dismiss Converted to Motion for Summary Judgment) (Docket # 19), Plaintiff's Ex Parte Motion to File Under Seal Motion for Appointment of Experts in the Interest of Justice and Motion for Appointment of Counsel in the Interest of Justice (Docket # 18) and Plaintiff's Ex Parte Production of Documents by Order of the Court (Docket #17), and the Court finds as follows:

Plaintiff's Ex Parte Motions shall be denied for reasons previously stated by this Court.

In Defendants' Motion to Dismiss, Defendants, appearing pro se, urge Plaintiff's

21

First Amended Complaint, also filed pro se, does not meet the jurisdictional amount of \$75,000.00 in this diversity action and that Plaintiff's First Amended Complaint should be dismissed. Defendants have attached evidentiary material in support of their motion.

The Court has previously entered Orders regarding Defendants' original motion to dismiss the initial Complaint and various other motions which have been filed by the parties setting forth the relationship of the parties and the context of their dispute in an attempt to expedite and streamline these proceedings.¹ In the most recent Order of March 12, 1999, the Court allowed Plaintiff to obtain discovery and advised Plaintiff that he must plead fraud with particularity. The Court directed Plaintiff's attention to the provisions of Fed. R. Civ. Pro. 11 and admonished Plaintiff that "further accusations brought with no support may expose him to sanctions including dismissal."

Plaintiff responded by filing the above-referenced Amended Complaint in which, at paragraph 8, he alleges that Defendants took a Quit-Claim Deed to Thornton on her death bed in 1998 and modified it to add Defendant Linda Jones.² Defendants' motion attaches an affidavit from the notary public which factually refutes this claim.

¹See Orders dated 11/5/98 and 3/12/99, incorporated herein by reference. The Court notes no streamlining has become evident.

²The Deed is dated August 7, 1996, which date is verified by notary records. Plaintiff originally alleged the Deed had been modified to add Tycene McNeal to deprive this Court of jurisdiction. Plaintiff does not explain on what basis he now changes his theory nor how Jones' name was added to the middle of the recitation. Plaintiff also does not specify if the dying aunt actually made the change herself or if this was done by the defendants, in which case they would not have needed to take the Deed to the death bed.

Plaintiff also asserts in the Amended Complaint that the notary public is a co-conspirator, although he has not been sued as a party. There is no evidence to support this claim and it appears Plaintiff has urged this based upon the Court's legal analysis of the initial Complaint in the Court's prior Orders. The Court allowed discovery by Plaintiff in order to give him sufficient time and opportunity to explore any basis for allegations regarding the notary. No evidence of wrongdoing has been filed with the Court. Further, the allegations found in Paragraph 19 involving the notary, fail to provide a factual or legal basis to find wrongdoing on the part of any named or unnamed party. This Court has previously ruled it does not find the signatures on the Deed and in the notary log to be inconsistent to raise a genuine issue of material fact. Based upon the notary's affidavit and judicial notice of Oklahoma law as it relates to transfer of marketable title to real property, Paragraphs 8 and 19 of the Amended Complaint shall be stricken.

Plaintiff cites the fact that the property was later conveyed by Defendant Linda Jones and her fellow defendant-husband Millard Jones as evidence that Millard Jones was involved in the conspiracy to deprive Plaintiff of his inheritance. There is nothing sinister or illegal to be inferred from the inclusion of Millard Jones on the Deed.

A fundamental requirement for transfer of marketable title in Oklahoma is the conveyance of any marital interest of the spouse, whether or not the spouse shares the

actual ownership of the property.³ A married person may legally hold property in his or her own name but the failure to include the marital interest of a non-owner spouse in the conveyance of the property clouds title, which could ultimately lead to the purchaser being forced to file litigation to extinguish the marital interest in order to quiet the title to the property. The Court concludes any reference to Millard Jones' name appearing on the Warranty Deed does not evidence fraud or conversion.

Defendant Linda Jones has also attempted to present evidence by her own affidavit to establish the disposition of Thornton's property. However, even though the affidavit of the notary public is in proper form, Jones' own affidavit does not comply with the requirements of Fed. R. Civ. Pro. 56 (e).

Jones does not state that the information is based upon her personal knowledge or set forth facts which would be admissible in evidence. She does not state the value of the items which she urges McNeal allowed family and friends of Ms. Thornton to retrieve at

³It appears Defendants are also unschooled at best as to property law in that they claim ignorance of the Deed containing Millard's name, speculating it must have been included by virtue of a power of attorney he held from Thornton. Defendants' further state he didn't sign the Deed. He would have been required to sign the Deed if only to extinguish his marital interest. Alternatively, if, in fact, Millard held a valid power or attorney, he would have been required to sign the Deed in that capacity, conceivably being required to sign in both capacities. If however, the aunt had already died on the date the Deed was *executed*, not *filed* as urged by Plaintiff, the power of attorney terminated with Thornton's death and Millard's signature would have been required in only his marital capacity. Whether Armstrong received marketable title may be affected by these scenario, however, the validity of Armstrong's title is not before this Court.

their choosing.⁴ Further, sworn or certified copies of papers referenced in the affidavit are not attached, but merely referenced in the statement that Defendants' will make copies available if necessary. Rule 56 deems it necessary. The affidavit does not establish that Jones had a legal right to write checks or withdraw funds from the account of the deceased Oklahoma aunt for any purpose.⁵

Of primary importance however is the fact that the affidavit is not sworn or acknowledged before one authorized in the state of Oklahoma to administer oaths. This is a fatal deficiency which renders the testimony it purports to offer of no value to the Court.⁶

Nor does it conform to the requirements of 28 U.S.C. §1746 which allows the

⁴The Court notes Jones' statement that Thornton handled McNeal's personal property, including "furs, coats, stoles and jewelry" tends to support Plaintiff's assertion that the estate meets the jurisdictional amount and that the estate was improperly distributed at least as to the personalty. Defendant does not mention the disposition of vehicles, if any which are asserted to be included in the estate. It would also be helpful to the Court to know whether the distributed property remained in the state of Oklahoma and what the value of personalty was which Thornton took back to California with her. In regard to the property given to the Salvation army, it would assist the Court to know if a receipt was obtained and if so, to attach a copy of same.

⁵The Court also may not consider Defendant Jones' unsupported statements set forth in the motion because they are not sworn statements, and therefore not admissible evidence which may be considered by the Court in ruling on summary judgment. For example, Jones states at page 1 of her motion that she was a cosigner on the aunt's bank account. This is not included however in the (ineffective) affidavit. Other such statements are found in the text of the motion. See paragraphs numbered 4, 5, 10, and 12.

⁶Defendants have also submitted a Durable Power of Attorney as Exhibit 5 which is incomplete and does not contain a signature page. In its present form it is of no evidentiary value to the Court. Paragraph 9 in Defendants' motion references a Warranty Deed as Exhibit 2, which is not attached.

Court to consider unsworn affidavits under limited circumstances. The statute requires such an affidavit to be subscribed under penalty of perjury in the form subscribed by the statute.⁷

Despite its numerous legal deficiencies however, the local rules of this district require Plaintiff to respond to the Defendants' motion or face possible dismissal. Response was due on or about May 10, 1999. None was filed nor has the Court received a motion for extension of time to respond even though this procedure was previously directed to the attention of Plaintiff by earlier order of the Court.

Ultimately, dismissal may not be granted unless it is clear that the moving party is entitled to the relief sought. In this case, had Defendants' properly presented their Rule 56 motion with admissible evidence, based upon Plaintiff's failure to respond, the Court notes without holding, Defendants would have prevailed on some, if not all, their assertions. At the very least the Court would be in a position to address the future

⁷The statute provides: "Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn . . . affidavit, in writing of the person making the same . . . such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form. . .

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

direction of the case. This is the difficulty faced by the Court in dealing with parties who choose to represent themselves. While they are certainly entitled to proceed in this fashion, they generally do so at their own risk and at considerable expense to the Court in judicial resources required to be expended in properly determining and applying the law.

Based upon the current status of the pleadings, the Court denies Defendants' motions for summary judgment. However, the Court has before it sufficient information at this time to determine that this matter is one which would be better addressed by the probate courts of the state of Oklahoma and California. A "probate exception" to diversity jurisdiction has long been recognized. *Markham v. Allen*, 326 U.S. 490, 494, 66 S. Ct. 296, 298, 90 L.Ed. 256 (1946).

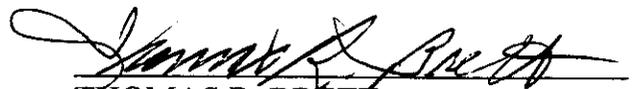
The Tenth Circuit Court of Appeals has framed the relevant inquiry as to the applicability of the exception as whether under state law the dispute would be cognizable only by the probate court. *Beren v. Ropfogel*, 24 F.3d 1226 (10th Cir. 1994). In this case, no probate has been filed for the estate of the deceased aunt in Oklahoma. It appears that some of the property may have been ineffectively transferred out of the estate. These matters would be before the probate court of the state of Oklahoma which has the authority to judicially determine and enforce legal entitlement to real and personal property.

A probate has been filed as to the estate of the deceased California aunt which estate appears to include some portion of the deceased Oklahoma aunt's property, some

of which the California aunt would have been entitled to had an Oklahoma probate been filed and some of which the California court may well determine was improperly acquired.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this Court lacks diversity jurisdiction over this action by virtue of the probate exception as set forth herein. The case is accordingly dismissed.

DONE THIS 28th DAY OF JULY, 1999.


THOMAS R. BRÉTT
UNITED STATES DISTRICT JUDGE

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

JUL 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BERL AND DONNA HART, as parents)
and next friend of LINDSEY)
HART, a minor child,)

Plaintiffs,)

vs.)

No. 99-C-074-B(M)

INDEPENDENT SCHOOL DISTRICT NO.)
5 of Tulsa County, Oklahoma, and)
KATHRYN MCGREW,)
in her individual and official capacity, and)
ANGELA DUNN in her individual and)
official capacity, and CHERYL KELSEY)
in her individual and official capacity, and)
DR. KIRBY LEHMAN in his)
individual and official capacity,)

Defendants.)

ENTERED ON DOCKET
DATE JUL 29 1999

ORDER

The Court has for consideration Defendants' Motion to Dismiss (Docket #5) and the Court finds as follows:

Defendants, Independent School District No. 5 ("Jenks"), Kathryn McGrew, Angela Dunn, Cheryl Kelsey, and Dr. Kirby Lehman (collectively "School District Defendants") move to dismiss the Plaintiffs' ("Harts") 42 U.S.C. § 1983 claims pursuant to Fed.R.Civ.Pro. 12(b)(6) for failure to state a claim upon which relief can be granted. The Harts challenge School District Defendants' assigning Lindsey Hart, an 8th grade student of the Jenks School District, to an in-school intervention program after she

was found to be in possession of a dangerous weapon while on school grounds. School District Defendants request the Court consider this motion as a motion for summary judgment pursuant to Fed.R.Civ.Pro. 56 because Defendants submit matters outside the pleadings in support of their motion.

Defendants submit three propositions in support of summary judgment. First, Defendants state Plaintiffs have failed to identify any deprivation of property protected by the Fourteenth Amendment. Second, Defendants assert Lindsey Hart has not been deprived of any constitutionally-protected liberty interest. Finally, Defendants urge the failure to identify either a property or liberty interest which has been infringed leaves Plaintiffs' substantive due process claim with no more merit than their procedural due process claim.

In Plaintiffs' Amended Response brief, but not by separate motion and without statement of objection by opposing counsel, Plaintiff's request an additional month of discovery prior to the Court ruling upon the motion.¹ Defendants' Reply incorporates an objection.

Plaintiff cites Fed.R.Civ.Pro. 56 (f) and the language of *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) for the proposition that summary judgment is not to be entered until adequate time for discovery has been allowed. In *Celotex*, the court stated:

The plain language of Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery and*

¹See N.D.LR7.1 E.

upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. (emphasis added)

477 U.S. at 317 (1986).

Rule 56 (f) provides:

"Should it appear *from the affidavits of a party opposing the motion* that the party cannot for reasons stated present by affidavits facts essential to justify the party's opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." (emphasis added)

Plaintiffs have submitted no affidavits as required to establish entitlement to additional discovery nor advised the Court what they expect additional discovery time to uncover to aid in their opposition to summary judgment. Further, Plaintiffs filed their response brief on June 7, 1999, and Defendants filed their reply on June 11, 1999. Consequently, the additional month Plaintiffs sought for discovery has elapsed without any supplementation of the pleadings before the Court.

Additionally, the Amended Response ordered by this Court *sua sponte* for failure to comply with N.D.LR 56.1(B) still does not comply with this rule. In particular, Plaintiffs' counsel is directed to that portion of the rule which directs counsel to "state the number of the movant's fact that is disputed."²

²A hodgepodge of alleged disputed facts thrown at the Court in shotgun fashion is exactly the practice the local rule is intended to prevent. Plaintiffs are directed to pps. 3-5 of Defendants' initial reply brief filed on May 21, 1999, prior to the filing of Plaintiffs' amended response for an example of the correct format in which to present disputed facts..

Defendants' urge the Amended Response also violates the Court's order in that the Court directed that no new issues were to be raised by the Amended Response brief, which was intended only to force compliance with N.D.LR 56.(B). Defendants' correctly assert that Plaintiff filed an entirely new brief expanding on the arguments in their original brief and raising additional challenges to the school districts in-house intervention program. Defendants' urge the Amended Response should be stricken. The Court agrees. However, the Court again declines to grant summary judgment on that basis alone.

Based upon the status of the record at this time, the Court concludes that Plaintiffs shall be given an additional 11 days from the date of this Order within which to file a Second Amended Response limited to a statement of disputed facts in proper form pursuant to N.D. LR 56.1(B) and any arguments, authority or evidentiary matter which has arisen as a result of discovery conducted after the filing of the initial Response Brief. Any such argument, authority or evidentiary matter is to be clearly identified as to the date and type of discovery from which it arose. Failure to comply with this Court's second directive may result in the sustaining of the Defendants' motion for summary judgment.

Defendants shall then have 11 days thereafter to file supplemental reply brief also limited to only those issues raised in Second Amended Response Brief which are properly raised by virtue of having been included in the original response brief or identified as having been obtained through additional discovery as set forth herein.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that Plaintiffs Amended Response Brief is hereby stricken. Plaintiffs shall have 11 days from the date of this Order within which to file a Second Amended Response limited to a statement of disputed facts in proper form pursuant to N.D. LR 56.1(B) and any arguments, authority or evidentiary matters which have arisen as a result of discovery conducted after the filing of the initial Response Brief. Defendants shall then have 11 days thereafter to file supplemental reply brief also limited to only those issues raised in Second Amended Response Brief.

DONE THIS 28 DAY OF JULY, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

JUL 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM HAMILTON)

Plaintiff,)

vs.)

No. 99-C-140-B(E) /

THE CITY OF SAPULPA, a municipal)
corporation, CAROL JONES, individually)
and in her official capacity as Court Clerk)
for the Municipal Court for the City of)
Sapulpa, and TOM DeARMON, individually)
and in his official capacity as City Manager)
of the City of Sapulpa,)

Defendants.)

ENTERED ON DOCKET
DATE JUL 29 1999

ORDER

Comes on for consideration First Motion for Summary Judgment of all

Defendants' and the Court finds as follows:

In response brief filed in opposition to the Defendants' motion, Plaintiff failed to submit a statement of controverted facts pursuant to N.D. LR 56.1(B), which states:

"The response brief ... shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party."

B

Plaintiff did submit his own statement of alleged material facts to which Defendants have responded. Plaintiff shall be given 10 days within which to file a N.D. LR 56.1(B) statement in response to Defendants' motion and brief. No new issues may be raised in the response. Defendants shall then have 7 days thereafter to file any reply, at which time the Court will consider the motion at issue. Failure to comply with this Order may result in Defendants' summary judgment motion being sustained against Plaintiff.

IT IS SO ORDERED THIS ~~18~~^{28th} DAY OF JULY, 1999.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Plaintiff,)

v.)

RICHARD ALVIN CARROLL, et al.,)

Defendants.)

ENTERED ON DOCKET
DATE JUL 29 1999

CIVIL ACTION NO. 98-CV-0563-B (J)

**ORDER
VACATING JUDGMENT OF FORECLOSURE,
VACATING ORDER OF SALE AND DISMISSING WITHOUT PREJUDICE**

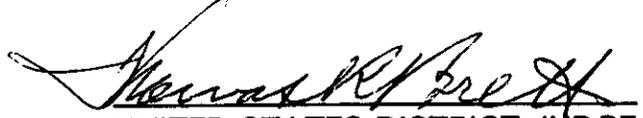
This matter comes on before the Court on this 27th day of

July, 1999, upon the Motion of the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, for an Order of this Court to vacate the Judgment of Foreclosure filed on March 30, 1999, to vacate the Order of Sale issued on May 21, 1999, and to dismiss this case without prejudice. The Court, having considered the motion and the records and files in this case, and being fully advised in the premises, finds that good cause has been shown for the relief sought and that the motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Judgment of Foreclosure filed on March 30, 1999, be, and the same is hereby vacated, set aside and held for naught.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Order of Sale issued on May 21, 1999, be, and the same is hereby vacated, set aside and held for naught.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action
be, and the same is hereby dismissed without prejudice.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

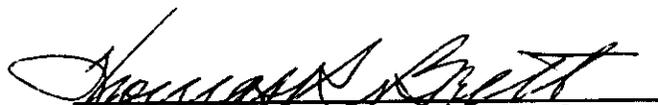
STEPHEN C. LEWIS
United States Attorney



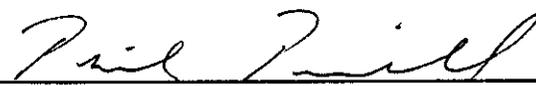
PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

PP:css

provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.966 percent per annum until paid, plus costs of this action.

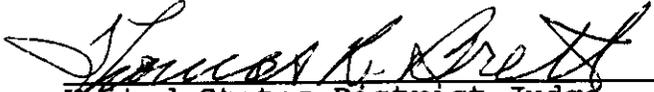

United States District Judge

Submitted By:


PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

PEP/11f

\$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.966 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

PEP/llf

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

F I L E D

JUL 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMAX NETS INTERNATIONAL)
CORP., d/b/a ADMAX)
INTERNATIONAL, a Oklahoma)
Corporation, GEORGE ELIAS, JR.,)
and JAMES BROWN,)

Plaintiffs,)

vs.)

IRVING L. FRAUGHT in his individual)
capacity and DAVID NUESOME in his)
individual and official capacity,)

Defendants.)

Case No.: 99-CV-073B(J)

ENTERED ON DOCKET
JUL 28 1999

NOTICE OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiffs in the above referenced action Pursuant to Rule 40 of
the Federal Rules of Civil Procedure and dismisses his cause of action without prejudice
against all of the aforementioned Defendants.

Respectfully submitted,



David R. Blades, OBA#15187
1861 E. 15th Street
Tulsa, OK 74104-4610
(918) 747-4600
(918) 744-6300 Fax

Attorney for Plaintiff

Handwritten mark

Handwritten mark

Handwritten checkmark

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CERTIFICATE OF MAILING

This is to certify that on the 28th day of July, 1999, a true, correct, and exact copy of the above and foregoing document was mailed, **first class mail**, to the following with the correct postage fully prepaid thereon:

Sidney K. Swinson
Gable, Gotwals, Mock, Schwabe & Kihle
2000 Nationsbank Center
15 West 6th Street, Suite 200
Tulsa, Oklahoma 74119-5447

Robert Anthony
Assistant Attorney General
Litigation Division
4545 N. Lincoln Blvd., Suite 260
Oklahoma City, OK 73105-3498



David R. Blades, OBA #15187

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
 vs.)
)
 JIMMY M. SMITH; and ROBERT)
 D. MARSTERS, as trustee of)
 the CROW-MARSTERS REVOCABLE)
 LIVING TRUST,)
)
 Defendants.)

DATE JUL 28 1999

Case No. 99-CV-79-BU(E)

FILED

JUL 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court upon the motion of Plaintiff, United States of America ("United States"), for summary judgment against Defendant, Jimmy M. Smith ("Smith"), pursuant to Rule 56(c), Fed. R. Civ. P. Smith has responded to the motion and the United States has replied thereto. Upon due consideration of the parties' submissions, the Court makes its determination.

The United States commenced this action on January 26, 1999 seeking to reduce certain unpaid federal tax assessments against Smith to judgment. In its Complaint, the United States also sought a determination that certain property, commonly known as 5675 S. Boston Avenue, Tulsa, Oklahoma, was held by the Crow-Marsters Revocable Living Trust as the nominee of Smith and sought to foreclose federal tax liens upon that property. Smith answered the Complaint, but Defendant, Robert D. Marsters, as Trustee for the Crow-Marsters Revocable Living Trust, failed to answer or otherwise respond to the Complaint. The Clerk of the Court entered default against Defendant, Robert D. Marsters, as Trustee for the Crow-Marsters Revocable Living Trust, on April 12, 1999. Thereafter, on

May 19, 1999, this Court, upon motion of the United States, entered default judgment against Defendant, Robert D. Marsters, as Trustee for the Crow-Marsters Revocable Living Trust. The default judgment declared that one-half interest held by the Crow-Marsters Revocable Living Trust in property commonly known as 5675 S. Boston Avenue, Tulsa, Oklahoma, is held by the Trust as the alter ego, nominee or agent of Smith and that the interest should be disregarded. It further declared that the United States has valid and subsisting federal tax liens on Smith's one-half interest in the property, which is superior to any legal and equitable interests of the Crow-Marsters Revocable Living Trust in this property.

In the instant motion, the United States seeks to reduce the unpaid federal tax assessments against Smith to judgment and seeks to foreclose the federal tax liens which arose as of the dates of those assessments and the federal tax liens which arose of the dates of assessments of certain taxes previously reduced to judgment in Velma L. Kirk v. United States, Case No. 95-C-635-W, against the property commonly known as 5675 S. Boston Avenue, Tulsa, Oklahoma.

Smith, in response to the United States' motion, does not challenge the assessments of unpaid federal taxes which the United States seeks to reduce to judgment. Instead, Smith argues that he does not have a one-half interest in the property commonly known as 5675 S. Boston Avenue, Tulsa, Oklahoma and that foreclosure of the federal tax liens and sale of the property would not be appropriate. In his response, Smith states that the Estate of John

Lee Glover left an undivided one-half interest in three tracts of land to Smith and Robert D. Marsters. According to Smith, he and Mr. Marsters entered into a written agreement whereby Smith would sell two of the tracts of land and keep the proceeds from that sale for himself and the third tract of land would belong to Robert D. Marsters to do as he so wished. Smith states that he thereafter sold his two tracts of land according to the agreement. In addition, Smith states that in 1992, the property commonly known as 5675 S. Boston Avenue, Tulsa, Oklahoma, which was then owned by Smith, was in foreclosure. Smith states that he approached Mr. Marsters and proposed that Smith procure a buyer for the third tract of land belonging to Mr. Marsters from the Estate of John Lee Glover and that Mr. Marsters use the proceeds from the sale to purchase the 5675 S. Boston property. According to Smith, the 5675 S. Boston property was more valuable and a better investment for Mr. Marsters. Smith states that Mr. Marsters agreed to the proposal and Smith sold the third tract of land. Smith states that thereafter Robert D. Marsters purchased the 5675 S. Boston property at a sheriff's sale. Smith states that because the purchase of the 5675 S. Boston property came from monies which did not belong to Smith, the sale of the 5675 S. Boston property to satisfy the federal tax liens should not be allowed.

In reply, the United States asserts that Smith's interest in the 5675 S. Boston property has already been decided by the Court in the default judgment against Defendant, Robert D. Marsters, as Trustee of the Crow-Marsters Revocable Living Trust. The United

States asserts that the property transactions raised by Smith are not relevant and they fail to raise any genuine issues of fact. Furthermore, the United States contends that Smith lacks standing to raise any defense on behalf of the Crow-Marsters Revocable Living Trust.

Under Federal Rule of Civil Procedure 56(c) summary judgment shall be granted if the record shows that, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party has the burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986). In determining whether a genuine issue of a material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983).

Having reviewed the record, the Court finds that the United States is entitled to summary judgment. As previously stated,

Smith, in response to the United States' motion, has not challenged the unpaid federal tax assessments which the United States seeks to reduce to judgment. The United States has produced the certificates of assessments and payments for the federal employment, unemployment and incomes taxes and penalties assessed against Smith. These certificates constitute prima facie evidence that the assessments are valid and that the amounts are correct. Guthrie v. Sawyer, 970 F.2d 733, 737 (10th Cir. 1992). As Smith has not produce any countervailing proof that the assessments set forth in the certificates are incorrect, the Court finds that the United States is entitled to judgment as a matter of law with respect to these assessments.

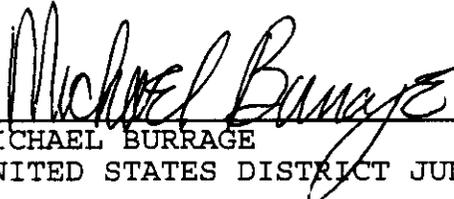
The Court additionally finds that the United States is entitled to foreclose the federal tax liens against Smith for the unpaid federal tax liabilities. The undisputed facts show that a judgment was entered in favor of the United States and against Smith in the counterclaim action brought against Smith in Velma L. Kirk v. United States, Case No. 95-C-635-W. This judgment awarded \$102,104.82 plus statutory interest from the dates of assessment, plus costs, for the trust fund penalty imposed against Smith under 26 U.S.C. § 6672 for all four quarters of 1989 and 1990. A federal tax lien arose against Smith upon the assessment of the trust fund penalty and the record shows that notices of federal tax liens reflecting the tax liabilities were filed with the County Clerk, Tulsa County, Oklahoma on February 14, 1991 for the four quarters of 1989 and on May 15, 1992 for the four quarters of 1990. The

the tracts. The statements do not reflect any information about any written agreement between Smith and Mr. Marsters. Also, Smith has not presented any evidence of the proposal to Mr. Marsters about the purchase of the 5675 S. Boston property. Smith has simply made allegations of the agreements between he and Mr. Marsters and mere allegations are not sufficient to defeat summary judgment.

Based upon the undisputed facts and the record in this case, the Court finds that the United States is entitled as a matter of law to a judgment foreclosing the federal tax liens for Smith's unpaid federal tax liabilities.

Accordingly, Plaintiff, United States of America's Motion for Summary Judgment Against Defendant Jimmy Smith (Docket Entry #14) is GRANTED. Default Judgment against Defendant, Robert D. Marsters, as trustee of the Crow-Marsters Revocable Living Trust, has been previously issued by the Court. Judgment against Defendant, Jimmy M. Smith, shall issue forthwith.

ENTERED this 27th day of July, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GREGORY ELLIS,)
)
Plaintiff,)
)
vs.) No. 98-C-357-B
)
THE CITY OF TULSA, a municipal)
corporation, THE COUNTY OF TULSA,)
a municipal corporation, WEXFORD)
MEDICAL SERVICES, CHIEF OF)
POLICE RON PALMER, in his official)
capacity, SHERIFF STANLEY GLANZ,)
in his official capacity, VICKY SMEDLEY,)
MARK GROVES, CPL. BRUCE)
BURTON, individually and in their)
official capacities, SGT. RODNEY)
FLOYD, individually and in his official)
capacity, and OTHER UNKNOWN)
PERSONS,)
)
Defendants.)

ENTERED ON DOCKET
JUL 28 1999
DATE _____

ORDER

Before the Court are the Motion to Strike Plaintiff's Witness List (Docket No. 42) filed by defendants Board of County Commissioners of Tulsa County, Stanley Glanz, Sheriff of Tulsa County and Deputy Rodney Floyd (hereinafter referred to as "Tulsa County"); Motion to Strike Plaintiff's Witnesses (Docket No. 43), Motion in limine (Docket No. 37) and Motion for Summary Judgment (Docket No. 38) filed by defendant Wexford Health Sources, Inc. ("Wexford"); and Motion in limine to Strike Plaintiff's Witness List (Docket No. 41) filed by defendants City of Tulsa, Vicki Smedley, Mark Groves and Bruce Burton (hereinafter referred to as the "City of Tulsa").

This case was filed on May 13, 1998. Plaintiff Gregory Ellis ("Ellis") amended the Complaint on June 1, 1998 and again on October 27, 1998, pursuant to motion. On January 11,

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1999, Ellis filed a motion to withdraw his second attorney, Michael French, and to stay the case management conference scheduled for February 4, 1999. On January 12, 1999, the Court denied the motion to stay the case management conference and instructed Ellis to retain new counsel or enter an appearance *pro se* by February 4, 1999. Ellis filed an appearance on February 4, 1999 indicating his intention to proceed *pro se*. At the February 9, 1999 case management conference, Ellis appeared by telephone and requested thirty days within which to hire new counsel. The Court granted Ellis' request, but informed Ellis that he must retain new counsel within thirty days and instruct new counsel that he or she would not be allowed to withdraw. When Ellis inquired as to whether the Court's proposed scheduling order could be amended, the Court expressly informed Ellis as follows:

"Everything ought to be able to be done under this particular trial schedule with a trial date set for September 20th, and discovery is to be concluded by the end of June, which is about four months from now."

"This trial is not set until September the 20th. Discovery cutoff is not until June the 30th. That means you've got March, April, May, June to either get a lawyer and get on the ball and get this matter discovered or not within that period of time. All of that is reasonable time, and if you've got a lawyer they ought to get on board and proceed to . . . prosecution of the matter, otherwise you'll be representing yourself."

"If you're going to have a lawyer, just get it in the hands of your lawyer so they will know what your schedule is and they will have ample time to prepare under this schedule."

Despite the Court's admonition, Ellis did not request new counsel enter the case until May 10, 1999, three months after the case management conference, when he filed motions to permit Arkansas counsel, Darrell Brown and Alvin Shay, to appear *pro hac vice* on his behalf. The Court granted the motions on May 12, 1999. Although plaintiff's witness list was due on June 4, 1999, plaintiff did not seek an extension. On June 11, 1999, a month after entering their appearance, Mr. Brown and Mr. Shay filed a motion to continue the trial date based on their lack of preparation and

failure to locate local counsel. Citing its prior refusal to extend the schedule, the Court denied the motion on June 12, 1999.

Defendants now seek to strike Plaintiff's witness list as untimely. Ellis did not file or serve his witness list on defendants until July 6, 1999, over one month after the deadline for filing. Ellis states he did not have adequate time to prepare the witness list. As Ellis failed to request an extension before the deadline and to heed the Court's admonition concerning the schedule, the Court grants the motions to strike plaintiff's witness list (Docket Nos. 41, 42 and 43). Only Ellis will be allowed to testify in his case-in-chief at trial.

Defendant Wexford also moves for summary judgment based on Ellis' failure to establish a prima facie case showing Wexford's deliberate indifference to his serious medical needs when he was booked into the Tulsa County Jail on May 17, 1997 for public drunkenness and resisting arrest. Wexford provided medical care at the jail during the time in question. In his Second Amended Complaint, Ellis has alleged Wexford violated his Eighth Amendment right to protection from "unnecessary and wanton infliction of pain" by being deliberately indifferent to his head wound and partial blindness which resulted from the police's use of pepper spray and restraints during his arrest and detention.¹

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In *Celotex*,

¹ Ellis' claim against Wexford is a violation of his due process rights and not the Eighth Amendment as he was a pretrial detainee at the time of the alleged violation and pretrial detainees are not protected by the Eighth Amendment until after an adjudication of guilt. *See Bell v. Wolfish*, 441 U.S. 520, 535-36 and n.17 (1979).

the Supreme Court stated:

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

Wexford states the following undisputed facts:

1. Plaintiff filed his Second Amended Complaint for Damages on October 29, 1998, alleging that Wexford violated Plaintiff's Eighth Amendment rights.
2. Plaintiff was a pretrial detainee during the relevant time period.
3. Plaintiff failed to follow this Court's Case Management Scheduling Order which required Plaintiff to identify his expert in compliance with Federal Rule of Civil Procedure 26(a)(2)(A)(B) by June 11, 1999.

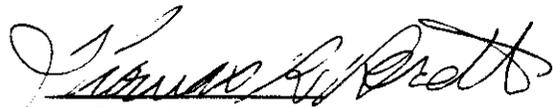
4. Plaintiff has not provided this Defendant or this Court with any expert who will testify that the treatment by Wexford or its nurses was deliberately indifferent to plaintiff's serious medical need.
5. Plaintiff has no medical education or training.
6. Plaintiff does not know when Defendant Wexford was made aware that he was in the jail.

Wexford's Motion for Summary Judgment, pp. 2-3 (citations to exhibits omitted). Wexford contends the undisputed facts establish that Ellis cannot show its "deliberate indifference" or that Ellis had "serious" medical needs. Specifically, Wexford argues Ellis has offered no expert or physician testimony that his injuries were sufficiently serious to warrant Fourteenth Amendment protection.

Ellis' only response to Wexford's motion for summary judgment is that he has had inadequate time to prepare and locate an expert on the issue of Wexford's deliberate indifference to Ellis' serious medical needs because the Court denied his motion for continuance. Ellis offers no evidence to rebut Wexford's statement of undisputed facts.

As outlined above, the Court finds Ellis' delay in prosecuting his case does not excuse his burden on summary judgment. Based on the undisputed facts in the record, the Court grants Wexford's motion for summary judgment (Docket No. 38). In granting the summary judgment motion, the Court finds Wexford's motion in limine to be moot (Docket No. 37).

IT IS SO ORDERED this 27 day of July, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD A. COPELAND,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

No. 99CV0279E(J)

ENTERED ON DOCKET
DATE JUL 28 1999

DEFAULT JUDGMENT

This matter comes on for consideration this 27th day of July, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Richard A. Copeland, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Richard A. Copeland, was served with Summons and Complaint on June 21, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Richard A. Copeland, for the principal amounts of \$7,275.36 and \$5,655.92, plus accrued interest of \$5,042.84 and \$3,183.04, plus interest thereafter at the rates of 9.13% and 8% per annum until judgment,

6

plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.966 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

PEP/11f

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

F I L E D

JUL 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORLANDO REED,)
)
Plaintiff,)
)
vs.)
)
TULSA COUNTY SHERIFF'S)
DEPARTMENT, et al.,)
)
Defendants.)

No. 98-CV-768-B (M)

ENTERED ON DOCKET
DATE JUL 28 1999

ORDER

Plaintiff, appearing *pro se* and *in forma pauperis*, brings this civil rights action pursuant to 42 U.S.C. § 1983 against the Tulsa County Sheriff's Department, Sheriff Stanley Glanz, and Bill Thompson, Undersheriff, for being housed in unhealthy living conditions during his detention at the Tulsa County Jail ("TCJ"). Specifically, Plaintiff alleges that he was required to sleep on the floor in a portable bed ("boat") within 5 feet of showers, drains and toilets, that the toilets overflowed causing human waste to spill onto the floors and his bedding, and that he was subjected to "disturbing and sicking" (sic) odors as a result. Plaintiff seeks damages only for pain and suffering. For the reasons stated below, the Court finds that Plaintiff's civil rights action should be dismissed for failure to state a claim upon which relief can be granted.

A. The PLRA

Under The Prison Litigation Reform Act of 1996 ("PLRA"), a district court may dismiss an action filed *in forma pauperis* "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. 28 U.S.C. § 1915(e)(2)(B). 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. Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110. Moreover, the PLRA bars recovery for mental or emotional injury absent a prior showing of physical injury. See 42 U.S.C. § 1997e(e).¹

B. Standard governing Plaintiff's claim

In order to hold jail officials liable for violating an inmate's right to humane conditions of confinement, two requirements must be met.² First, the deprivation alleged must be "sufficiently serious," (the "objective prong" of the test), depriving the inmate of "the minimal civilized measure of life's necessities." Barney v. Pulsipher, 143 F.3d 1299, 1310 (10th Cir. 1998) (quoting Wilson

¹42 U.S.C. §1997e(e) states: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."

²While conditions of confinement claims brought by convicted prisoners are governed by the Eighth Amendment, the Supreme Court has instructed that claims involving conditions of confinement brought by pretrial detainees should be analyzed under the Due Process Clause of the Fourteenth Amendment rather than under the Eighth Amendment. Bell v. Wolfish, 441 U.S. 520, 535 & n. 16 (1979). The due process standard is used because the Eighth Amendment is concerned with punishment, and a pretrial detainee may not be punished prior to an adjudication of guilt. Id. In the instant case, the Court is unable to determine, based on the information provided in the Complaint, whether Plaintiff was a pretrial detainee or a convicted inmate during his incarceration at TCJ. Nevertheless, the elements necessary to demonstrate a constitutional violation are the same under either the Fourteenth Amendment Due Process Clause, in the case of a pretrial detainee, or the Eighth Amendment prohibition against cruel and unusual punishment, in the case of a convicted prisoner. See Craig v. Eberly, 164 F.3d 490, 495 (10th Cir. 1998) (stating that although the Due Process Clause governs a pretrial detainee's claim of unconstitutional conditions of confinement, the Eighth Amendment standard provides the benchmark for such claims).

v. Seiter, 501 U.S. 294, 298-99 (1991)). Second, the official involved must have a “sufficiently culpable state of mind,” i.e., Plaintiff must demonstrate that the official exhibited “deliberate indifference” to a substantial risk of serious harm to the inmate (the “subjective prong”). Id. (citing Farmer v. Brennan, 511 U.S. 825, 834 (1994)).

C. Plaintiff’s complaint fails to state a claim upon which relief can be granted

Plaintiff claims his civil rights were violated by the unsanitary conditions he endured at the Tulsa County Jail — the overflowing toilets, the stopped-up shower drains, the smell and stench of the area, and the filthy bedding. From his affidavit (#12) and original complaint (#1) filed in this matter, Plaintiff states that he was placed in a cell on June 22, 1998, assigned to a “regular bed (rack)” until September 21, 1998, at which time he was given a “portable bed or (boat)” and moved to a different cell “within 5 ft. of a drain that back up daily . . . had a disturbing and sickening odor . . . within 5 ft. of a shower that leaked on my bed, blanket, and sheets . . . within 5 ft. of toilet fixtures that over-flowed and got feces and urin (sic) on my bed, blanket, and sheets.” Plaintiff alleges that he complained, both verbally and in writing, to several jail personnel. Although he was told “it would be taken care of,” the situation was not remedied. Plaintiff states he had difficulty breathing and would “wake-up from bad dreams” because of these filthy conditions. Plaintiff seeks relief only for mental anguish, pain and suffering.

After liberally construing Plaintiff’s *pro se* pleadings, and viewing the complaint in the light most favorable to Plaintiff, the Court finds that the conditions Plaintiff complains of do not rise to the level of a constitutional violation. Based on the relatively short period of time Plaintiff was exposed to these unsanitary conditions, coupled with Plaintiff’s failure to allege any serious injury

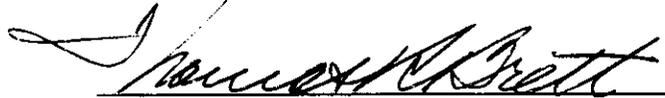
or to provide any evidence that he was or has been treated for any medical problems as a result of these conditions, the Court concludes Plaintiff's allegations fail to satisfy the objective "sufficiently serious" standard necessary to implicate a constitutional violation.

Furthermore, as noted, Plaintiff has neither alleged nor shown any physical injury as a result of these unsanitary conditions, seeking relief only for his pain and suffering. Therefore, in the absence of a physical injury, the Court finds Plaintiff's claim for mental anguish, pain and suffering is barred by the PLRA.

The Court concludes that Plaintiff's complaint should be dismissed for failure to state a claim upon which relief can be granted. 28 U.S.C. § 1915(e)(2)(B). This dismissal counts as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).³

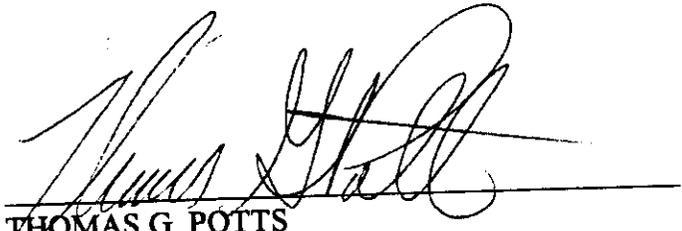
ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's complaint is dismissed for failure to state a claim upon which relief may be granted. The Clerk is directed to "flag" this dismissal as a strike pursuant to 28 U.S.C. 1915(g).

SO ORDERED this 27th day of July, 1999.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

³28 U.S.C. § 1915(g) provides that "[i]n no event shall a prisoner bring a civil action . . . if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action . . . in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted"



THOMAS G. POTTS
James, Potts & Wulfers, Inc.
2828 Mid-Continent Tower
401 South Boston Avenue
Tulsa, Oklahoma 74103-4016
Telephone: (918) 584-0881
Facsimile: (918) 584-4521

Judgment is hereby entered in accordance with the stipulation of the parties.

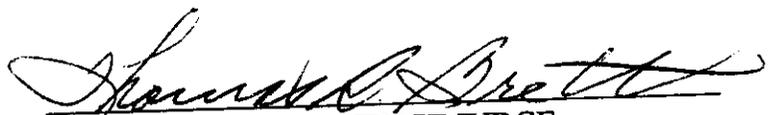
It is so ordered.

FILED

JUL 26 1999

Prill Campbell, Clerk
U.S. DISTRICT COURT

-26-99



UNITED STATES DISTRICT JUDGE

90-C-616-B

ENTERED ON DOCKET

~~JUL 27 1999~~

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 GREGORY McBEE,)
)
 Defendant.)

Case No. 97-CR-178-C
99-C-388-C

FILED
JUL 26 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
JUL 27 1999

JUDGMENT

This matter came before the Court for consideration of defendant Gregory McBee's motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255. The motion having been duly considered and a decision having been rendered in accordance with the Order filed previously,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for plaintiff, the United States of America, and against defendant, McBee, on his challenge to the legality of his conviction and sentence.

IT IS SO ORDERED this 26 day of July, 1999.


H. Dale Cook
United States District Judge

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2349

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 CHRIS CORBY,)
)
 Defendant.)

ENTERED ON DOCKET

DATE JUL 27 1999

CASE NO. 99CV0274H(J)

FILED

JUL 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AGREED JUDGMENT AND ORDER OF PAYMENT

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

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.
2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.
3. The defendant hereby agrees to the entry of Judgment in the principal sum of \$2,765.37, plus accrued interest of \$1,416.76 , plus interest thereafter at the rate of 8.41% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate until paid, plus costs of this action, until paid in full.

st

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

(a) Beginning on or before the fifteenth day of August, 1999, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$200.00, and a like sum on or before the fifteenth day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

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

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided

by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

(d) The defendant shall keep the United States currently informed in writing of any material change in his financial situation or ability to pay, and of any change in his employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth above.

(e) The defendant shall provide the United States with current, accurate evidence of her assets, income and expenditures (including, but not limited to her Federal income tax returns) within fifteen (15) days for the date of a request for such evidence by the United States Attorney.

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

6. The parties further agree that any Order of Payment which may be entered by the Court pursuant hereto may thereafter be modified and amended upon stipulation of the parties; or, should the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Chris Corby, in the principal amount of \$2,765.37, plus accrued interest in the amount of \$1,416.76, plus interest at the rate of 8.41 until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 4.966 percent per annum until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney


PHIL PINNELL, OBA #7169
Assistant United States Attorney


CHRIS CORBY

LFR/11f

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

FILED

JUL 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
WILLIE WALTER FRISBY,)
)
Defendant.)

Case Nos. 97-CR-81-BU ✓
99-CV-445-BU

ENTERED ON DOCKET

DATE JUL 27 1999

JUDGMENT

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

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Plaintiff, United States of America, and against Defendant, Willie Walter Frisby.

Dated at Tulsa, Oklahoma, this 26th day of July, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
)
WILLIE WALTER FRISBY,)
)
Defendant.)

Case Nos. 97-CR-81-BU ✓
99-CV-445-BU

ENTERED ON DOCKET
DATE JUL 27 1999

ORDER

This matter comes before the Court upon the motion of Defendant, Willie Walter Frisby, to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Plaintiff, United States of America, has responded to the motion and Defendant has replied thereto. Upon due consideration of the parties' submissions and the record herein, Court makes its determination.

In an amended information filed August 22, 1997, Defendant was charged with knowingly executing and attempting to execute a scheme and artifice to defraud a bank by fraudulently cashing or causing to be cashed a forged check in the amount of \$2,400 in violation of 18 U.S.C. §§ 2(b) and 1344(1). On September 25, 1997, Defendant, while represented by counsel, entered a plea of guilty to the charge. Subsequently, on July 29, 1998, Defendant was sentenced to 30 months imprisonment, with three years supervised released. Defendant was also ordered to pay restitution jointly and severally with his Co-Defendant in the amount of \$537,071.79. In determining Defendant's 30-month sentence, the Court, in accordance with the recommendations of set forth in the presentence report, found that Defendant's total offense level was 18, that his criminal history

category was I and that the guideline range was 27 to 33 months. Final judgment, reflecting Defendant's sentence, was entered on August 7, 1998.

On August 17, 1998, Defendant filed a notice of appeal. On appeal, Defendant argued that this Court, prior to sentencing, violated Rule 32, Federal Rules of Criminal Procedure. Specifically, Defendant contended that this Court failed to verify that Defendant and his counsel read and discussed the presentence report in violation of Rule 32(c)(3)(A) and failed to afford Defendant's counsel an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence in violation of Rule 32(c)(1). On May 19, 1999, the Tenth Circuit Court of Appeals entered an Order and Judgment finding that this Court did not violate either Rule 32(c)(1) or Rule 32(c)(3) and affirming Defendant's sentence.

In its Order and Judgment, the Tenth Circuit noted that even if Defendant had succeeded in showing that this Court had violated Rule 32, he nonetheless would have had to show that he was prejudiced by the Rule 32 violation. The Tenth Circuit found that Defendant had not shown any prejudice. Defendant, in his appeal, had argued that he had suffered prejudice in two ways. First, Defendant had argued that if this Court had given him the opportunity to comment on the probation officer's recommendations, he would have objected to the probation officer's recommendation that he not receive a decrease in his offense level for acceptance of responsibility. Second, he would have objected to the amount of

the restitution order entered by the Court. According to Defendant, if he had been able to object on these two grounds, he would have received a shorter sentence or he would have owed a lower amount of money under the restitution order. The Tenth Circuit, however, rejected Defendant's allegations of prejudice. In regard to former ground, the Tenth Circuit found that Defendant had not set forth any evidence that he should have received a reduction in sentence for acceptance of responsibility. The Tenth Circuit found that although Defendant had admitted responsibility for the offense he was charged by pleading guilty, Defendant's obstruction of the pending investigation undercut any reduction he could have received under § 3E1.1 of the Sentencing Guidelines. The Tenth Circuit noted that the probation officer's recommendation of the two-point increase for obstruction of justice was accepted by this Court and was not challenged by Defendant on appeal. As to the amount of the restitution order, the Tenth Circuit found that information was in the presentence report as to Defendant's ability to pay restitution and that this Court considered the information in entering the restitution order. As this Court had complied with the applicable law by considering the information regarding Defendant's ability to pay, the Tenth Circuit found no prejudice.

In his § 2255 motion, Defendant moves to vacate his sentence on the basis that his counsel was ineffective at sentencing. Specifically, Defendant asserts that his counsel was ineffective in failing to object to the presentence report insofar as it did not recommend an acceptance of responsibility adjustment. Defendant

contends that he was entitled to a two-point reduction of his offense level for acceptance of responsibility under § 3E1.1(a) because he admitted guilt to the charged offense. According to Defendant, the presentence report, in addressing the acceptance of responsibility adjustment, provided that "although [Defendant] initially admitted his conduct relative to the PMC, he had knowledge of his wife's continued illegal activity regarding Holliman Langholz following his plea of guilty in this case." Defendant contends that he was not required to provide any information concerning his wife's activities to receive the acceptance of responsibility reduction. Defendant contends that according to the application notes of § 3E1.1(a), he was not required to volunteer, or affirmatively admit relevant conduct beyond the offense of conviction in order to obtain a acceptance of responsibility reduction. Defendant also asserts that according to the application notes, he was entitled to remain silent with respect to the relevant conduct beyond the offense of the conviction without affecting his ability to obtain a reduction. Defendant states that his counsel should have defended his right to receive the acceptance of responsibility deduction without discussing his wife's involvement and such failure to so defend constituted ineffective assistance of counsel.

In addition to the two-point reduction under § 3E1.1(a), Defendant contends that his counsel was also ineffective in failing to argue for the one-point acceptance of responsibility reduction under § 3E1.1(b). Defendant states that he qualified for the

reduction under § 3E1.1(b) because he timely provided complete information to the Government in regard to his own conduct in the charged offense and timely notified the Government of his intention to plead guilty. Defendant contends that had he received the one-point reduction under § 3E1.1(b) in addition to the two-point reduction under § 3E1.1(a), his sentence would have been lowered by nine months.

The Government, in response, contends that Defendant is not entitled to relief under § 2255 for sentencing guideline issues. Although the Government acknowledges that Defendant has raised a Sixth Amendment claim of ineffective assistance of counsel, it argues that such claim is merely a guise for sentencing guideline issues. As sentencing guideline issues are not cognizable under § 2255, the Government contends that Defendant's motion should be denied. Additionally, the Government argues that Defendant's motion should be denied as the Tenth Circuit has already determined that Defendant is not entitled to a reduction of the total offense level for acceptance of responsibility. The Government contends that Defendant's counsel cannot be deemed ineffective for failing to make an argument that, according to the Tenth Circuit would have been meritless. The Government asserts that in light of the Tenth Circuit's decision on direct appeal, Defendant cannot demonstrate prejudice, a prerequisite for a claim of ineffective assistance of counsel.

To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was

constitutionally deficient, and that this deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); United States v. Kissick, 69 F.3d 1048, 1054 (10th Cir. 1995). Under the first prong of this test, a defendant must establish "that counsel made errors so serious that [he] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. Under this standard, "[j]udicial scrutiny of counsel's performance must be highly deferential," and the court must avoid the "distorting effects of hindsight." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Kissick, 69 F.3d at 1054. Under the second prong of the Strickland test, a defendant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; Kissick, 69 F.3d at 1055. "However, a court may not set aside a conviction or a sentence solely because the outcome would have been different absent counsel's deficient performance." Kissick, 69 F.3d at 1055. "Instead, in order to establish the required prejudice, a defendant must demonstrate that counsel's deficient performance rendered the proceeding 'fundamentally unfair or unreliable.'" Id. (quoting Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993)).

Upon review, the Court finds that Defendant has failed to establish his claim for ineffective assistance of counsel. The Court concludes that Defendant has failed to show that his

counsel's performance was constitutionally deficient. As explained by the Tenth Circuit in its Order and Judgment, Defendant was not entitled to an acceptance of responsibility adjustment because he received an enhancement under § 3C1.1 for obstruction of justice. Note 4 under the Application Notes of § 3E1.1 provides "[c]onduct resulting in an enhancement under § 3C1.1 . . . ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply." U.S.S.G. § 3E1.1, comment. (n.4). Defendant has not presented any facts that his case was the extraordinary case warranting a decrease for acceptance of responsibility in spite of his enhancement for obstruction of justice. Because Defendant was not entitled to an acceptance of responsibility adjustment, the Court finds that his counsel's failure to argue for an offense level reduction of acceptance of responsibility did not fall below "an objective standard of reasonableness." Strickland, 466 U.S. at 688, 104 S.Ct. at 2064.

Even if the Court were to find counsel's performance had been deficient as argued by Defendant, the Court concludes that Defendant has not demonstrated that such performance was prejudicial. Specifically, Defendant has not shown that "counsel's . . . performance rendered the proceeding 'fundamentally unfair or reliable.'" Kissick, 69 F.3d at 1055 (quoting Lockhart, 506 U.S.

at 369, 113 S.Ct. at 842).¹

Based upon the foregoing, Defendant, Willie Walter Frisby's Motion to Vacate, Set Aside, or Correct Sentence (Docket Entry #47) is DENIED. Judgment shall issue forthwith.

ENTERED this 26th day of July, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

¹ In light of the Court's finding that Defendant has not establish a claim for ineffective assistance of counsel, the Court need not address the Government's argument that Defendant is actually raising a sentencing guideline issue in the guise of a ineffective assistance of counsel claim and such issue is not cognizable under § 2255.

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

F I L E D

JUL 27 1999

EUGENE PELIZZONI, SR. AND EUGENE A. PELIZZONI, JR.,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiffs,)

vs.)

Case No. 99 CV 0307K(J)

SOLOMON SMITH BARNEY, a New York corporation and WALTER E. WATTS, JR.,)

(formerly CJ-99-01472, Dist. Ct.

Tulsa County, Oklahoma)

Defendants.)

ENTERED ON DOCKET

DATE JUL 27 1999

NOTICE OF DISMISSAL WITHOUT PREJUDICE

The Plaintiffs hereby dismiss the above styled and numbered cause of action without prejudice to future filings.

Respectfully submitted,

EDWARDS & HUFFMAN, L.L.P.

By: _____

Robert A. Huffman, Jr., OBA #4456

Rodney A. Edwards, OBA #2696

Two Warren Place

6120 S. Yale, Suite 1470

Tulsa, OK 74136-4223

(918) 496-0444

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 1999, I caused a true and correct copy of the above and foregoing instrument to be mailed with proper postage thereon prepaid to Mona Lambird Andrews Davis Legg Bixler Milsten & Price, 500 West Main, Suite 500, Oklahoma City, OK 73102 and to Helen Duncan, LeBoeuf, Lamb, Greene & MacRae, L.L.P., 725 South Figueroa Street, Los Angeles, CA 90017-5436.

Robert A. Huffman, Jr.

Handwritten initials: CJJ

MT

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

FILED

MERRILL LYNCH, PIERCE, FENNER
& SMITH)

JUL 27 1999

Plaintiff,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

vs.)

Case No. 97-C-217-H

C. DAN PENTECOST,)

ENTERED ON DOCKET

Defendant.)

DATE JUL 27 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Merrill Lynch, Pierce, Fenner & Smith Inc., and defendant, C. Dan Pentecost, pursuant to the provisions of Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby stipulate to the dismissal of this proceeding, with prejudice to refileing.

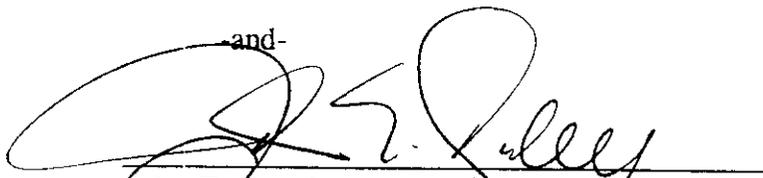
Respectfully submitted,



Michael J. Fortunato
Rubin & Associates, P.C.
10 South Leopard Road
MCS Building, Suite 202
Paoli, Pennsylvania 19301
(610) 408-2005

**Attorneys for Plaintiff,
Merrill Lynch, Pierce, Fenner & Smith**

and-



John E. Dowdell
NORMAN WOHLGEMUTH CHANDLER & DOWDELL
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571

**Attorneys for Defendant,
C. Dan Pentecost**

C/S

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

FILED

JUL 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOLLAR RENT A CAR SYSTEMS,)
INC., an Oklahoma corporation,)
)
Plaintiff,)
vs.)
)
R.A.H. CORPORATION, a California)
corporation; ROBERT HEYMANN,)
an individual, and RALPH)
HEYMANN, an individual,)
)
Defendants.)

Case No. 98-CV-748-BU(J) /

ENTERED ON DOCKET
DATE JUL 27 1999

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 26th day of July, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

JUL 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BED-CHECK CORPORATION,)
)
 Plaintiff,)
)
 vs.)
)
 KOREGON ENTERPRISES, INC.,)
)
 Defendant.)

No. 99-CV-212-BU(E)

ENTERED ON DOCKET

DATE JUL 27 1999

ORDER

This matter comes before the Court upon Plaintiff's Notice of Dismissal Without Prejudice, wherein Plaintiff requests that this Court issue an order dismissing without prejudice the above-styled action. Upon due consideration, the Court finds that Plaintiff's request should be and is hereby GRANTED.

Accordingly, the above-styled action is hereby DISMISSED WITHOUT PREJUDICE.

ENTERED THIS 26th day of July, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 26 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
WESLEY SMITH, WARREN W.)
SMITH & ASSOCIATES, WAYNE)
NUNEMAKER, NUNEMAKER)
ARCHITECTS, GUY DONOHUE,)
DONOHUE SERVICE COMPANY,)
INC., and DOUGLAS HAYNES,)
)
Defendants.)

Case No. 99-CV-52-BU(E)

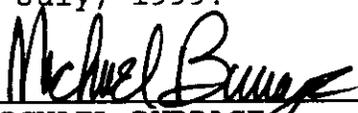
ENTERED ON DOCKET
DATE JUL 27 1999

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

ENTERED this 26th day of July, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

MT

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

FILED

JUL 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARTHENIA ANDERSON,)
)
Plaintiff,)
)
vs.)
)
AMOCO CORPORATION,)
)
Defendant.)

Case No. 99 CV 22K ✓

ENTERED ON DOCKET

DATE JUL 26 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1), Fed.R.Civ.P., the parties hereby stipulate that the above-captioned case be dismissed with prejudice.

Kimberly Lambert Love

Kimberly Lambert Love, OBA #10879
Mary L. Lohrke, OBA #15806
BOONE, SMITH, DAVIS, HURST & DICKMAN
500 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103-4215
Attorneys for the Defendant, Amoco Corporation

Jeff Nix

Jeff Nix, OBA #6688
Petroleum Club Building
601 South Boulder
Suite 610
Tulsa, Oklahoma 74119
Attorney for the Plaintiff, Marthenia Anderson

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ctj

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)
)
Plaintiff,)
)
v.)
)
JAMES R. UTT aka James Russell Utt;)
SPOUSE OF JAMES R. UTT aka James Russell Utt;)
REBECCA LYN UTT aka Rebecca L. Utt)
aka Rebecca Lyn Ratliff aka Rebecca Osborne;)
SPOUSE OF REBECCA LYN UTT)
aka Rebecca L. Utt aka Rebecca Lyn Ratliff)
aka Rebecca Osborne;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma;)
STATE OF OKLAHOMA ex rel.)
Oklahoma Tax Commission,)
)
Defendants.)

FILED
JUL 22 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE JUL 26 1999

CIVIL ACTION NO. 98-CV-0562-H (E) ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22ND day of July, 1999.

The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; the Defendants, Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne and Spouse of Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne who is one and the same person as Frank Osborne,

appear not, having filed their Disclaimers; and the Defendants, James R. Utt aka James Russell Utt and Spouse of James R. Utt aka James Russell Utt who is one and the same person as Susan Utt, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, James R. Utt aka James Russell Utt, executed a Waiver of Service of Summons on August 10, 1998; that the Defendant, Spouse of James R. Utt aka James Russell Utt who is one and the same person as Susan Utt, was served with Summons and Amended Complaint by certified mail, return receipt requested, delivery restricted to the addressee on February 8, 1999; that the Defendant, Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne, executed a Waiver of Service of Summons on September 21, 1998; that the Defendant, Spouse of Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne who is one and the same person as Frank Osborne, was served with Summons and Amended Complaint by a United States Deputy Marshal on February 25, 1999.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on August 12, 1998; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer on or about February 18, 1999; that the Defendants, Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne and Spouse of Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne who is one and the same person as Frank Osborne, filed their Disclaimers on March 11, 1999; and that the Defendants, James R. Utt aka James Russell Utt and Spouse of James R. Utt aka James Russell Utt who is one and the same person as Susan Utt, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Two (2), Block Eight (8), of the Resubdivision of the Amended Plat of MEADOW HEIGHTS ADDITION to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on August 17, 1992, James R. Utt and Rebecca Lyn Utt executed and delivered to BancOklahoma Mortgage Corp. their mortgage note in the amount of \$39,350.00, payable in monthly installments, with interest thereon at the rate of 8.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, James R. Utt and Rebecca Lyn Utt, husband and wife, executed and delivered to BancOklahoma Mortgage Corp. a real estate mortgage dated August 17, 1992, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on August 19, 1992, in Book 5428, Page 2331, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 19, 1997, BancOklahoma Mortgage Corp. assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs. This Corporation Assignment of Mortgage was recorded on March 17, 1997, in Book 5895, Page 1269, in the records of Tulsa County, Oklahoma. On August 17, 1992, the Secretary of Veterans Affairs reamortized the loan making the entire debt due principal and the interest rate was changed to 7.75 percent per annum.

The Court further finds that Defendants, James R. Utt aka James Russell Utt and Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne, made default

under the terms of the aforesaid note and mortgage 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 \$41,597.20, plus administrative charges in the amount of \$529.00, plus penalty charges in the amount of \$208.00, plus accrued interest in the amount of \$2,042.84 as of December 15, 1997, plus interest accruing thereafter at the rate of 7.75 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of cleaning and mowing taxes in the amount of \$226.49, plus penalties and interest, for the year 1997. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action in the amount of \$442.90 together with interest and penalty according to law, by virtue of Tax Warrant No. MVC9800000100, dated January 26, 1998, and recorded on February 4, 1998, in Book 6007, Page 0901 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, James R. Utt aka James Russell Utt and Spouse of James R. Utt aka James Russell Utt who is one and the same person as Susan Utt, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that the Defendants, Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne and Spouse of Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne who is one and the same person as Frank Osborne, disclaim any right, title or interest in or to the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against Defendants, James R. Utt aka James Russell Utt and Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne, in the principal sum of \$41,597.20, plus administrative charges in the amount of \$529.00, plus penalty charges in the amount of \$208.00, plus accrued interest in the amount of \$2,042.84 as of December 15, 1997, plus interest accruing thereafter at the rate of 7.75 percent per annum until judgment, plus interest thereafter at the current legal rate of 4.966 percent per annum until fully paid, plus the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$226.49, plus penalties and interest, for 1997 cleaning and mowing taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, have and recover judgment in the amount of \$442.90 together with interest and penalty according to law, by virtue of Tax Warrant

No. MVC9800000100, dated January 26, 1998, and recorded on February 4, 1998, in Book 6007, Page 0901 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants, James R. Utt aka James Russell Utt; Spouse of James R. Utt aka James Russell Utt who is one and the same person as Susan Utt; Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne; Spouse of Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne who is one and the same person as Frank Osborne; and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

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

Fourth:

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission.

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

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


UNITED STATES DISTRICT JUDGE

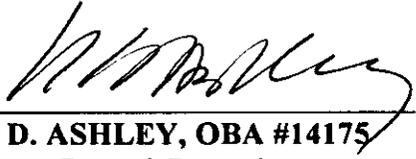
APPROVED:

STEPHEN C. LEWIS
United States Attorney


PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463


DICK A. BLAKELEY, OBA #0852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 98-CV-0562-H (E) (Ut)



KIM D. ASHLEY, OBA #14175

Assistant General Counsel

P.O. Box 53248

Oklahoma City, Oklahoma 73152-3248

(405) 521-3141

Attorney for Defendant,

State of Oklahoma, ex rel.

Oklahoma Tax Commission

A 99-159

Judgment of Foreclosure

Case No. 98-CV-0562-H (E) (Utt)

PP:ess

MT

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

F I L E D

JUL 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANGELA SIPES,)
)
 Plaintiff,)
)
 DIANA M. RUBIN,)
)
 Plaintiff in Intervention,)
)
 v.)
)
 AESTHETECH CORPORATION,)
 et. al.,)
)
 Defendants.)

Case No. 92-C-1013-E ✓

ENTERED ON DOCKET

DATE JUL 26 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff in Intervention, Diana M. Rubin, and Defendant, Baxter Healthcare Corporation, by and through their attorneys of record, hereby stipulate that Ms. Rubin's claims against Baxter Healthcare Corporation, Baxter International Inc., American Heyer-Schulte Corporation, f/k/a Heyer-Schulte Corporation, and American Hospital Supply Corporation, should be and hereby are dismissed with prejudice.

By: *Mark B. Hutton*
MARK B. HUTTON

Of the Firm:

HUTTON & HUTTON
P.O. Box 638
Wichita, KS 67201-0638
Telephone: (316) 688-1166
Telefax: (316) 686-1077

ATTORNEYS FOR PLAINTIFF IN INTERVENTION

mail
copy's etc
C/S

53

By: 
CHARLES E. GEISTER III (OBA #3311)
PHILLIP G. WHALEY (OBA #13371)

Of the Firm:

HARTZOG CONGER & CASON
1600 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102-7801
Telephone: (405) 235-7000
Telefax: (405) 235-7329

ATTORNEYS FOR DEFENDANT
BAXTER HEALTHCARE CORPORATION

CERTIFICATE OF MAILING

I hereby certify that on this the 22nd of July, 1999 a true and correct copy of the foregoing instrument was mailed via First Class Mail, postage prepaid thereon, to the following attorneys of record:

Charles E. Geister III, Esq.
Hartzog Conger & Cason
201 Robert S. Kerr, Suite 1600
Oklahoma City, Oklahoma 73102



Mark B. Hutton

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

F I L E D

JUL 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DELBERT LEROY OLDHAM,)
)
 Petitioner,)
)
 vs.)
)
 CARL D. WHITE,)
)
 Respondent.)

Case No. 97-CV-445-B (J) ✓

ENTERED ON DOCKET
DATE JUL 23 1999

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 convictions in Washington County District Court, Case Nos. CRF-82-133 and CRF-92-189. Respondent has filed a Rule 5 response (Docket #5) to which Petitioner has replied (#10). Petitioner also submitted a supplemental reply (#13). As more fully set out below the Court concludes that this petition should be denied.

BACKGROUND

Petitioner identifies eleven (11) propositions of error in his petition, including a claim that the sentence he received as a result of his conviction in Case No. CRF-92-189 was improperly enhanced with an invalid prior conviction in Case No. CRF-82-133. Petitioner also directly attacks his conviction in Case No. CRF-82-133. Therefore, a review of the background in this case begins with Petitioner's conviction in Case No. CRF-82-133.

On June 3, 1982, Petitioner pled guilty to Second Degree Forgery in Washington County District Court, Case No. CRF-82-133 (#5, Ex. A), and received a five year suspended sentence (90

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days to be served in the county jail). Petitioner did not perfect a direct appeal. On March 11, 1987, Petitioner discharged the suspended sentence. (#5, Ex. B).

More than five (5) years after discharging his sentence, Petitioner was tried by a jury on charges of Lewd Molestation (Count I), First Degree Rape (Count II), and Lewd Molestation (Count III) in Washington County District Court, Case No. CRF-92-189. On November 5, 1992, after his first trial ended in a mistrial, Petitioner was convicted by a second jury on all charges. He received sentences of 10 years, 60 years, and 30 years imprisonment on each count, respectively. Petitioner perfected a direct appeal raising three (3) propositions of error: (1) the trial court erred in denying Petitioner's supplemental motion for discovery, (2) the trial judge erred in limiting cross-examination about the victim's prior allegations of sexual abuse and prevented Petitioner from defending himself, in violation of his right to confrontation; and (3) the trial court erred by admitting the expert testimony of clinical therapist Kimberly Adams about the behaviors and characteristics exhibited by sexually-abused children and the prosecutrix's exhibition of the behaviors and characteristics. (#5, Ex. E). On April 24, 1995, the Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction and sentence in Case No. CRF-92-189.

Petitioner sought post-conviction relief as to both his 1982 and 1992 convictions. On April 26, 1996, Petitioner filed an application for an appeal out of time as to the conviction entered in Case No. CRF-82-133. (See #5, Ex. F, attachment marked "Ex. C"). He filed an amended post-conviction application on August 14, 1996, incorporating a challenge to his conviction in Case No. CRF-92-189. (See #5, Ex. F, attachment marked "Ex. E"). On January 2, 1997, the state district court denied the relief requested in two separate orders. (See #5, Ex. F, 2 attachments marked "Ex. A"). Petitioner appealed the denial of post-conviction relief to the Oklahoma Court of Criminal Appeals. (#5, Exs.

F and G). On post-conviction appeal, Petitioner raised the following issues as to his conviction in Case No. CRF-82-133:

- Proposition I: Trial court failed to make specific findings of fact and conclusions of law concerning each issue presented.
- Proposition II: Petitioner is unconstitutionally imprisoned because trial court did not secure a knowing waiver of counsel but relied on prior felony to enhance his present sentences.
- Proposition III: Trial court failed to ascertain that there was a factual basis for accepting plea of guilty.
- Proposition IV: Petitioner was denied an appeal through no fault of his own in CRF-82-133.

(#5, Ex. F). On post-conviction appeal, Petitioner raised the following issues as to his conviction in Case No. CRF-92-189:

- Proposition I: The trial court failed to make specific findings of fact and conclusions of law concerning each issue presented.
- Proposition II: Petitioner is unconstitutionally imprisoned because the trial court did not have jurisdiction to impose sentences under title 21 O.S. § 51, because the predicate offense CRF-82-133 used to enhance was constitutionally invalid because obtained without benefit or aid of counsel.

(#5, Ex. G). On February 27, 1997 and again on April 11, 1997, the Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief in both CRF-82-133 and CRF-92-189. (#5, Exs. H and I).

Petitioner filed the instant habeas corpus petition on May 7, 1997. He raises the following eleven (11) propositions of error:

- Ground I: The Oklahoma Court of Criminal Appeals violated due process and equal protection of the law when it determine there is no need to decide whether Petitioner knowingly and intelligently waived counsel on appeal [in CRF-82-

133] because Petitioner was denied an appeal through no fault of his own.

- Ground II: Trial court failed to secure a knowing and intelligent waiver of counsel in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Oklahoma Constitution under Article II §§ 7 and 20 under Faratta v. California, 95 S.Ct. 2525.
- Ground III: Trial court failed to ascertain that there was a factual basis for accepting the plea of guilty in CRF-82-133 rendering said conviction constitutionally invalid. U.S. Const. Amends. 14th; Okla. Const. Art. II §§ 7 and 20. King v. State, 553 P.2d 529 (Okl. Cr.).
- Ground IV: Petitioner was deprived of his constitutional right to counsel for appeal on his plea of guilty in CRF-82-133 as afforded by the due process and equal protection clause of the Sixth and Fourteenth Amendments of the United States Constitution.
- Ground V: Petitioner is unconstitutionally imprisoned and CRF-92-189 should be modified from one-hundred (100) years to the minimum sentences because the trial judge committed fundamental error in instructing the jury that the minimum range of punishment with one (1) prior felony would be not less than ten (10) years under 21 Okla. Stat. Ann. 1991, § 51(A), Oklahoma's criminality statute (sic). This statute (sic) did not apply because CRF-82-133 is "allegedly invalid" and not usable for enhancement.
- Ground VI: The Oklahoma Court of Criminal Appeals violated due process when it decided a first impression issue and held the procedure in 10 O.S. Supp. 1992, § 1125.(c) controls over the discovery code promulgated in Allen v. District Court, 803 P.2d 1164 (Okl. Cr. 1990).
- Ground VII: The Oklahoma Court of Criminal Appeals violated due process when it applied the overruling section of Woods v. State, 657 P.2d 180 (Okl. Cr. 1983), and interpreted Walker v. State, 841 P.2d 1159 (Okl. Cr. 1992), as holding the same. The applied portion of Woods was overruled in Beck v. State, 824 P.2d 385, 389 (Okl. Cr. 1991), in Petitioner's direct appeal in CRF-92-189.
- Ground VIII: The Oklahoma Court of Criminal Appeals violated due process and equal protection of the law when it decided a first impression issue and held that discovery of information contained in a District Attorney's files concerning a juvenile complaining witness' prior reports of molestations were not discoverable unless the petitioner showed the materiality of the information according to the overruled standard of Woods v. State, 657 P.2d 180 (Okl.

Cr. 1983). Additionally, as a first impression issue, the Oklahoma Court of Criminal Appeals erroneously extended the procedure and changed the burden of proof for objections to discovery under Amos v. District Court, 814 P.2d 502 (Okla. Cr. 1992).

Ground IX: The Oklahoma Court of Criminal Appeals violated due process and equal protection of the law because it did not apply the proper standard and methodology for state appellate review as set forth in Simpson v. State, 876 P.2d 690 (Okla. Cr. 1994).

Ground X: The trial judge erred in limiting cross examination about Alana Buckner's prior allegations of sexual abuse and prevented appellant Petitioner from defending himself, which violated Petitioner's right to confrontation under the Sixth Amendment of the U.S. Constitution and Okla. Const. Art. §§ 7 and 20.

Ground XI: The trial court erred by admitting the expert testimony of clinical therapist Kimberly Adams about the behaviors and characteristics exhibited by sexually-abused children and the prosecutrix's exhibition of the behaviors and characteristics.

ANALYSIS

As a preliminary matter, Respondent concedes and the Court finds Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). In addition, the Court finds Petitioner's request for an evidentiary hearing (see #1) should be denied. Petitioner requested and was denied an evidentiary hearing in the state courts. Therefore, he is not precluded from receiving an evidentiary hearing by the provisions of 28 U.S.C. § 2254(e)(2). Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998). However, the Court finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). The granting of such a hearing is within the discretion of the district court, and this Court finds that a hearing is not necessary.

A. Petitioner's claims numbered I -- IV

In his first four propositions of error, Petitioner attempts to attack directly his conviction entered in Washington County District Court, Case No. CRF-82-133. Petitioner identifies the conviction under attack as CRF-82-133 and seeks to invalidate the conviction because it was used to enhance the sentence imposed in CRF-92-189. Petitioner also argues, as his fifth proposition of error, that his current sentence, imposed as a result of his conviction in CRF-92-189, was improperly enhanced by use of an invalid conviction.

At the time Petitioner filed the instant petition, he had completely discharged the sentence imposed in Case No. CRF-82-133. This Court may only entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court" 28 U.S.C. § 2254(a). Because Petitioner had discharged the challenged conviction, he was not "in custody" pursuant to the judgment and sentence entered in Case No. CRF-82-133 when he filed the instant petition and this Court is precluded from considering direct challenges to the discharged conviction. Maleng v. Cook, 490 U.S. 488, 492 (1989). Therefore, to the extent Petitioner identifies the challenged conviction in this case as CRF-82-133, the Court concludes those claims directly challenging that conviction, i.e., Propositions I -- IV, should be denied for lack of jurisdiction.

However, Petitioner may direct an attack toward the enhanced sentence, i.e., the sentence entered in CRF-92-189, by arguing that his present sentence is improper because it was enhanced by the prior, allegedly unconstitutional conviction entered in CRF-82-133. Gamble v. Parsons, 898 F.2d 117. Petitioner's fifth proposition of error raises such a challenge and may be properly considered by this Court. See discussion of Proposition V, in Part B(2)(a), below.

B. Petitioner's claims numbered V -- XI

1. Standard of review under the AEDPA

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Pursuant to 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), this Court cannot grant habeas corpus relief on Petitioner's claims adjudicated by the Oklahoma Court of Criminal Appeals either on direct appeal or on post-conviction appeal unless the adjudication of the claims –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Petitioner's claim numbered V was considered by the Oklahoma Court of Criminal Appeals on the merits in Petitioner's post-conviction appeal. See #5, Ex. I. Similarly, the arguments raised in Petitioner's claims numbered VI -- XI were considered on the merits by the Oklahoma Court of Criminal Appeals in Petitioner's direct appeal. See #5, Ex. E. Therefore, unless the Court of Criminal Appeals's adjudication of these claims was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," this Court must deny the requested habeas relief as to Petitioner's claims numbered V -- XI. 28 U.S.C. § 2254(d).

2. Review of Petitioner's claims

a. Proposition V -- improper enhancement

Although Respondent argues that Petitioner's improper enhancement claim is procedurally barred because the Oklahoma Court of Criminal Appeals found Petitioner had defaulted the claim,

the record indicates that the Oklahoma Court of Criminal Appeals carefully reviewed Petitioner's allegations concerning his conviction in Case No. CRF-82-133 and the state district court's denial of post-conviction relief as to his conviction in Case No. CRF-92-189. By order dated April 11, 1997, the state appellate court stated as follows:

As we **FIND** it was not error for the District Court to deny post-conviction relief upon Petitioner's 1982 conviction, it follows Petitioner is not entitled to post-conviction relief under Proposition IV of his Application and Proposition II on appeal wherein he contends the State's use of the 1982 conviction to enhance Petitioner's sentences in Case No. CRF-92-189 was improper.

(#, Ex. I at 5) (emphasis in original). Thus, because the state appellate court reviewed the facts relevant to Petitioner's allegation of improper enhancement and found the claim to be without merit, the claim is not procedurally barred from this Court's review.

However, after reviewing the record, this Court finds nothing to indicate that the state court's resolution of Petitioner's improper enhancement claim either contradicts or was an unreasonable application of Supreme Court precedent. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938), *overruled on other grounds*, Edwards v. Arizona, 451 U.S. 477 (1981). The Oklahoma Court of Criminal Appeals determined that the "Summary of Facts" (see #5, Ex. A), completed and signed by Petitioner at the time of his guilty plea and sentencing in CRF-82-133, revealed that Petitioner was then thirty-two years old and that he was advised of the charge against him, of his right to trial upon the charge, of the range of punishments which could be imposed should he plead guilty to the charge, and of the recommended sentence.

The state appellate court also determined that Petitioner answered in the affirmative when he was specifically asked whether he entered his plea of guilty because he was indeed guilty and whether he admitted doing those acts charged. Lastly, the state appellate court found that Petitioner answered in the affirmative both to question 8, "[d]o you understand that you are entitled to have an attorney and if you are unable to afford an attorney you are entitled to a court appointed attorney?" and to question 9, "[d]o you wish to waive the right to have an attorney?" Based on these facts and finding no other evidence in the record to support Petitioner's claims, the Oklahoma Court of Criminal Appeals concluded that Petitioner's waiver of counsel was knowingly and voluntarily made and that there was a factual basis for his plea. As a result, the court rejected Petitioner's claim that his 1992 sentence was improperly enhanced with his invalid 1982 conviction.

After reviewing the record, this Court finds the decision of the Oklahoma Court of Criminal Appeals was consistent with Supreme Court precedent and was not an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Therefore, pursuant to 28 U.S.C. § 2254(d), habeas corpus relief on Petitioner's improper enhancement claim should be denied.

b. Habeas corpus relief cannot be granted based on propositions VI -- XI

Each of Petitioner's allegations of error presented in Propositions VI -- XI challenges either an evidentiary ruling by the trial court or the resolution of the claim by the Oklahoma Court of Criminal Appeals. In Propositions VI and VIII, Petitioner argues that state appellate court violated due process and equal protection in rejecting his claim that the trial court improperly prevented his discovery of the rape victim's medical and psychological records and any evidence of prior sexual assaults experienced by the victim. Petitioner challenged the trial court's discovery rulings on direct

appeal, designated as "Proposition I." (#5, Ex. C). In Propositions IX and XI, Petitioner alleges that the trial court improperly failed to exclude testimony of a mental health professional who testified as a witness for the state regarding her observations of the victim and that the Oklahoma Court of Criminal Appeals applied the wrong standard in its opinion affirming Petitioner's conviction. Petitioner raised his challenge to the trial court's evidentiary ruling on direct appeal, designated as "Proposition III." (#5, Ex. C). In Propositions VII and X, Petitioner alleges that the trial court improperly prevented him from cross-examining the victim about her prior allegations of sexual abuse. Petitioner alleges this ruling violated his right to confrontation. Petitioner raised this claim on direct appeal, designated as "Proposition II." (#5, Ex. C). Petitioner also alleges that the Oklahoma Court of Criminal Appeals violated due process in denying this claim on direct appeal. Each of these claims allege errors of state law resulting from the trial court's evidentiary rulings and the appellate court's decision affirming Petitioner's conviction.

In Estelle v. McGuire, 502 U.S. 62, 67-68 (1991), the Supreme Court emphasized that "'federal habeas corpus relief does not lie for errors of state law' . . . it is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." (citations omitted). This Court may consider claims challenging evidentiary rulings only if the alleged errors of state law rendered Petitioner's trial "fundamentally unfair." Hatch v. State of Oklahoma, 58 F.2d 1447, 1468 (10th Cir. 1995); Hopkinson v. Shillinger, 866 F.2d 1185, 1197 (10th Cir. 1989).

However, the Court finds that in this case, Petitioner has failed to demonstrate that the challenged rulings, even if erroneous under state law, rendered his trial fundamentally unfair. The

victim testified at trial and Petitioner's counsel cross-examined extensively. (Trans. at 78-131). The victim acknowledged that there were "problems" between her family and Petitioner's family. (Trans. at 129-130). In addition, Petitioner testified in his own defense. He denied the allegations made by the victim (Trans. at 289) and told the jury about the conflict between the two families, thereby providing his explanation for the victim's accusations. (Trans. at 289). Thus, the jury had the opportunity to view both the victim's and Petitioner's demeanor and to assess their credibility. In light of these events, the Court finds that the challenged evidentiary rulings, even if error under state law, did not render Petitioner's trial fundamentally unfair and habeas corpus relief should be denied.

In addition, because Petitioner raised these claims on direct appeal where the merits were considered and rejected by the Oklahoma Court of Criminal Appeals (#5, Ex. E at 2-7), habeas relief cannot be granted on these claims unless the § 2254(d) standard, as discussed above, is satisfied. After reviewing the record, this Court finds the decision of the Oklahoma Court of Criminal Appeals was consistent with Supreme Court precedent and was not an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

On direct appeal, the Oklahoma Court of Criminal Appeals determined that, as to Petitioner's arguments raised in propositions VI and VIII, the production of the juvenile records of the victim was governed by the specific procedure outlined in Okla. Stat. tit. 10, § 1125.1 (1992). Because discovery of the requested records could proceed only under the juvenile code, the state appellate court ruled that the discovery motion was properly denied. As to Petitioner's arguments raised in propositions IX and XI, the Oklahoma Court of Criminal Appeals ruled that while the admission of the testimony concerning behavior patterns of sexually abused children was error, counsel for Petitioner failed to object, thereby waiving all but "plain error." After finding that Petitioner failed

to demonstrate that the admission of the testimony seriously affected the fairness, integrity or public reputation of the judicial proceeding, the state appellate court concluded that no "plain error" had occurred and rejected Petitioner's claim.

Petitioner alleges that the challenged evidentiary rulings violated due process and equal protection. An evidentiary ruling does not violate the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Montana v. Egelhoff, 518 U.S. 37, 43 (1996) (citation and internal quotations omitted). Due process "is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). In the instant case, the evidentiary rulings by the trial court did not deny Petitioner the opportunity to defend against the state's accusations. Nothing indicates that it was unreasonable for the Oklahoma Court of Criminal Appeals to conclude that Petitioner was not denied a fair trial by the trial court's rulings. See Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996) (state court's application of law to facts is unreasonable only if reasonable jurists considering question would be of one view that state court ruling was incorrect). No habeas relief is warranted under § 2254(d).

The Equal Protection Clause of the Fourteenth Amendment requires that no person be denied equal protection under the law. See United States v. Armstrong, 517 U.S. 456 (1996). Equal protection merely insures that if the government draws a classification, the classification is reasonably (or strictly, depending upon the "group" classified) related to a legitimate governmental purpose. A case asserting a violation of the Equal Protection Clause requires, at a minimum, an assertion that similarly situated "entities" are being treated differently, and the identification of the "classification." Petitioner in this case has failed to assert that, as a result of the state courts' rulings,

he has been treated differently from a similarly situated entity and to identify any "classification" resulting from the state courts' rulings. The Court finds no basis for an equal protection violation justifying habeas relief under § 2254(d).

As to Petitioner's arguments raised in propositions VII and X, the Oklahoma Court of Criminal Appeals ruled that the trial court's limitation of cross-examination of the victim was not error because Petitioner failed to establish that the line of inquiry concerning incidents of prior sexual abuse would cast doubt on the victim's credibility. Petitioner alleges that a violation of the confrontation clause occurred when he was denied the opportunity to cross-examine the victim on the subject of prior instances of sexual abuse. The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The right of confrontation "means more than being allowed to confront the witness physically." Davis v. Alaska, 415 U.S. 308, 315 (1974). Indeed, "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." Id., at 315-316 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)). However, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). In the instant case, the limitation imposed on Petitioner's cross-examination of the victim was reasonable and fell within the trial judge's wide

latitude. The state appellate court's rejection of this claim does not entitle Petitioner to habeas corpus relief under the § 2254(d) standard.

The Court concludes that Petitioner is not entitled to relief based on the claims raised in Propositions VI -- XI. 28 U.S.C. § 2254(d).

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. The petition for writ of habeas corpus should be denied.

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

SO ORDERED THIS 22nd day of July, 1999.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED
JUL 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DELBERT LEROY OLDHAM,)
)
 Petitioner,)
)
 vs.)
)
 CARL D. WHITE,)
)
 Respondent.)

Case No. 97-CV-445-B (J) ✓

ENTERED ON DOCKET
DATE JUL 23 1999

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 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 Respondent and against Petitioner.

SO ORDERED THIS 22nd day of July, 1999.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

17

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

FILED

JUL 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
GREGORY McBEE,)
)
Defendant.)

Case No. 97-CR-178-C
99-C-388

ENTERED ON DOCKET
JUL 23 1999

ORDER

Before the Court is defendant, Gregory McBee's, pro se motion seeking to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255.

On December 3, 1997, McBee was named in a five-Count Indictment, charging him with conspiracy, armed robbery, and use of a firearm during a crime of violence. On February 18, 1998, McBee waived jury trial and entered a plea of guilty pursuant to a plea agreement to Counts Three and Five, which charged McBee with using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). On May 19, 1998, the Court sentenced McBee to a mandatory sixty months' imprisonment as to Count Three and a mandatory consecutive 240 months' imprisonment as to Count Five, under § 924(c). McBee did not file a direct appeal following entry of judgment. McBee timely submitted the present motion on May 11, 1999, and the Court notes that this is his first such motion.

The Court notes at the outset the well-settled principle that "§ 2255 is not available to test the legality of matters which should have been raised on appeal." United States v. Walling, 982 F.2d 447, 448 (10th Cir.1992). A failure to raise an issue on direct appeal thus acts as a bar to raising the issue in a § 2255 motion unless McBee can show cause and actual prejudice or can show that a

28

fundamental miscarriage of justice will result if his claim is not addressed. United States v. Allen, 16 F.3d 377, 378 (10th Cir.1994). This procedural bar applies to collateral attacks on a defendant's sentence, as well as his conviction. Id. Since the government raised this procedural bar in the instant case, this Court must enforce it and hold McBee's claims barred unless cause and prejudice or a fundamental miscarriage of justice is shown.¹ Id.

The Court additionally notes that McBee, on page two of his plea agreement, expressly waived his right to all appellate rights and any collateral attacks.² Hence, McBee effectively waived his right to attack his conviction or sentence in a § 2255 motion. See Watson v. United States, 165 F.3d 486 (6th Cir. 1999). Notwithstanding the waiver, however, McBee may be able to attack his plea agreement and sentence on the grounds of ineffective assistance of counsel. See Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999) (claim of ineffective assistance of counsel in connection with the negotiation of a plea agreement cannot be barred by the agreement itself); United States v. Attar, 38 F.3d 727, 732 (4th Cir. 1994) (defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations). While a § 2255 collateral attack may surely be waived in a plea agreement, the Court does not believe that the waiver should extend to claims of ineffective assistance of counsel occurring during the plea or sentencing phase of the proceedings. Hence, the Court will examine the issue of whether McBee received effective assistance

¹ As noted below, since McBee waived his right to appeal in his plea agreement, he was foreclosed from raising virtually any issue on appeal.

² Page two of the plea agreement states, "**Appellate Waiver: THE DEFENDANT AGREES TO WAIVE ALL APPELLATE RIGHTS, INCLUDING ANY AND ALL COLLATERAL ATTACKS INCLUDING BUT NOT LIMITED TO THOSE PURSUED BY MEANS OF A WRIT OF HABEAS CORPUS.**"

of counsel during the plea phase and at sentencing. The Court will, however, uphold and enforce the waiver with respect to claims not involving an allegation of ineffective assistance of counsel.³

A claim of ineffective assistance of counsel requires that McBee satisfy the rigid standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). The Supreme Court in Strickland held that a claim of ineffective assistance of counsel has two components. First, McBee must show that his attorney “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment.” Id. at 687. “The proper standard for attorney performance is that of reasonably effective assistance.” Id. Therefore, to succeed, McBee must show that his counsel’s performance fell below an objective standard of reasonableness. Furthermore, McBee must show that “the deficient performance prejudiced the defense.” Id. For the reasons stated below, the Court concludes that McBee failed to satisfy the Strickland standard for demonstrating ineffective assistance of counsel.

McBee first alleges that counsel was ineffective in failing to file his requested notice of appeal regarding the government’s breach of the plea agreement. McBee argues that the government breached that portion of the plea agreement appearing on page 9 of the agreement, which states that, “Provided the defendant clearly demonstrates acceptance of responsibility, the United States agrees

³ The Court notes that McBee, in addition to his ineffective assistance claims, also alleges that the government breached the plea agreement. The Court is of the opinion that, as in the case of ineffective assistance claims, an allegation that the government breached a plea agreement is cognizable despite a waiver of appellate and collateral review rights. If the government fails to comply with a plea agreement, the agreement essentially becomes a nullity, relieving the defendant of his waiver of review rights. Indeed, the plea agreement at issue here contains a clause relieving one party from its obligations under the agreement in the event the other party breaches the agreement. In the present case, however, the Court does not find that the government breached the plea agreement. As discussed below, although the government may have promised to make known McBee’s cooperation and recommend a downward adjustment, such an adjustment was not permitted due to the mandatory sentence that the Court was required to impose under 18 U.S.C. § 924(c).

to recommend a two-level reduction in offense level pursuant to U.S.S.G. § 3E1.1. The United States agrees to recommend that the defendant receive an additional one-level reduction pursuant to U.S.S.G. § 3E1.1(b)(2).” The government concedes that it “incorrectly” left these provisions in the plea agreement. While the Court would not expect the government to make such a careless error, the Court is satisfied that the plea agreement was not breached.

As noted above, § 924(c) provides for a statutory mandatory term of imprisonment, and a downward adjustment was not permitted under the Guidelines in this case. Prior to accepting McBee’s pleas of guilty to Counts Three and Five, the Court fully advised McBee of the mandatory minimum sentence of twenty-five years imprisonment.⁴ Further, defense counsel, by affidavit, represents that, prior to permitting McBee to enter his pleas, counsel advised McBee that he would receive a mandatory term of twenty-five years imprisonment under Counts Three and Five. Counsel also represents that he did not tell McBee that he would receive a two or three level departure or any sentence less than twenty-five years, because of the mandatory term imposed under § 924(c). Counsel represents that he did not file a notice of appeal because McBee waived his rights to appeal, and he was not asked to file one.

Because McBee was adequately advised prior to entering his plea to Counts Three and Five of the mandatory term of imprisonment that would be imposed at sentencing, McBee’s argument must fail. In light of the advice given to McBee by the Court and his counsel prior to entering his pleas of guilty, he could not have had a reasonable expectation of receiving anything less than the mandatory minimum term of imprisonment. Notwithstanding this advice, which was contrary to the

⁴ Subsequent to taking McBee’s pleas, the Probation Office prepared the presentence report, which also advised that the mandatory term of imprisonment was twenty-five years. A copy of the report was provided to McBee prior to sentencing.

promise that the government made in the plea agreement relating to the seeking of a downward adjustment, McBee nevertheless chose to plead guilty to Counts Three and Five. Thus, had defense counsel appealed this issue, the Tenth Circuit would surely have rejected it. The Court therefore finds no error.

McBee next contends that his guilty pleas were based on erroneous legal advice, and, as such, were not voluntary. McBee argues that counsel advised that, 1) McBee would receive not less than ten years imprisonment but not more than twenty years, 2) McBee would receive a downward adjustment for acceptance of responsibility, 3) the Court would take into account McBee's age and the fact that this was his first adult offense, and 4) the government would recommend a sentence of between fifteen and twenty years. However, the advice given to McBee by the Court prior to the entry of his guilty pleas, as well as the sworn representations made by defense counsel which contradict McBee's assertions, belie his present argument. Because the Court advised McBee of the mandatory term of imprisonment which he faced in the event he pled guilty to Counts Three and Five, McBee cannot seriously argue that he then pled guilty without fully knowing the consequences of his pleas.

McBee again complains of the government's alleged breach of the plea agreement, arguing that defense counsel failed to object to the breach during the sentencing hearing. However, as explained above, while the government mistakenly left a provision in the plea agreement providing that it would recommend a reduction, such a reduction is inconsistent with the advice which the Court gave to McBee prior to accepting his pleas, and it is also inconsistent with the advice which defense counsel represents he gave to McBee prior to the change of plea hearing. After being advised of the consequences of his pleas by the Court during the change of plea hearing, McBee could not have reasonably expected to receive a downward adjustment at the subsequent sentencing

hearing. Moreover, at sentencing, the Court gave McBee adequate opportunity to make any statements or objections he desired, and he did not voice any objection to the presentence report, which clearly advised of the mandatory term of imprisonment, nor did he attempt to voice any objections after the sentence was handed down or otherwise raise the issue of the alleged breach. The Court therefore finds no error.

McBee argues that defense counsel failed to research the law regarding § 924(c) and that counsel misrepresented the elements of the offense in order to induce McBee's pleas of guilty. McBee represents that counsel erroneously advised that if his co-defendant pulled a gun during a robbery, McBee was automatically guilty under § 924(c) regardless of whether he knew that the accomplice had a gun or not. To show ineffective assistance of counsel in connection with a guilty plea, McBee must show, 1) that counsel's representation fell below an objective standard of reasonableness, and 2) that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985).

Defense counsel represents by affidavit that he studied the law surrounding 18 U.S.C. §§ 2 and 924(c) and discussed the research with McBee prior to the change of plea hearing. Defense counsel does not, however, dispute the allegation that he advised McBee that if a co-defendant pulled a gun during the robbery, McBee would "automatically" be found guilty regardless of whether he knew that the accomplice had a gun.⁵ Nevertheless, prior to accepting McBee's pleas of guilty to

⁵ It is highly likely that, had the case gone to trial, McBee would have been convicted under § 924(c), even though an accomplice brandished the weapon. In a conspiracy case, which was alleged here, so long as the conspiracy continues, each conspirator acts for the other in carrying it forward. "An overt act of one partner may be the act of all without any new agreement specifically directed to that act." Pinkerton v. United States, 328 U.S. 640, 646-47 (1946). In a conspiracy to commit robbery, it is very likely that one partner will possess and display a firearm, and all conspirators

Counts Three and Five, the Court asked McBee to detail, under oath, the factual basis supporting his pleas. The Court would not have accepted any plea had it found that a factual basis was lacking. Given the representations made by McBee under oath during the change of plea hearing, the Court was, and is, satisfied that McBee's pleas were voluntarily and knowingly made and that a sufficient factual basis supports the pleas.

Moreover, while McBee makes the conclusory statement that there exists more than a reasonable probability that he would not have pled guilty and would have gone to trial if counsel properly explained § 924(c)'s elements, the Court finds that he failed to satisfy this prong of ineffective assistance. As the government points out, McBee's guilty pleas resulted in the dismissal of Counts One, Two, and Four, which, combined, carried a maximum term of imprisonment of twenty years. Had McBee gone to trial, he faced possible imprisonment of forty-five years, as well as additional fines. Clearly, McBee benefitted by pleading guilty rather than having his case go to a jury. The Court agrees with the government that McBee, in pleading guilty, took the calculated risk that the consequences which flowed from entering the guilty pleas would be more favorable than those that would flow from going to trial. Bailey v. Cowley, 914 F.2d 1438, 1441 (10th Cir. 1990). The Court cannot now find that his pleas of guilty were not voluntarily and knowingly made or that they were not supported by a factual basis.

assume the risk of being held accountable for the acts of that partner. Further, at the moment that his co-defendant brandished the firearm, McBee unquestionably had knowledge that it was being used in furtherance of the robbery conspiracy, but he apparently continued as an active participant in the conspiracy. Indeed, McBee states that he "did not know that [his co-defendant] had or possessed a weapon *until [the co-defendant] pulled the gun during the robbery.*" Yet, there is no indication that McBee withdrew from the conspiracy or robbery at that time. See United States v. Price, 76 F.3d 526, 529-530 (3rd Cir. 1996) (even if defendant had not known in advance that co-defendant was going to use a firearm during robbery, it is clear that defendant was aware that the firearm was being used while he continued to participate in the robbery, and, therefore, § 924(c) liability is proper).

Lastly, McBee argues that he would not have pled guilty had he known that he could not receive a downward adjustment for acceptance of responsibility. However, as described above, McBee was fully advised by the Court prior to entering his pleas as to the consequences of pleading guilty. Hence, McBee could not have had any reasonable expectation of receiving a downward adjustment prior to entering his pleas of guilty.⁶

McBee requests a hearing on this matter. Section 2255 provides that unless the motion and records conclusively show that McBee is entitled to no relief, the Court shall grant a hearing. In the present case, the Court concludes that the record conclusively shows that McBee is entitled to no relief, and a hearing would be nonproductive. Hence, McBee's request for a hearing is denied.

Accordingly, McBee's motion pursuant to § 2255 is hereby DENIED.

IT IS SO ORDERED this 22nd day of July, 1999.


H. DALE COOK
Senior United States District Judge

⁶ Because the Court finds no error in counsel's performance, it need not address McBee's final claim of cumulative error.

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

JUAN WESLEY ADAMS,)
)
Petitioner,)
)
vs.)
)
BOBBY BOONE,)
)
Respondent.)

ENTERED ON DOCKET
DATE JUL 23 1999

No. 99-CV-202-H (J) ✓

FILED

JUL 21 1999 *A*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge entered on March 30, 1999, in this habeas corpus action brought pursuant to 28 U.S.C. § 2254. Petitioner is represented by counsel. In the Report, the Magistrate Judge recommends that Petitioner's petition for a writ of habeas corpus be denied. Neither party has filed an objection to the Report.

Having reviewed the Report and the facts of this case, pursuant to Rule 8(b) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

IT IS THEREFORE ORDERED that the Report and Recommendation of the Magistrate Judge (#2) is adopted and affirmed. The petition for a writ of habeas corpus is denied.

IT IS SO ORDERED.

This 21st day of July 1999.


Sven Erik Holmes
United States District Judge

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

JUAN WESLEY ADAMS,

Petitioner,

vs.

BOBBY BOONE,

Respondent.

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ENTERED ON DOCKET

DATE JUL 23 1999

No. 99-CV-202-H (J)

FILED

JUL 21 1999 *SK*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

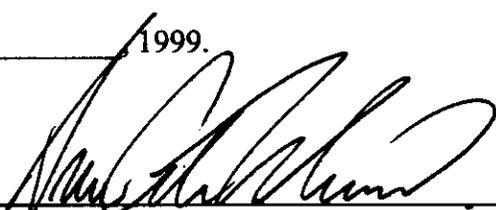
JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 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 Respondent and against Petitioner.

IT IS SO ORDERED.

This 21st day of July, 1999.


Sven Erik Holmes
United States District Judge

4

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

MDI ENTERTAINMENT, INC.,)
)
Plaintiff,)
)
v.)
)
INTERNATIONAL BUYING)
POWER CORP.,)
)
Defendant.)

ENTERED ON DOCKET

JUL 23 1999

DATE

Case No. 97-CV-996-H

FILED

JUL 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court on a Motion to Confirm Arbitration Award by Plaintiff MDI Entertainment, Inc. The Court, having duly reviewed the award of the arbitrator entered May 5, 1999, finds that the award should be and is hereby confirmed.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Plaintiff and against Defendant pursuant to and in accordance with the Award of Arbitrator by John R. Preston, dated May 5, 1999.

IT IS SO ORDERED.

This 22ND day of July, 1999.



Sven Erik Holmes
United States District Judge

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

RICHARD LEE SMITH,)
)
 Petitioner,)
)
 vs.)
)
 MICHAEL ADAMS,)
)
 Respondent.)

ENTERED ON DOCKET
JUL 23 1999
DATE _____

No. 99-CV-573-K (M)

F I L E D

JUL 22 1999 SA

ORDER

Phil Lombardi, Clerk
U.S. DISTRICT COURT

On April 6, 1999, Petitioner, a federal prisoner incarcerated at the United States Penitentiary in Lompoc, California, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the Central District of California, Western Division, challenging his conviction, entered in this District Court in Case No. 93-CR-91-B, for possession of a firearm after former conviction of a felony. After construing the petition as a motion under 28 U.S.C. § 2255, the petition was transferred to this Court over Petitioner's objection (see Docket #1-7).

After reviewing the petition submitted by Petitioner, this Court agrees with the United States District Court for the Central District of California and finds that the claims raised in this petition are consistent with a § 2255 motion rather than a petition pursuant to § 2241. Section 2241 is intended to provide a remedy for challenges to the execution of a sentence while § 2255 provides the "*exclusive* remedy for testing the validity of a judgment and sentence." Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996) (emphasis added). In this case, Petitioner has previously filed a motion pursuant to 28 U.S.C. § 2255 challenging his conviction entered in Case No. 93-CR-91-B. The Court denied the requested relief on December 6, 1996. Petitioner appealed and, on September 22, 1997, the Tenth Circuit Court of Appeals denied a certificate of appealability and dismissed the

appeal. In the petition currently before the Court, Petitioner again challenges the validity of the judgment entered against him in Case No. 93-CR-91-B by claiming that (1) his sentence was improperly enhanced with a prior California state narcotics conviction, and (2) he received ineffective assistance of counsel at both trial and sentencing. Petitioner admits that these are the same allegations of error raised in his prior § 2255 motion.

Nonetheless, because relief has been denied on his claims previously raised pursuant to § 2255, Petitioner now argues that “the scope and flexibility of the extraordinary remedy of the writ of habeas corpus” is adequate to entitle him to proceed under § 2241. See Docket #1-7, Petitioner’s letter in opposition to recommendation to transfer this case. The Court finds Petitioner’s argument is without merit. The Tenth Circuit has expressly held “habeas corpus is not an additional, alternative, or supplemental remedy, to the relief afforded by motion in the sentencing court under § 2255.” Williams v. United States, 323 F.2d 672, 673 (10th Cir. 1963). Furthermore, “[f]ailure to obtain relief under § 2255 does not establish that the remedy so provided is either inadequate or ineffective.” Id. (quoting Overman v. United States, 322 F.2d 649 (10th Cir. 1963)); see also Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996); Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1987).

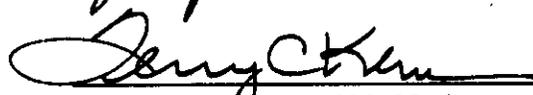
Because this Court has considered these claims in Petitioner’s prior § 2255 motion, the Court finds that had Petitioner filed this action as a § 2255 motion, it would constitute a “second or successive” motion and could not be considered by this Court unless Petitioner received authorization from the Tenth Circuit Court of Appeals as required by 28 U.S.C. §§ 2244 and 2255. Petitioner cannot use § 2241 to challenge his conviction to avoid the “abuse of the writ” doctrine or to circumvent the finality provisions of § 2255, as amended by the Antiterrorism and Effective Death

Penalty Act ("AEDPA").¹ A federal prisoner seeking to challenge his conviction via a "second or successive" § 2255 motion, must comply with the provisions of § 2244 which mandate that the petitioner receive authorization from the circuit court of appeals before filing a "second or successive" § 2255 motion in the district court. Should Petitioner in this case believe he can make the showing necessary to receive authorization for proceeding with a second or successive § 2255 motion, he must first petition the Tenth Circuit Court of Appeals for authorization, pursuant to 28 U.S.C. §§ 2244 and 2255.

Because the exclusive remedy for Petitioner's challenge to his conviction is provided by § 2255, the Court concludes that the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 is **dismissed with prejudice**. Petitioner may file a second or successive motion pursuant to § 2255 in this Court only if he is granted authorization by the Tenth Circuit Court of Appeals.

SO ORDERED THIS 21 day of July, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

¹Section 2255 provides, in pertinent part, as follows:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
ONE 1992 CHEVROLET 3500)
4-DOOR DUALY PICKUP TRUCK,)
VIN #1GCHK34F0NE194813; et. al.)
)
Defendants.)

ENTERED ON DOCK
DATE JUL 23 1999

CIVIL ACTION NO. 97-CV-507-K (J)

FILED

JUL 22 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SECOND PARTIAL JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Partial Judgment of Forfeiture by Default as to these defendant vehicles ("default vehicles"):

- a) One 1992 Chevrolet 3500 Dually Pickup Truck, VIN 1GCHK34F0NE194813;
- b) One 1993 Chevrolet C-10 Pickup Truck, VIN 1GCDCA4D6PZ134220;
- c) One 1989 Chevrolet One Ton Dually Pickup, VIN 2GCHK39N5K1148813;
- d) One 1984 Southwind Motorhome, outside manufacturer's identification number H037226S0805;

and all entities and/or persons interested in the default vehicles, the Court finds as follows:

The verified Complaint for Forfeiture *In Rem* was filed in this action on the 27th day of May, 1997, alleging that the default vehicles were subject to forfeiture pursuant to 18 U.S.C. § 981, because they are proceeds or constitute proceeds obtained directly or

indirectly from a violation of 18 U.S.C. § 511 (altering or removing motor vehicle numbers); § 2321 (transporting stolen vehicles in interstate commerce); or § 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce).

Warrant of Arrest and Notice *In Rem* was issued on the 4th day of June 1997, 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 vehicles and/or parts, trailer, and crusher and for publication in the Northern District of Oklahoma.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture *In Rem* and the Warrant of Arrest and Notice *In Rem* on the defendant vehicles on August 26, 1996.

On February 9, 1998, a Partial Judgment of Forfeiture was entered forfeiting the following described defendant vehicles to the United States of America for disposition according to law:

- a) One 1994 Chevrolet Silverado Suburban 1500, VIN 1GNEC16K4RJ426042:
- b) One 1990 Chevrolet C1500, Pickup Truck, VIN 1GCDC14K9LZ220862:
- c) One 1988 Chevrolet Silverado 1500 Pickup Truck, VIN 2GCFC29K4J1139085:
- d) One 1988 GMC Cab and Chassis Extended Cab Pickup Truck, VIN 1GTDC14K5JE534710:
- e) One 1996 Chevrolet Cab and Chassis Extended Cab Pickup Truck, VIN 1GCEC19R0VE101053:
- f) One White Z-71 Short Narrow Bed Pickup Truck Trailer, VIN Number Unknown:

- g) One Beckham Black Box Trailer, SN 1BTT2620XTAB12167;

The following parties were determined to be the only individuals with possible standing to file a claim to the default vehicles, and, therefore the only individuals to be served with process in this action, and were served as follows:

- a) Ron Briscoe d/b/a Briscoe Auto Sales;
- b) Miami Investment Company;

Ron Briscoe d/b/a Ron's Auto Sales filed his Claim on June 30, 1997, and subsequently filed his Answer to Complaint on July 21, 1997, wherein he claimed an interest in the following described vehicles:

- a) One 1992 Chevrolet 3500 Dually Pickup Truck, VIN 1GCHK34F0NE194813;
- b) One 1993 Chevrolet C-10 Pickup Truck, VIN 1GCDCA4D6PZ134220;
- c) One 1992 Chevrolet One Ton Pickup Truck, VIN 2GCHC39N1N1177632;
- d) One 1989 Chevrolet One Ton Dually Pickup, VIN 2GCHK39N5K1148813;
- e) One 1984 Southwind Motorhome, outside manufacturer's identification number H037226S0805;
- f) Miscellaneous automobile tools and parts;
- g) One 1992 Chevrolet Car hauler, VIN 1GCHC33J0C5127341;

On May 14, 1999, Ron Briscoe, individually and Ron Briscoe d/b/a Ron's Auto Sales executed and filed his Stipulation for Forfeiture, wherein he consented to the forfeiture of

the following described defendant vehicles, which includes those vehicles which he had filed a claim and answer to:

- a) One 1993 Chevrolet C10 Pickup Truck, VIN 1GCDC14Z6PZ134220;
- b) One 1989 GMC Pickup Truck, VIN 1GTDC14K0KE516746;
- c) One 1992 Chevrolet 3500 4-Door Dually Pickup Truck, VIN 1GCHK34F0NE194813;
- d) One 1976 Southwind Motor Home, renumbered to a 1984 model, Outside Manufacturer's ID NO. H037226S0805;
- e) One 1992 Chevrolet One-Ton Pickup Truck, VIN 2GCHC39N1N1177632;
- f) One 1989 Chevrolet One-Ton Dually Pickup Truck, VIN 2GCHK39N5K1148813;
- g) One 1983 Chevrolet Car Hauler, VIN 1GCHC33J0CS127341;
- h) One 1990 Chevrolet C1500, Pickup Truck, VIN 1GCDC14K9LZ220862;

Miami Investment Company filed its Claims on July 3, 1997, and subsequently filed its Answers on July 10, 1997, wherein it claimed an interest in the following described vehicles:

- a) One 1992 Chevrolet 3500 4-Door Dually Pickup Truck, VIN 1GCHK34F0NE194813;
- b) One 1992 Chevrolet One-Ton Dually Pickup Truck, VIN 2GCHK39N5K1148813.

Miami Investment Company filed its Release of Claims to on June 18, 1999, releasing its

claim to the 1992 Chevrolet 3500 4-Door Dually Pickup Truck, VIN 1GCHK34F0NE194813 and the 1992 Chevrolet One-Ton Dually Pickup Truck, VIN 2GCHK39N5K1148813.

All persons and/or entities interested in the default vehicles 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 claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the default vehicles, and no persons or entities have plead or otherwise defended in this suit as to said default vehicles and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to the default vehicles and all persons and/or entities interested therein, save and except Ron Briscoe d/b/a Briscoe Auto Sales, who filed his Stipulation for Forfeiture herein, and Miami Investment Company, who filed its Release of Claims 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 vehicles and/or parts, trailer, and crusher was located, on October 30, November 6 and 13, 1997, and in the Miami News-Record, Miami, Oklahoma, the county where the defendant vehicles are located, on October 30, November 6 and 13, 1997. Proof of Publication was filed December 30, 1997.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described default vehicles:

- a) One 1992 Chevrolet 3500 Dually Pickup Truck, VIN 1GCHK34F0NE194813;
- b) One 1993 Chevrolet C-10 Pickup Truck, VIN 1GCDCA4D6PZ134220;
- c) One 1989 Chevrolet One Ton Dually Pickup, VIN 2GCHK39N5K1148813;
- d) One 1984 Southwind Motorhome, outside manufacturer's identification number H037226S0805;

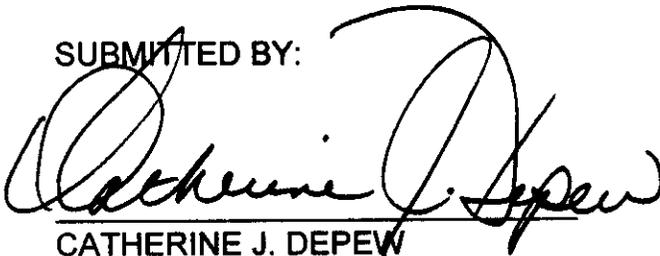
be, and they hereby are, forfeited to the United States of America for disposition according to law.

Entered this 22 day of July, 1999.



TERRY C. KERN
Chief Judge of the United States District Court for
the Northern District of Oklahoma

SUBMITTED BY:



CATHERINE J. DEPEW
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JERRY LORETT and)
CLYDE ANGELO,)

Plaintiffs,)

vs.)

Case No. 98 CV 0964E(J)

ROGER D. BREWER and)
PHILIP STORY,)

Defendants.)

ENTERED ON DOCKET

JUL 22 1999

ORDER

THIS MATTER coming on before this Court on this 21st day of July, 1999, upon the Agreed Upon Motion by the Plaintiffs to Dismiss the Defendant, Roger D. Brewer, only, and with the Defendant, Roger D. Brewer, dismissing his counterclaims against the Plaintiffs, and it appearing to the Court that the motion is made for good cause,

IT IS THEREFORE ORDERED that the Agreed Upon Motion to Dismiss the Defendant, Roger D. Brewer, only, is granted and that the Defendant, Roger D. Brewer, dismisses all of his counterclaims against the Plaintiffs herein all without prejudice.


JUDGE OF THE DISTRICT COURT

Lee I. Levinson OBA #5395
5310 E. 31st Street, Suite 1100
Tulsa, OK 74135
(918) 664-0800

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CERTIFICATE OF MAILING

I, hereby certify that I placed a true and correct copy of the above and foregoing instrument in the U. S. Mail, postage prepaid, to:

Jeffrey A. Martin
Attorney for Defendant
Roger D. Brewer
624 S. Denver Avenue, Suite 202
Tulsa, OK 74119

Phillip Story
139 Comet Drive
Toney, AL 35773

on this ____ day of July, 1999.

022499b/ml

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JERRY LORETT and)
CLYDE ANGELO,)
)
Plaintiffs,)
)
vs.)
)
ROGER D. BREWER and)
PHILIP STORY,)
)
Defendants.)

Case No. 98 CV 0964E(J)

ENTERED ON DOCKET

JUL 22 1999

JOURNAL ENTRY BY DEFAULT

THIS cause came on to be heard this 21st day of July, 1999, the Plaintiffs, Jerry Lorette and Clyde Angelo, appearing by their attorney, Lee I. Levinson, and the Defendant, Phillip Story, hereinafter referred to as "Story", having entered his appearance herein, and has failed and refused to answer the Plaintiffs Complaint and is in default.

FINDINGS

1. The Court finds that the Plaintiffs, Lorette and Angelo, between July 9, 1998 and September 21, 1998 invested the total sum of \$51,000.00 with the Defendant Story in order to purchase interests in real estate located in the State of Alabama.

2. The Court finds that the purchase and sale of these real estate interests and the acts as set forth in their Complaint involved the purchase and sale of securities within the meaning of Section 2(1) of the Securities Act and Sections 3(a)(10) of the Exchange Act by means of Oral Communications, use of the mails and by the use and means and instrumentalities of Interstate Commerce.

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C/π

3. The Court finds that the securities offered and sold by the Defendant Story to the Plaintiffs, Loretta and Angelo, were not registered with the Securities and Exchange Commission as required by Section 5 of the Securities Act and were therefore offered and sold by the Defendants in violation of Section 12(1) of the Securities Act.

4. The Court finds that the Defendant Story misrepresented these securities to the Plaintiffs at the time of purchase and such misrepresentations were violative of the provisions of Section 12(2) of the Securities Act in connection with the Defendant's sale of these securities to the Plaintiffs.

5. The Court finds that the Defendant's fraudulent activities and course of conduct in connection with the sale to the Plaintiffs of the securities constituting interest in Alabama real estate were in violation of Section 10(b) of the Exchange Act and Rule 10-b-5 thereunder.

6. The Court finds that the Defendant's misstatements, omissions, manipulations and fraudulent activities and conduct by Brewer toward the Plaintiffs constitute a violation of Section 17(a) of the Securities Act.

7. The Court finds that the Defendant Story violated the provisions of the Oklahoma Securities Act, 71 O.S. §101 et al., as a result of the Defendant Story's schemes and artifices to defraud the Plaintiffs Loretta and Angelo.

8. The Court finds that the Defendant Story's actions constituted deceit and fraud upon the Plaintiffs and was done in

total disregard of the rights of the Plaintiffs Loretta and Angelo.

9. The Court finds that as a result of the fraudulent conduct and violation of the aforesaid acts, the Plaintiffs Loretta and Angelo have incurred damages in the sum of \$51,000.00 for the actual amounts that were paid by the Plaintiffs to the Defendant Story for the purchase of the subject securities.

10. The Court finds that the Defendant Story should also be responsible to pay interest at the rate of 10% per annum on the aforesaid sum from September 21, 1998 to the date of judgment in the amount of \$2,975.00, as well as the Plaintiffs Loretta and Angelo should be entitled to the reimbursement of all reasonable attorney's fees for the prosecution of this action.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant Story is hereby adjudged to be in default and that the allegations of the Plaintiffs' Complaint be taken as true against the Defendant Story.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that as a result of the securities fraud by virtue of the violation of the Federal and State Securities Acts by the Defendant Story which findings are incorporated herein by reference, as well as common law fraud, the Plaintiffs Loretta and Angelo are awarded judgment against the Defendant Story in the sum of \$51,000.00, with interest thereon at the rate of ten percent (10%) from September 21, 1998 being the additional sum of \$2,975.00,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs be awarded their reasonable attorney's fees from the prosecution of this action which shall be determined by a later order of this Court.



JAMES O. ELLISON
JUDGE OF THE DISTRICT COURT

Lee I. Levinson OBA #5395
Attorney for Plaintiffs
5310 E. 31st Street, Suite 1100
Tulsa, OK 74135
(918) 664-0800

022499b/ml

2. The plaintiff was, at all relevant times, a resident of the Northern District of Oklahoma and the acts complained of occurred at the Claremore Indian Hospital (CIH), situated in Rogers County, Oklahoma, within the Northern District of Oklahoma. The United States of America, through the Indian Health Service of the Public Health Service of the United States Department of Health and Human Services, owns and operates the Claremore Indian Hospital.

3. Plaintiff, 22 years old at the time and accompanied by his mother, Karen Mattia, presented at the emergency department of CIH on May 28, 1997, at 8:05 a.m. complaining of a lump on the right side of his throat. He reported a history of recurrent strep infections which had been previously treated with penicillin shots without adverse reactions. Plaintiff also had a history of having had a prior peritonsillar abscess.

4. Plaintiff was examined by Jeannette Ramos-Fast, M.D., a staff physician at CIH. Dr. Ramos-Fast noted: normal vital signs; that Plaintiff's throat was red; that his right tonsil was inflamed and covered with white plaques; and that Plaintiff had enlarged nodes on the right side of his neck. Dr. Ramos-Fast ordered a throat culture and 2.4 million units of Bicillin (Penicillin) IM to be administered that morning and Pen VK-500 mg. to be taken orally every six hours for ten days.

5. LaDonna Jones, L.P.N., advised Plaintiff to get something to eat prior to the IM injections. Upon Plaintiff's return to the clinic, Nurse Jones had Plaintiff lie on a table and at 10:45 a.m. she administered the penicillin injections (1.2 million units into each gluteus). Nurse Jones charted that she would recheck Plaintiff in twenty

minutes. Nurse Jones periodically checked Plaintiff while he was lying on the examination table. A few minutes before 11:00 a.m. she had Plaintiff sit up on the examination table for a minute or so. She then had Plaintiff sit in a chair in the examination room for a minute or so; and then had Plaintiff walk around the examination room. Nurse Jones asked Plaintiff how he was feeling and upon Plaintiff's response that he felt okay she released Plaintiff at 11:00 a.m. to go to the hospital pharmacy to pick up his prescription. Nurse Jones charted: "no reaction noted, OK when he left the room."

6. Plaintiff walked from the clinic to the pharmacy where he dropped off his prescription and then walked back to the reception area of the hospital. Without warning, at 11:05 a.m., Plaintiff fainted in the reception area of the hospital, fell and hit his head.

7. Plaintiff was treated in the emergency department of the hospital with IV fluids and lab work. An EKG performed in the emergency department reported normal results. Plaintiff did not show signs of an allergic reaction to the penicillin injections and was not treated for an allergic reaction to the penicillin injections.

8. Plaintiff did not suffer an allergic reaction to the penicillin injections administered at CIH.

9. Plaintiff was transferred to Claremore Columbia Regional Hospital for a CT scan of the brain which showed a subarachnoid hemorrhage. Plaintiff was then transferred to St. John Medical Center in Tulsa, Oklahoma, under the care of

neurosurgeon, David G. Malone, M.D. An arteriograph of Plaintiff revealed a linear skull fracture, nondepressed. No aneurysm was detected.

10. Plaintiff's treatment at St. John Medical Center consisted of monitoring and administration of medication. No surgical or other invasive procedures, other than the arteriography, were performed at St. John Medical Center. Plaintiff was discharged from St. John Medical Center on May 31, 1997.

11. Plaintiff had essentially normal findings on his June 11, 1997, follow-up examination by Dr. Malone.

12. On February 18, 1998, Plaintiff was examined by Dr. Malone for complaints of fatigue and dizziness. Dr. Malone's examination yielded essentially normal results. An MRI of Plaintiff's brain was conducted at Columbia Regional Medical Center in Tulsa, Oklahoma, on March 4, 1998. The results were normal resonance imaging of the brain.

13. The evidence established that reasonable medical care requires that a patient be observed following an injection of penicillin to determine if the patient will have an allergic (anaphylactic) reaction to the injection of penicillin. Plaintiff presented evidence, through Dr. Weiss, that reasonable medical practice requires observation for thirty minutes after the injection and a re-check of vital signs with no reaction before release of the patient. Through Nurse Jones, Dr. Ramos-Fast, Dr. Sacra and Dr. Lawton Defendant presented evidence that the observation period ranges from 15 to 30 minutes; that the appropriate amount of time depends upon the clinical

presentation of the patient and the clinical judgment of the health care provider; and that no re-check of vital signs is required.

14. While the evidence clearly established that reasonable medical care requires that a patient be observed by a health care provider following an injection of penicillin to watch for an allergic reaction, there was conflicting evidence on the length of time the patient needs to be observed and the procedures to be used in the observation. Based on the evidence, the court finds that there is no mandatory minimum amount of time for this observation, but that reasonable medical care requires a period of observation after injection of penicillin of approximately 15 to 30 minutes depending upon the patient's reaction to the injection, if any, and depending on all other facts and circumstances of the case.

15. Fainting, or syncope, can occur suddenly and without warning. There are a variety of causes for syncope and certain factors can increase a person's susceptibility to syncope. The evidence established that one or more factors were present which increased Plaintiff's susceptibility to syncope, including: not having eaten prior to presentation to the hospital; possible use of alcohol the night before his presentation to the hospital; possible lack of sufficient sleep the night before his presentation to the hospital; and the presence of THC (marijuana) in his system at the time of his presentation to the hospital.

16. Plaintiff failed to establish that his syncope was in any way related to his treatment at CIH. The court concludes that Plaintiff experienced syncope of an unknown cause, but unrelated to his treatment at CIH.

17. Plaintiff alleges permanent injury, including dizziness, fatigue, irritability, etc., as the result of his fall at CIH. No medical doctor has diagnosed any permanent injuries attributable to the fall and no other medical evidence supports the existence of permanent injuries resulting from the fall. Further, the evidence established that Plaintiff's alleged symptoms would not later manifest themselves following a normal examination. The court therefore concludes that Plaintiff has suffered no permanent injuries as a result of his May 28, 1997, fall at CIH.

18. Any conclusion of law which is more appropriately characterized as a finding of fact is hereby incorporated as a finding of fact.

Conclusions of Law

1. Any finding of fact which is more appropriately characterized as a conclusion of law is hereby incorporated as a conclusion of law.

2. This court has jurisdiction of the parties and the subject matter pursuant to 28 U.S.C. § 1346(b).

3. The medical health care providers at CIH did not breach any standard of care or duty owed to Plaintiff and did follow the appropriate standard of care in their treatment of Plaintiff. They did not commit negligence or medical malpractice.

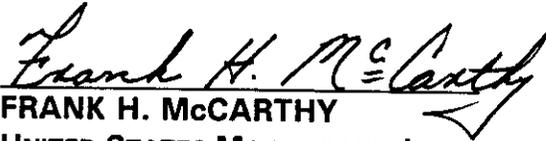
4. Even if a breach of duty had occurred, such breach did not proximately cause Plaintiff's alleged injuries or damages.

5. Plaintiff did not suffer any permanent injuries or damages.

6. Any injuries or damages which Plaintiff may have suffered were not caused by any acts or omissions of Defendant.

7. Judgment will be entered in favor of Defendant and against Plaintiff dismissing the complaint in conformity with these findings of fact and conclusions of law.

DATED this 21st day of July, 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE **JUL 21 1999**

NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN HUNT, et al,)
)
 Plaintiff(s),)
)
 vs.)
)
 INDEPENDENT SCHOOL DIST. NO. 1,)
 TULSA COUNTY, OKLAHOMA,)
)
 Defendant(s).)

Case No. 98-C-82-B ✓

ENTERED ON DOCKET
DATE **JUL 22 1999**

ADMINISTRATIVE CLOSING ORDER

The Parties having advised the Court of the filing of an action seeking the proper statutory interpretation of Oklahoma law in the Fourteenth Judicial District, State of Oklahoma, Tulsa County Case No. CJ 99-2148, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the above referenced State Court case, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 21st day of July, 1999.



THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROZELLA M. COOK,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL, Commissioner)
 of the Social Security Administration,)
)
 Defendant.)

No. 99-CV-134-B(J) ✓

ENTERED ON DOCKET

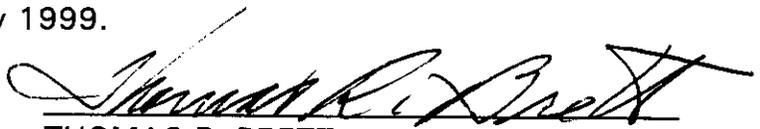
DATE JUL 22 1999

ORDER

Plaintiff filed this social security appeal on February 18, 1999. To date, Plaintiff has not served the Defendant in this case. Plaintiff has had almost six months to obtain service. On June 23, 1999, the Court ordered Plaintiff to show cause by July 6, 1998 why this case should not be dismissed for failure to serve Defendant within 120 days as required by Fed. R. Civ. P. 4(l) and (m). To date, Plaintiff has not responded to the Court's show cause order. Consequently, this case is dismissed for failure to effect timely service, for failure to prosecute, and for failure to follow the orders of this Court. See Fed. R. Civ. P. 4(m) and 41(b).

IT IS SO ORDERED.

Dated this 21 day of July 1999.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT JUDGE

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

F I L E D

JUL 21 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARYLAND INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
SOONER FREIGHT, INC.,)
)
Defendant.)

Case No. 98-CV-427-B(M)

ENTERED ON DOCKET
JUL 22 1999

AGREED AMENDED JUDGMENT

In accord with the June 2, 1999 Order sustaining the Defendant's Motion for Summary Judgment and the July 12, 1999 Order denying the Plaintiff's Motion for New Trial, the Court hereby enters judgment in favor of Defendant Sooner Freight, Inc. and against Plaintiff Maryland Insurance Company, finding liability coverage to a limit of \$50,000.00. The Court's July 12, 1999 Amended Judgment is hereby vacated. Defendant is awarded costs and attorneys' fees in the total sum of \$15,000.00.

Dated this 21ST day of July, 1999.


Thomas R. Brett, United States District Judge

MT
A-8-99

RECEIVED
JUL 6 1999
U.S. ATTORNEY
N.D. OKLAHOMA

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JUL 21 1999

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
PETER H. WILLIAMS,)
)
Defendant.)

CIVIL ACTION NO. 99CV0389C (J) ✓

FILED

JUL 20 1999

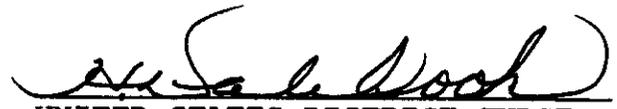
Phil Lombardi, Clerk
U.S. DISTRICT COURT

AGREED JUDGMENT

This matter comes on for consideration this 5th
July 1999
day of ~~June~~, 1999, the Plaintiff, United States of America, by
Stephen C. Lewis, United States Attorney for the Northern District
of Oklahoma, through Loretta F. Radford, Assistant United States
Attorney, and the Defendant, Peter H. Williams, appearing pro se.

The Court, being fully advised and having examined the
court file, finds that the Defendant, Peter H. Williams,
acknowledged receipt of Summons and Complaint on May 21, 1999. The
Defendant has not filed an Answer but in lieu thereof has agreed
that Peter H. Williams is indebted to the Plaintiff in the amount
alleged in the Complaint and that judgment may accordingly be
entered against Peter H. Williams in the principal amount of
\$4,753.07, plus administrative costs in the amount of \$5.25, plus
accrued interest in the amount of \$5,265.88, plus interest
thereafter at the rate of 9% per annum until judgment, plus filing
fees in the amount of \$150.00, plus interest thereafter at the
current legal rate until paid, plus the costs of this action.

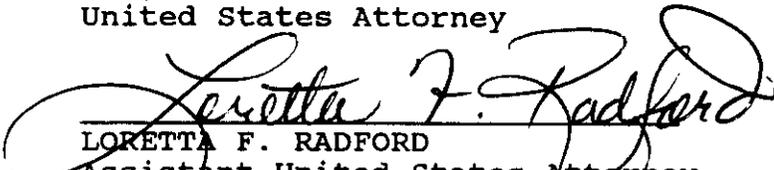
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of \$4,753.07, plus administrative costs in the amount of \$5.25, plus accrued interest in the amount of \$5,265.88, plus interest thereafter at the rate of 9% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 5.163 until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD
Assistant United States Attorney


PETER H. WILLIAMS

LFR/dlo

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

F I L E D

MICHAEL D. CLARK,
441-44-2615

Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-587-M ✓

JUL 20 1999 SA

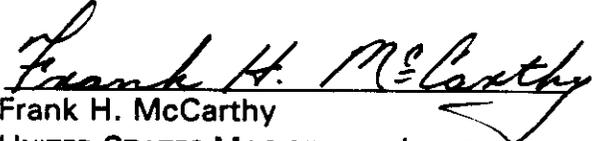
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUL 21 1999

JUDGMENT

Judgment is hereby entered for the Plaintiff and against Defendant. Dated this
20th Day of July, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

MICHAEL D. CLARK,
441-44-2615

JUL 20 1999 SAZ

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff,

vs.

Case No. 98-CV-587-M ✓

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

ENTERED ON DOCKET

Defendant.

DATE JUL 21 1999

ORDER

Plaintiff, Michael D. Clark, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.¹ In accordance with 28 U.S.C. § 636(c)(1) & (3), the parties have consented to proceed before a United States Magistrate Judge.

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

¹ Plaintiff's June 28, 1995, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held December 4, 1996. By decision dated December 17, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on June 29, 1998. 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 & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born March 12, 1946, and was 50 years old at the time of the hearing. He has a 7th grade education and past work as a painter and general laborer. He claims to have been unable to work since 1990 due to drug and alcohol addiction, nervousness, breathing difficulty, fatigue, a learning disability, and left foot fracture. The ALJ determined that Plaintiff is not disabled because there is no medically determinable severe impairment which would prevent Plaintiff from performing basic work activities such as sitting, standing, walking, lifting and carrying. [R. 15]. The case was thus decided at step two 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, at step-two only a *de minimis* proof of impairment is required and that the medical record contains sufficient proof of chronic obstructive pulmonary disease to require the ALJ to proceed beyond step-two. The

court concludes that the record contains substantial evidence that Plaintiff suffers from a severe condition as that term is used in step-two of the evaluative sequence. Therefore, the Commissioner's decision is reversed and the case is remanded for further evaluation.

It is well-settled that Plaintiff has the burden to prove disability. *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997). At step two to demonstrate that an impairment is severe, the plaintiff must show that it "significantly limits [his] physical or mental ability to do basic work activities." 20 C.F.R. § 416.920(c). The Tenth Circuit has characterized the step two showing as "de minimis." *Hawkins*, 113 F.3d at 1169. The mere presence of a condition or ailment documented in the record is not sufficient to prove that the claimant is significantly limited in the ability to do basic work activities. The claimant must establish by objective medical evidence that he has a medically determinable physical or mental impairment and that the impairment could reasonably be expected to produce the alleged symptoms. *See Hinkle v. Apfel*, 132 F.3d 1349, 1352 (10th Cir. 1997). Once the relationship between a medically determinable impairment and the symptoms is established, the intensity, persistence, and limiting effects of the symptoms must be considered along with the objective medical and other evidence in determining whether the impairment is severe. SSR 96-3p. If the symptom related limitations have more than a minimal effect on the ability to do basic work activities, the ALJ must find that the impairment is "severe" and must proceed to the next step in the evaluative sequence, even if the objective medical evidence would not in itself establish that the impairment is severe. *Id.*

Although the medical record contained an August 18, 1993, x-ray report showing Plaintiff's lungs were clear [R. 180], pulmonary function studies performed on December 17, 1995, found a moderate obstructive lung defect. [R. 213]. A moderate obstructive lung defect is a medically determinable condition which could produce breathing difficulty and fatigue thereby preventing Plaintiff from performing the basic work activities of standing, walking, lifting, and carrying.

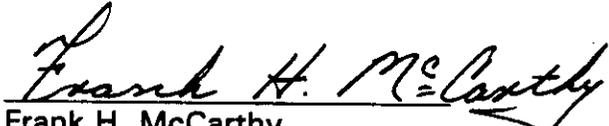
In addition, records not before the ALJ, but which were submitted to the Appeals Council² reveal that on July 24, 1996, Plaintiff presented to Tulsa Regional Medical Center complaining of breathing difficulties. Examination revealed sonorous rhonchi present, particularly in the right lung, and scattered sibilant rhonchi present diffusely, no rales were present. [R. 243]. After a breathing treatment, wheezing and some of the sonorous rhonchi resolved. The physician diagnosed "acute sinobronchial syndrome." [R. 244]. X-ray studies indicated that the lung fields were "hyperaerated with flattening of the diaphragms and increased retrosternal air space, suggestive of chronic obstructive pulmonary disease." [R. 239, 240].

The 1995 finding of a moderate obstructive lung defect and the July 1996 findings suggestive of chronic obstructive pulmonary disease establish the existence of a medically determinable impairment that could reasonably be expected to produce the shortness of breath and fatigue which Plaintiff claimed interfered with his ability

² To the extent new evidence submitted to the Appeals Council is material and relevant to the pertinent time period, it is to be considered by the court when evaluating the Commissioner's decision for substantial evidence. *O'Dell v. Shalala*, 44 F.3d 855, 859 (10th Cir. 1994).

to work. The court finds that the ALJ should have proceeded beyond step-two in the sequential evaluation. The decision of the Commissioner finding Plaintiff not disabled is REVERSED and the case REMANDED for further proceedings. In remanding this case, the court does not dictate the result, nor does it suggest that the record is insufficient. Rather, remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based upon the facts of the case.

SO ORDERED this 20th Day of July, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE