

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

**FILED**

JAN 20 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DAVID EUGENE WILLIAMS, )  
)  
Petitioner, )  
)  
vs. )  
)  
HOWARD RAY, )  
)  
Respondent. )

Case No. 97-CV-565-BU ✓

ENTERED ON DOCKET

DATE JAN 20 2000

**ORDER**

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, appearing *pro se* and currently confined in the Oklahoma Department of Corrections, challenges his conviction in Tulsa County District Court, Case No. CRF-96-3287. Respondent has filed a Rule 5 response (#4) to which Petitioner has replied (#5). As more fully set out below, the Court concludes that no evidentiary hearing is required and that the petition should be denied.

**BACKGROUND**

On September 19, 1996, Petitioner pled guilty pursuant to a plea agreement to the charge of Larceny of Merchandise from a Retailer in excess of \$500 in Tulsa County District Court, Case No. CRF-96-3287 (#4, Ex. A). According to Petitioner, he was charged originally with Embezzlement by Employee; however, after the State's witness testified at the preliminary hearing, defense counsel suggested and the prosecution agreed that the information should be amended to charge Larceny of Merchandise from Retailer after former conviction of a felony (#4, Ex. B at 3). On the date of the preliminary hearing on the new charge and on defense counsel's recommendation, Petitioner pled

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guilty pursuant to a written plea agreement which he signed (#4, Ex. A and Ex. B at 4). Immediately preceding Petitioner's signature, the plea agreement includes a provision entitled "Notice of Right to Appeal" explaining that if he wished to appeal from the conviction, he should file an Application to Withdraw his Plea of Guilty within ten days (#4, Ex. A at 6). Petitioner was sentenced to three years in the custody of the Department of Corrections. He did not file a direct appeal.

Petitioner filed two post-conviction relief applications in the state courts. In his first application for post-conviction relief, Petitioner alleged: (1) ineffective assistance of counsel for failing to move the dismissal the indictment, subpoena the co-defendant charged in the original information, or investigate or interview witnesses; (2) failure of the court to provide him with a copy of the amended information and failure to arraign him on that new charge; and (3) his sentence was improperly enhanced because counsel did not inform him about the enhancement statute (#4, Ex. B). This first application for post-conviction relief was denied on March 6, 1997 (#4, Ex. C). The trial court determined that Petitioner's claim of ineffective assistance of counsel did not meet the tests set forth in Strickland v. Washington, 466 U.S. 668 (1984) (#4, Ex. C at 4). Further, the trial court determined that Petitioner had never indicated that he desired to appeal his case, and because of his failure to file a timely appeal he waived any remaining issues (#4, Ex. C at 5). Petitioner appealed the denial of his application for post-conviction relief (#4, Ex. D), and the Oklahoma Court of Criminal Appeals ("OCCA") affirmed the denial on May 8, 1997 (#4, Ex. E).

Petitioner filed a second application for post-conviction relief.<sup>1</sup> Apparently, Petitioner again raised a claim of ineffective assistance of counsel, and the trial court denied the application on April 3, 1997, restating its prior ruling that Petitioner failed to demonstrate that counsel was ineffective

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<sup>1</sup>This second application for post-conviction relief is not part of the record in this case.

and that he had waived any remaining issues (#1, first unnumbered attachment). There is no indication in the record that Petitioner appealed the denial of this second application for post-conviction relief.

In the instant habeas corpus petition, Petitioner alleges that (1) he was denied the effective assistance of counsel because trial counsel failed to investigate, failed to interview potential witnesses, and failed to properly advise Petitioner of exactly what rights he was waiving by pleading guilty; (2) his guilty plea was not knowingly or voluntarily entered because the record is silent as to anyone advising Petitioner of the nature of the charges against him and he was not provided with a copy of the amended information; and (3) his sentence is excessive in that it exceeds the punishment authorized by statute.

Respondent contends that Petitioner is procedurally barred from raising his claims because he failed to follow state appellate procedures. Respondent asserts that the OCCA found that Petitioner had defaulted his claims, and thus federal habeas review is barred unless Petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation, or that failure to consider the claims will result in a fundamental miscarriage of justice. Respondent contends that Petitioner fails to make this showing.

Petitioner replies that his claims should not be procedurally barred because the state court did not "clearly and expressly" state that its judgment rested on state procedural bar grounds. Petitioner also restates his claims of ineffective assistance of counsel, involuntary guilty plea, and excessive sentence.

## *ANALYSIS*

### **A. Exhaustion / Evidentiary Hearing**

The Court must determine whether Petitioner has met the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Coleman v. Thompson, 501 U.S. 722, 732 (1991); Rose v. Lundy, 455 U.S. 509 (1982). Respondent does not address the exhaustion issue; however, the Court finds that Petitioner has presented his claims to the OCCA; thus, the Court finds that the exhaustion requirement imposed by § 2254(b) is satisfied.

The Court also finds that an evidentiary hearing is not necessary as Petitioner has not met his burden of proving entitlement to an evidentiary hearing. See Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998). In denying Petitioner's first application for post-conviction relief, where he raised the claims presented in the instant petition, the state trial court stated that "the matter under consideration does not present any genuine issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony." (#4, Ex. C). Thus, the state court denied an evidentiary hearing on Petitioner's claims and he shall not be deemed to have "failed to develop the factual basis of a claim in state court." Id. Therefore, his request is governed by standards in effect prior to enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") rather than by 28 U.S.C. § 2254(e)(2), as amended by the AEDPA. Id. Under pre-AEDPA standards, in order to be entitled to an evidentiary hearing, Petitioner must make allegations which, if proven true and "not contravened by the existing factual record, would entitle him to habeas relief." Id. Petitioner's claims in this case, as discussed below, are procedurally barred or are without merit. Therefore, the Court finds that an evidentiary hearing is not necessary.

**B. Ineffective Assistance of Counsel Claim**

The habeas corpus statute, as amended by the AEDPA, provides that:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

- (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). Because the state courts considered and rejected Petitioner's claim of ineffective assistance of counsel on the merits, this provision applies to guide this Court's review of Petitioner's ineffective assistance of counsel claim. The state district court examining Petitioner's application for post-conviction relief applied the Strickland standard of "reasonably effective assistance" by which an attorney's performance is judged. Strickland v. Washington, 466 U.S. 668, 687 (1984). The court cited the two-part test which the defendant must meet: first, that his attorney's performance "fell below an objective standard of reasonableness," id. at 688; and second, that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694. The court noted that except for Petitioner's unsupported statements in his brief, there was no indication that Petitioner ever discussed a desire to appeal with his attorney. The court also found that counsel acted as a reasonably competent attorney under the facts and circumstances of this case. (#4, Ex. c at 4). In affirming the district court's denial of Petitioner's application for post-conviction relief, the Court of Criminal Appeals cited Strickland and affirmed the district court's finding that "Petitioner failed to overcome the first tier of the Strickland test." (#4, Ex. E at 2).

It is clear that the state courts articulated the correct federal standards by which a claim of ineffective assistance of counsel is judged. Next, the Court must determine whether the state court's decision represents an unreasonable application of the law to the facts under § 2254(d)(1). To do this, the Court examines the issues which Petitioner promulgates in support of his claim of ineffective assistance of counsel.

Petitioner alleges that his defense counsel failed to investigate the charges against him, failed and/or refused to interview potential witnesses requested by Petitioner, and failed to properly advise Petitioner of exactly what rights he was waiving by pleading guilty.

After reviewing the record, the Court concludes that Petitioner has failed to demonstrate ineffective assistance of counsel; thus, the state court's decision does not represent an unreasonable application of the law to the facts. Petitioner's allegations that counsel failed to investigate and failed to interview potential witnesses are wholly conclusory in that he fails to describe what exculpatory evidence counsel might have been expected to uncover upon investigation and how these unnamed potential witnesses would have aided in his defense. Further, Petitioner's allegation that counsel failed to advise him of the rights he was waiving by pleading guilty are belied by the plea agreement he signed which explicitly set forth those rights (#4, Ex. A). Moreover, Petitioner fails to state how the knowledge of any of his specific rights would have affected his decision to plead guilty. As a result, pursuant to 28 U.S.C. § 2254(d), habeas corpus relief on this ground should be denied.

**C. Procedural bar (Claims 2 and 3)**

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined or would decline to reach the merits of that claim on

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

Respondent argues that Petitioner procedurally defaulted his claims when he failed to withdraw his plea of guilty and otherwise perfect a direct appeal. In affirming the trial court's denial of post-conviction relief, the OCCA specifically found that Petitioner had waived his claims by failing to raise them in a direct appeal as required by Oklahoma procedural rules and that he had failed to provide the court sufficient reason for his failure to file a direct appeal. (#4, Ex. E).

Applying the principles of procedural default to the instant case, the Court concludes Petitioner's second and third claims are procedurally barred. The state court's procedural bar as applied to these claims was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the OCCA has consistently declined to review claims which could have been but were not raised on direct appeal. Okla. Stat. tit. 22, § 1086.

Because of his procedural default, this Court may not consider Petitioner's second and third claims unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510

U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

In his reply to Respondent's response, Petitioner does not attempt to show cause for his procedural default. Instead, he contends that his claims are not procedurally barred because the state court did not "'clearly and expressly' state that it's [sic] judgment rested on state procedural bar." (#5 at 2). Petitioner's contention is clearly erroneous. The OCCA's opinion states that "the trial judge found Petitioner waived any remaining issues and denied his application for post-conviction relief." (#4, Ex. E). Therefore, in light of the record, the Court concludes Petitioner has failed to demonstrate "cause" to excuse his procedural default.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 506 U.S. 390, 403-404 (1993); Sawyer v. Whitley, 505 U.S. 333, 339-341 (1992). However, Petitioner does not allege that he is actually innocent of the crime for which he was convicted. Therefore, the Court finds that the "fundamental miscarriage of justice" exception to the procedural default doctrine has no application to this case.

As a result of Petitioner's failure to demonstrate "cause and prejudice" or that a fundamental

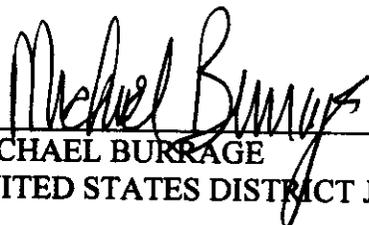
miscarriage of justice would occur if his claims are not considered, this Court is procedurally barred from considering Petitioner's second and third claims.

**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 writ of habeas corpus is denied.

SO ORDERED THIS 20<sup>th</sup> day of January, 2000.

  
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MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JAN 20 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

R. THOMAS SEYMOUR, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MARILYN EICKENHORST AND )  
CHARLES EICKENHORST, )  
 )  
Defendants. )

Case No. 99-CV-797-BU(J)

ENTERED ON DOCKET

DATE JAN 20 2000

ADMINISTRATIVE CLOSING ORDER

The Court has reviewed the Notice of Commencement of Bankruptcy Proceeding and Imposition of Automatic Stay filed by Defendants, Marilyn Eickenhorst and Charles Eickenhorst on December 20, 1999. Having done so, the Court concludes that this matter should be administratively closed during the pendency of the bankruptcy proceedings before the United States Bankruptcy Court for the Southern District of Texas, Houston Division. It is therefore ordered that the Clerk administratively terminate this action in his records pending resolution of the bankruptcy proceedings.

The parties are **DIRECTED** to notify the Court of the resolution of the bankruptcy proceedings, within ten (10) days thereafter, so that they may reopen this matter, if necessary, to obtain a final determination of this litigation.

ENTERED this 20<sup>th</sup> day of January, 2000.

  
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MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 20 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ELIZABETH M. DEMAURO, )  
 )  
 Defendant. )

No. 99CV0367B(E)

ENTERED ON DOCKET  
DATE JAN 20 2000

DEFAULT JUDGMENT

This matter comes on for consideration this 19<sup>th</sup> day of January, 2000, 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, Elizabeth M. Demauro, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Elizabeth M. Demauro, was served with Summons and Complaint on June 25, 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, Elizabeth M. Demauro, for the principal amount of \$2,817.50, plus

accrued interest of \$1,751.89, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.997 percent per annum until paid, plus costs of this action.

  
United States District Judge  
 THOMAS R. DRETT

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

**FILED**  
JAN 14 2000  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CARYL STRAUB, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 RAE CORPORATION, )  
 )  
 Defendant. )

Case No. 99-CV-480-B(E)

**FILED**  
ENTERED ON DOCKET JAN 20 2000  
DATE JAN 20 2000 Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER OF DISMISSAL WITH PREJUDICE**

This matter comes before the Court on the Joint Stipulation of Dismissal with Prejudice by the parties. The parties represent to the Court they have entered into an agreement for the entry of this Order of Dismissal with no finding of legal violation on the part of RAE Corporation.

IT IS THEREFORE ORDERED that this matter is dismissed with prejudice with no finding of any legal violation on the part of RAE Corporation. Each party shall bear their own attorney fees and costs.

  
JUDGE OF THE DISTRICT COURT  
For Thomas R. Brett, Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 19 2000 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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. )

ENTERED ON DOCKET  
DATE JAN 20 2000

CIVIL ACTION NO. 98-CV-0562-H (E) ✓

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 19<sup>th</sup> day of January, 2000, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on November 15, 1999, pursuant to an Order of Sale dated August 20, 1999, of the following described property located in Tulsa County, 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.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, James R. Utt aka James Russell Utt; Susan Utt, Spouse of James R. Utt aka James Russell Utt; Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne; Frank Osborne, Spouse of Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne; County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney; and State of Oklahoma ex rel. Oklahoma Tax Commission through Kim D. Ashley, Assistant General Counsel, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Broken Arrow Daily Ledger, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the

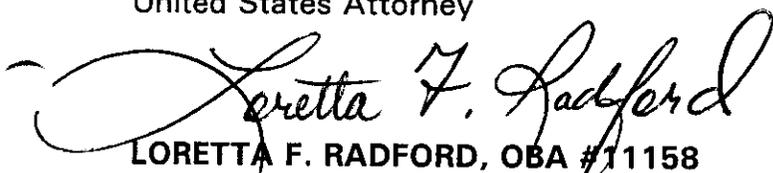
Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

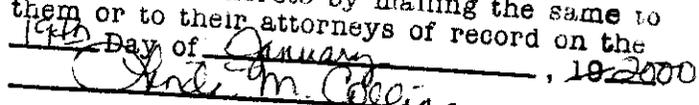
APPROVED AS TO FORM AND CONTENT:

**STEPHEN C. LEWIS**  
United States Attorney



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

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 14th Day of January, 192000  


Report and Recommendation of United States Magistrate Judge  
Case No. 98-CV-0562-H (E) (Utt)

LFR:css

mt

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

MARJORIE NILSON, an individual, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 TULSA COMMUNITY COLLEGE, )  
 )  
 METRO CAMPUS, )  
 )  
 CARL AKINS, an )  
 )  
 individual, )  
 )  
 Defendants. )

**FILED**

JAN 19 2000

Case No: 99-C-824-H

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JAN 20 2000

**DISMISSAL WITHOUT PREJUDICE**

COMES NOW, the Plaintiff, Marjorie Nilson, and the Defendants Tulsa Community College, Metro Campus and Carl Akins, pursuant to Rule 41 of the Federal Rules of Civil Procedure, appear and stipulate to the dismissal of the above-styled action, *without prejudice* to the right of bringing any other future action.

Respectfully submitted,

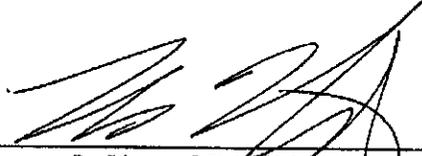
*Susan H. Stock*

N. Kay Bridger-Riley, OBA #1121  
Susan H. Stock, SCBA #14165  
**BRIDGER-RILEY & ASSOCIATES, P.C.**  
8908 South Yale Avenue, Suite 450  
Tulsa, OK 74137  
(918) 494-6699 (Telephone)  
(918) 494-8825 (Telefax)

ATTORNEYS FOR PLAINTIFF

CLJ

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Thomas L. Vogt, OBA #10995  
Jones, Givens, Gotcher & Bogan  
3800 First Place Tower  
15 East Fifth Street  
Tulsa, Oklahoma 74103-4309  
(918) 581-8200  
(918) 583-1189 (telecopier)

**ATTORNEY FOR ALL DEFENDANTS**

**ORIGINAL**

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

**FILED**

**JAN 20 2000**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**SECURITIES AND EXCHANGE COMMISSION,**

**Plaintiff,**

**vs.**

**LAZARUS R. LONG (a/k/a HOWARD TURNEY)  
individually and doing business as New Utopia**

**Defendant.**

**CIVIL ACTION NO.**

**99CV 0257BU(M)**

**ENTERED ON DOCKET  
DATE JAN 20 2000**

**FINAL JUDGMENT OF PERMANENT INJUNCTION AND OTHER  
EQUITABLE RELIEF AS TO LAZARUS R. LONG**

Plaintiff Securities and Exchange Commission ("Commission"), having filed its Complaint in this matter and defendant Lazarus R. Long ("Long"), through his Stipulation and Consent ("Consent"), having admitted service of the Summons and Complaint, having admitted the jurisdiction of this Court over him, having waived the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, having entered into his Consent voluntarily, no threats, promises of immunity or assurances having been made by the Commission or by any of its members, officers, agents or representatives to induce Long to enter into his Consent, having consented, without admitting or denying any of the allegations in the Commission's Complaint, except as to jurisdiction as set forth above, to entry without further notice of this Final Judgment of Permanent Injunction and Other Equitable Relief ("Final Judgment") enjoining defendant Long from engaging in transactions, acts, practices and courses of business which constitute and would constitute violations of Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933 ("Securities Act"), [15 U.S.C. §§ 77e(a), 77e(c) and 77(q)(a)] and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), [15 U.S.C. §78j(b)], and

FINAL JUDGEMENT AS TO  
LAZARUS R. LONG

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Rule 10b(5) thereunder [17 C.F.R. §240.10b-5]; and it further appearing that this Court has jurisdiction over defendant Long and over the subject matter of this action and that no further notice of hearing for the entry of this Final Judgment need be given; and the Court being fully advised in the premises:

I.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant Long, his agents, servants, employees, attorneys-in-fact and all other persons in active concert or participation with him who receive actual notice of this Final Judgment by personal service or otherwise, be and hereby are permanently restrained and enjoined, directly or indirectly, in connection with the purchase or sale of any security, from making use of any means or instrumentalities of interstate commerce or of the mails, or of any facility of any national securities exchange:

(a) to employ any device, scheme or artifice to defraud;

(b) to make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Long, his agents, servants, employees, attorneys-in-fact and all other persons in active concert or participation with him who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, be and hereby are permanently restrained and enjoined, in the offer or sale of any security, from making use of any means or instruments of transportation or communication in interstate commerce, or of the mails, directly or indirectly:

- (a) to employ any device, scheme or artifice to defraud;
- (b) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- (c) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon any purchaser.

III.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant Long, his agents, servants, employees, attorneys and all persons in active concert or participation with them, who receive actual notice of this Final Judgment and Order by personal service or otherwise, are permanently restrained and enjoined in the offer or sale of any security, from directly or indirectly:

- (a) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell any securities, through the use or medium of any prospectus or otherwise, unless and until a registration statement is in effect with the Commission as to such securities;
- (b) carrying securities, or causing them to be carried through the mails or in interstate commerce, by any means or instruments of transportation, for the purpose of sale or delivery after sale, unless and until a registration statement is in effect with the Commission as to such securities; or
- (c) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy, through the use or medium of any prospectus or otherwise, securities, unless a registration statement has been filed with the Commission as to such securities, or while

a registration statement filed with the Commission as to such securities is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding of examination under Section 8 of the Securities Act, as amended [15 U.S.C. § 77h]; provided, however, that nothing in this Part III shall apply to any security or transaction which is exempt from the provisions of Section 5 of the Securities Act, as amended [15 U.S.C. § 77e].

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Long shall, pay disgorgement in the amount of of \$24,000.00, representing his gains from the conduct alleged in the Complaint, plus prejudgment interest thereon in the amount of \$862.48. Based on defendant Long's sworn representations in his Statement of Financial Condition dated December 1, 1999, and submitted to the Commission, payment of the disgorgement and prejudgment interest amounts is waived, contingent upon the accuracy and completeness of defendant Long's Statement of Financial Condition.

V.

IT IS FURTHER ORDERED that based upon defendant Long's sworn representations in his Sworn Statement of Financial Condition dated December 1, 1999, and submitted to the Commission, the Court is not ordering him to pay a civil penalty pursuant to the provisions of Section 20(d) of the Securities Act [15 U.S.C. §77t(d)], and Section 21(d)(3) of the Exchange Act [15 U.S.C. §78u(d)(3)]. The determination not to impose a civil penalty or disgorgement is contingent upon the accuracy and completeness of defendant Long's Sworn Statement of Financial Condition. If at any time following the entry of this Final Judgment, the Commission obtains information indicating that defendant Long's representations to the Commission concerning his assets, income, liabilities or net worth were fraudulent, misleading, inaccurate or incomplete in any material respect as of the time such representations were made, the

FINAL JUDGEMENT AS TO  
LAZARUS R. LONG

Commission may, at its sole discretion and without prior notice to Long, petition this Court for an order requiring Long to pay a civil penalty and disgorgement. In connection with any such petition, the only issues shall be whether the financial information provided by defendant Long was fraudulent, misleading, inaccurate or incomplete in any material respect as of the time such representations were made, and the amount of civil penalty to be imposed. In its petition, the Commission may move this Court to consider all available remedies, including, but not limited to, ordering defendant Long to turn over funds and assets, directing the forfeiture of any assets, or sanctions for contempt of the Final Judgment, and the Commission may also request additional discovery. Defendant Long may not, by way of defense to such petition, challenge the validity of his Consent or this Final Judgment, contest the allegations in the Complaint filed by the Commission or that payment of a civil penalty or disgorgement should not be ordered.

VI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Consent filed herein be, and the same is hereby, incorporated in this Final Judgment with the same force and effect as if fully set forth herein.

VII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court shall retain jurisdiction over this action and over defendant Long for all purposes, including for purposes of enforcing the terms of this Final Judgment.

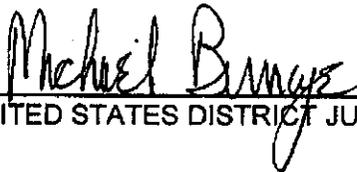
VIII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Final Judgment may be served upon defendant Long in person or by mail either by the United States Marshal, by the Clerk of the Court or by any member of the staff of the Commission.

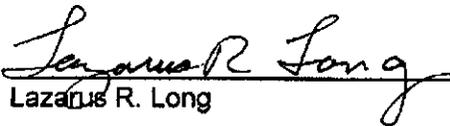
IX.

There being no just reason for delay, the Clerk of this Court is hereby directed to enter this Final Judgment as to defendant Long pursuant to Rule 54 of the Federal Rules of Civil Procedure.

SIGNED this 20<sup>th</sup> day of JAN, 2000.

  
UNITED STATES DISTRICT JUDGE

Agreed as to form and content

  
Lazarus R. Long

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 20 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
on behalf of the Secretary of Veterans Affairs, )  
 )  
Plaintiff, )  
v. )  
 )  
LUTHER DUANE JONES, et al., )  
 )  
Defendants. )

ENTERED ON DOCKET  
DATE JAN 20 2000

CIVIL ACTION NO. 99-CV-0183-BU (M) ✓

**ORDER**

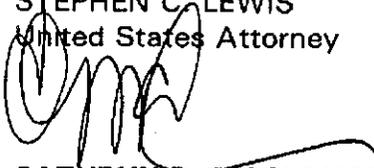
Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 20<sup>th</sup> day of JAN, 2000.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



CATHRYN D. MCCLANAHAN, OBA #014853  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

CDM:css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 20 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

Plaintiff,

v.

LUTHER DUANE JONES, et al.,

Defendants.

ENTERED ON DOCKET  
DATE JAN 20 2000

CIVIL ACTION NO. 99-CV-0183-BU (M)

**ORDER**

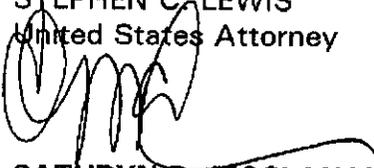
Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 20<sup>th</sup> day of JAN, 2000.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



CATHRYN D. MCCLANAHAN, OBA #014853  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

CDM:css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
on behalf of the Secretary of Veterans Affairs, )  
 )  
Plaintiff, )  
v. )  
 )  
UDO SCHMELING aka Udo W. Schmeling )  
aka Udo Wolfgang Schmeling; )  
JUNE SCHMELING aka June A. Schmeling )  
aka June Ann Schmeling; )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma, )  
 )  
Defendants. )

**FILED**

JAN 19 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JAN 20 2000

CIVIL ACTION NO. 99-CV-0179-K (J)

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 19<sup>th</sup> day of January, 2000, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on November 15, 1999, pursuant to an Order of Sale dated August 19, 1999, of the following described property located in Tulsa County, Oklahoma:

**Lot Twenty (20), Block Two (2), SOUTHBROOK III, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the Recorded Plat No. 4443.**

Appearing for the United States of America is Wyn Dee Baker, Assistant United States Attorney. Notice was given the Defendants, Udo Schmeling aka Udo W. Schmeling aka Udo Wolfgang Schmeling; June Schmeling aka June A. Schmeling aka June Ann Schmeling; and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant

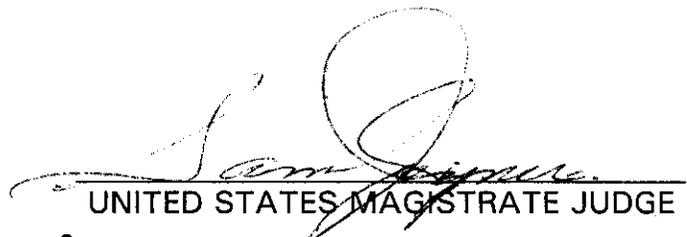
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AUC*

District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Broken Arrow Daily Ledger, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

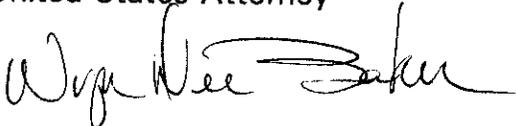
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

**STEPHEN C. LEWIS**  
United States Attorney



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

Report and Recommendation of United States Magistrate Judge  
Case No. 99-CV-0179-K (J) (Schmeling)

WDB:css

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 19th Day of January, 2000.

Andre M. Collins

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

**F I L E D**

JAN 19 2000 *PL*

MERCEDES P. DICKERSON,  
Plaintiff,

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

vs.

Case No. 99-CV-333-M /

WILLIAM J. HENDERSON,  
Postmaster General,  
Defendant.

ENTERED ON DOCKET

DATE JAN 20 2000

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this  
19<sup>th</sup> Day of January, 2000.

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

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

**F I L E D**

JAN 19 2000 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MERCEDES P. DICKERSON,  
Plaintiff,

vs.

WILLIAM J. HENDERSON,  
Postmaster General,  
Defendant.

Case No. 99-CV-333-M /

ENTERED ON DOCKET

DATE JAN 20 2000

ORDER

Defendant's "Second Motion To Dismiss, Or Alternatively, for Summary Judgment" [Dkt. 16] is before the court. Defendant's motion relies on matters outside the pleadings. In accordance with Fed.R.Civ.P. 12(b), the court treats such a motion as one for summary judgment under Fed. R. Civ. P. 56. Based upon the evidence the court finds that Defendant is entitled to summary judgment.

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings, affidavits and exhibits show that "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, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). To survive a motion for summary judgment, the nonmoving party "must establish that there is a genuine issue of material fact" and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,

475 U.S. 574, 585-86, 106 S.Ct. 1348, 1455-56, 89 L.Ed.2d 538 (1986). However, the factual record and reasonable inferences to be drawn therefrom must be construed in the light most favorable to the non-movant. *Gullickson v. Southwest Airlines Pilots' Ass'n.*, 87 F.3d 1176, 1183 (10th Cir. 1996).

Plaintiff has lodged allegations of sexual harassment based on remarks made to her by Mr. Mosely. She recorded the remarks in her diary on dates between March 31, 1997, and March 3, 1998. Defendant seeks dismissal for Plaintiff's failure to exhaust administrative remedies.

There is no dispute as to the material facts concerning Plaintiff's filings or as to the procedure to be followed to maintain this action. Plaintiff contacted the Postal Service Equal Employment Opportunity (EEO) office to request counseling for alleged sexual harassment on August 26, 1998. Applicable regulations require that such allegations be brought to the attention of an EEO counselor within 45 days of the date of the occurrence:

a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

29 C.F.R. § 1614.105(a)(1). Plaintiff does not dispute that she was aware of the 45 day requirement. On February 1, 1999, the Postal Service issued a final agency decision and dismissed Plaintiff's December 28, 1998, complaint for untimeliness.

The Postal Service found that Plaintiff had not contacted an EEO counselor about her allegations within 45 days of the alleged discriminatory acts and dismissed her complaint for untimeliness.

It is unclear whether the failure to timely comply with administrative prerequisites is properly considered a jurisdictional bar to a federal court action, or whether the failure operates as an affirmative defense like a statute of limitations which is subject to waiver, estoppel, and equitable tolling. *See Jones v. Runyon*, 91 F.3d 1398, 1399 n.1 (10th Cir. 1996). In this case the result is the same regardless of how the failure to timely contact a counselor is treated.

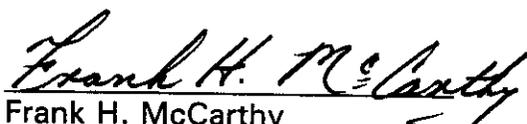
Plaintiff's contact with the EEO counselor was untimely. According to Plaintiff, the last act of alleged discrimination occurred on March 3, 1998. Plaintiff contacted an EEO counselor 176 days later on August 26, 1998, well outside of the 45-day time frame. Plaintiff states that she requested counseling on June 16, 1998, but her complaints were not dealt with appropriately. However, even the June 16 date is 60 days beyond the 45-day time frame.

Plaintiff asserts her claim should be equitably tolled. She claims she was lulled into inaction by the following comment made by Mr. Mosely on March 3, 1998: "Mercedes, you are not from here. The people in Tulsa Stick together. Being from California, you are an outsider. They will believe me over you." The Tenth Circuit has held that timely filing of a discrimination charge may be equitably tolled where the plaintiff has been lulled into inaction by her past employer, state or federal agencies or the courts. *Purrington v. University of Utah*, 996 F.2d 1025, 1030 (10th Cir.

1993). However, the time limit will only be tolled if there has been "active deception" concerning procedural prerequisites. *Id.* Mr. Mosely's comments do not purport to address the procedural requirements, but are merely his statement of Plaintiff's chance of success. Since Mr. Mosely did not make any statements about the filing time-frame, and since he did not mislead Plaintiff about filing requirements, the court finds that Mr. Mosely's comments do not constitute active deception such that tolling is appropriate.

Plaintiff failed to contact an EEO counselor within 45 days of the alleged discrimination as required by 29 U.S.C. § 1614.105(a). She is therefore precluded from maintaining this action. Defendant's Motion for Summary Judgment [Dkt. 16] is GRANTED.

SO ORDERED this 19<sup>th</sup> Day of January, 2000.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

LLOYD R. GREGORY,  
SSN: 446-50-2976

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,

Defendant.

**FILED**

JAN 19 2000 *SAC*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 99-CV-80-J

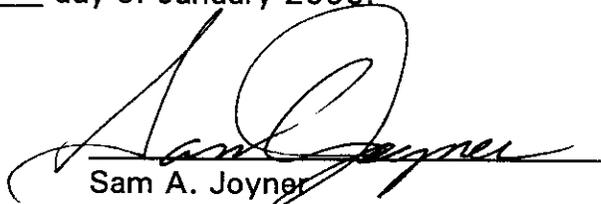
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DATE JAN 20 2000

**JUDGMENT**

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

It is so ordered this 18 day of January 2000.

  
Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

LLOYD R. GREGORY,  
SSN: 446-50-2976 )

Plaintiff, )

v. )

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

Defendant. )

JAN 19 2000 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 99-CV-80-J ✓

ENTERED ON DOCKET

DATE JAN 20 2000

ORDER<sup>1/</sup>

Plaintiff, Lloyd R. Gregory, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.<sup>2/</sup> Plaintiff asserts that the Commissioner erred because the ALJ did not consider Plaintiff's "chronic pain syndrome" as a mental impairment, and did not consider it as providing objective evidence of pain. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, in his disability report, states that he is disabled due to arthritis in his arm and shoulder, an inability to use his right arm, and a bad leg. [R. at 58]. Plaintiff

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<sup>1/</sup> This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

<sup>2/</sup> Administrative Law Judge David W. Engel (hereafter "ALJ") concluded that Plaintiff was not disabled on September 22, 1997. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on December 14, 1998. [R. at 4].

additionally reported that he sometimes had difficulty seeing and that the range of motion in his right arm was limited. [R. at 65-66].

Plaintiff was evaluated by James R. Campbell, D.O., on November 14, 1991, with regard to an injury to Plaintiff's right leg which occurred on November 12, 1991. [R. at 96]. Dr. Campbell wrote that Plaintiff complained of constant pain in his right lower leg. The physical examination revealed some swelling below Plaintiff's right knee. Dr. Campbell concluded that Plaintiff was temporarily disabled for approximately two to three weeks. [R. at 96-97].

Plaintiff was referred to a neurologist on January 15, 1992. [R. at 99]. The neurologist concluded that Plaintiff had no impaired neurological findings with regard to his leg. [R. at 99, 100]. Plaintiff was released from treatment as having reached maximum medical improvement. [R. at 99].

Plaintiff was examined by Jimmy C. Martin, M.D., on January 30, 1992. Dr. Martin concluded that Plaintiff was temporarily totally disabled from the date of his injury on October 28, 1991, until the date of his examination on January 30, 1992. [R. at 105]. Plaintiff complained of stiffness in his right leg, sharp pain, numbness, and tingling. [R. at 105]. Dr. Martin indicated that Plaintiff had a positive Homan's sign and exhibited tenderness over his calf. Dr. Martin concluded that Plaintiff had a 45 percent disability to his right foot based on weakness and decreased function of his right leg. [R. at 105-06].

Plaintiff was examined by Varsha Sikka, M.D., on August 16, 1996. [R. at 83]. Plaintiff complained of pain on the right side of his body and stated that he had been

injured one year previously when his leg "gave out" and he fell. Plaintiff reported that he had been told he had arthritis in his leg and that he experienced sharp radiating pain, cramping, weakness, numbness, pins and needles, decreased energy, and had difficulty sitting, standing, and sleeping. Plaintiff reported that his pain on a scale of zero to ten was approximately nine. Dr. Sikka indicated that Plaintiff's vision was 20/30 on his right and 20/25 on his left, with vision in both eyes of 20/25. Plaintiff's extremities revealed no cyanosis, clubbing, or edema. Plaintiff showed no sign of calf tenderness or Homans sign. Dr. Sikka reported that Plaintiff exhibited exaggerated behavior, that Plaintiff had tenderness all over his spine but exhibited no spasm, and that Plaintiff had no joint abnormality. Plaintiff's right knee indicated some minimal tenderness but showed no sign of swelling or effusion. Dr. Sikka reported that Plaintiff did not give full effort, and indicated that Plaintiff's grip strength in his right arm was four pounds, and in his left arm was 46 pounds. Dr. Sikka additionally observed that Plaintiff showed no signs of atrophy or wasting in his limbs. Plaintiff had a normal gait, and a normal heel/toe walk. Dr. Sikka concluded that Plaintiff suffered from chronic pain syndrome with several perpetuating factors but with no objective findings. In addition, Dr. Sikka reported that Plaintiff exhibited typical pain behavior with symptom magnification. [R. at 85]. Most of Plaintiff's range-of-motion measurements were recorded as "normal."

In November of 1996, Plaintiff complained of headaches. [R. at 107]. Plaintiff reported that his neck was much better in January, but that he was experiencing knee

pain. [R. at 107]. In March of 1997, Plaintiff complained that he had suffered from right leg pain for the previous four months. [R. at 107].

Plaintiff testified at a hearing before the ALJ on June 4, 1997. [R. at 130]. According to Plaintiff, he lived primarily in his van. [R. at 135]. Plaintiff stated that he was 46 years old at the time of the hearing, and was born September 15, 1950. [R. at 135].

Plaintiff testified that he had difficulty holding anything with his right arm and that his right leg went numb. [R. at 140]. According to Plaintiff, he ate at the Salvation Army, slept in his van, and occasionally mowed a friend's yard using a riding lawn mower. [R. at 149]. Plaintiff stated that he visits the grocery store approximately one to two times each week. [R. at 161-62]. Plaintiff testified that he had difficulty walking after fifteen minutes. Plaintiff additionally stated that he had problems with overhead reaching and with his vision. [R. at 152].

Plaintiff stated that he had never been treated for emotional or mental problems. [R. at 153]. Plaintiff contended that his level of pain remained at a constant level of eight to nine on a scale of zero to ten. [R. at 168-69]. Plaintiff sometimes uses icy-hot to relieve his pain. [R. at 168-69].

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

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

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

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

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

42 U.S.C. § 423(d)(2)(A).<sup>3/</sup>

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

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

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<sup>3/</sup> Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternate work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary<sup>4/</sup> as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

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<sup>4/</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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

The ALJ decided Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ concluded that Plaintiff had the RFC to perform a full range of sedentary exertional work with the additional limitations of no stooping, crouching, crawling or climbing infrequently, walking no more than 15 minutes at a time, standing no more than 30 minutes at one time, and no fine motor manipulation of his right hand. The ALJ additionally concluded that Plaintiff had moderate to chronic pain but would be able to remain attentive at work.

### **IV. REVIEW**

Plaintiff, in his brief, states that Plaintiff testified that he suffered from low stamina, an inability to sit, stand, or walk, and was forced to lie down due to his pain. Plaintiff's Brief at 4. Plaintiff alleges that "chronic pain syndrome" has both a mental and physical component, but the ALJ failed to consider the "mental component" of this syndrome. Plaintiff initially asserts that the "critical issue is whether the ALJ was justified in disregarding these subjective complaints." Plaintiff's Brief at 4.

Initially, Plaintiff asserts that "with chronic pain syndrome, pain merges into and becomes a part of the mental and psychological response that produce the functional impairments." Plaintiff's Brief at 4. Plaintiff makes this statement with no support and no medical documentation.

Plaintiff's argument that the ALJ ignored Plaintiff's subjective complaints of pain and ignored the "mental component" of "chronic pain syndrome" is an argument that is basically directed to the "nexus," or the first and second step of the pain analysis

addressed in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). In Luna, the Tenth Circuit Court of Appeals addressed the appropriate legal standards for the evaluation of pain. First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility. Id. at 164.

The "third step" of Luna involves the assessment of the claimant's credibility. An ALJ does not reach this step and is not required to assess credibility unless the claimant first alleges an objectively established pain-producing impairment which could be linked to the alleged pain. If the evidence supports such an impairment, the ALJ then evaluates the claimant's credibility in determining whether or not the alleged pain is disabling. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

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

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication."). Furthermore, the mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment.").

Plaintiff's argument presumes that the ALJ failed to consider Plaintiff's subjective complaints of pain. Plaintiff asserts that the critical issue is whether the ALJ was justified in disregarding Plaintiff's subjective complaints. Plaintiff notes that "chronic pain syndrome" has a mental component which Plaintiff alleges "can serve as objective evidence of pain." However, Plaintiff's argument fails to recognize that the ALJ completed all three steps of Luna. The ALJ noted Plaintiff's diagnoses, and proceeded to consider Plaintiff's objective complaints of pain. Plaintiff's argument is directed to the ALJ's failure to complete the first two steps of Luna, and consequent failure to evaluate Plaintiff's subjective complaints. However, the ALJ proceeded to

the third step of Luna, and evaluated Plaintiff's subjective complaints of pain. Plaintiff does not otherwise challenge the ALJ's evaluation of Plaintiff's complaints.

The ALJ specifically noted in assessing Plaintiff's RFC he was required to assess Plaintiff's subjective complaints of pain. [R. at 13]. The ALJ noted that Plaintiff's activities included mowing the yard, walking around a car lot, shopping one to two times each week for approximately 30 minutes at a time. [R. at 15]. The ALJ observed that Plaintiff took very few drugs for the relief of pain and used a "hot salve" once or twice a week. [R. at 15]. The ALJ noted that the medical records indicated a lack of consistency with regard to Plaintiff's complaints. [R. at 16]. The ALJ wrote that the consultative examiner observed exaggerated behavior from Plaintiff and Plaintiff's failure to give full effort. [R. at 16]. The ALJ observed that Plaintiff had nothing specific related to his onset date, and that Plaintiff had reported no significant earnings since 1985. The ALJ noticed entries in Plaintiff's records indicating that Plaintiff complained on one occasion of problems turning his neck for two and one-half years, but four days after complaining stated that the condition had improved. [R. at 17]. The ALJ wrote that no medical opinion contradicted the RFC he found for Plaintiff. The ALJ considered the degree and frequency of the medical treatment which Plaintiff sought, the discrepancies in the record, the reports of the doctors, the low level of medication, the lack of adverse side effects, the lack of a significant pattern of complaints, and Plaintiff's recorded poor effort during examinations. [R. at 17]. The ALJ therefore evaluated Plaintiff's subjective complaints, and concluded that Plaintiff's pain was not disabling.

Plaintiff's initial allegation of error, which hinges on "whether the ALJ was justified in disregarding these subjective complaints" ignores the fact that the ALJ did evaluate the complaints. Plaintiff states that the ALJ ignored the "mental component" of "chronic pain syndrome." The record does not reveal a discussion of any mental component of this syndrome. However, Plaintiff's asserted conclusion, that the ALJ erred by failing to evaluate Plaintiff's complaints of pain is simply incorrect.

Within the context of evaluating Plaintiff's subjective complaints of pain, Plaintiff additionally seems to assert that the ALJ erred by not developing evidence of Plaintiff's mental impairment. Plaintiff notes that "where there is information to suggest that such a [mental] impairment exists," the ALJ errs by not developing evidence of the impairment.

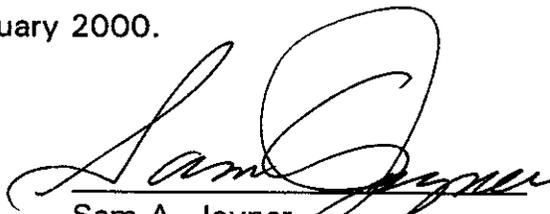
Initially, Plaintiff's argument assumes that the record contains evidence which would suggest Plaintiff has a mental impairment. The Court has reviewed the record. The record does not suggest and Plaintiff does not point to anything in the record suggesting that Plaintiff has a mental disorder. Plaintiff's sole support for a link between "chronic pain syndrome" and a "mental component" appears to be a Ninth Circuit case. The Court has reviewed the case law cited by Plaintiff. Generally, the cases are discussing the familiar nexus argument. The cases do not require a conclusion that a diagnosis of "chronic pain syndrome" requires an evaluation of Plaintiff's mental status. Plaintiff was asked at the hearing, by the ALJ, whether he had ever been treated for emotional or mental problems and answered "no." [R. at 153]. Plaintiff was represented at the hearing, but Plaintiff's attorney made no

mention of a "mental component" to Plaintiff's "chronic pain syndrome." Plaintiff refers the Court to nothing in the record which would suggest that the ALJ should have concluded that additional information with regard to Plaintiff's mental status was necessary. See also Hawkins v. Chater, 113 F.3d 1162, 1167 (10th Cir. 1997) ("When the claimant is represented by counsel at the administrative hearing, the ALJ should ordinarily be entitled to rely on the claimant's counsel to structure and present claimant's case in a way that the claimant's claims are adequately explored.").

In addition, even if the ALJ erred in not further developing or considering Plaintiff's "mental impairment," Plaintiff's argument does not convince the Court that a remand is necessary. Again, the result of Plaintiff's argument, as articulated by Plaintiff, is that the ALJ would have an objective finding upon which to then base his analysis of Plaintiff's subjective complaints of pain. However, as noted above, the ALJ did evaluate Plaintiff's complaints of pain. Plaintiff does not discuss this evaluation by the ALJ.

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

Dated this 18 day of January 2000.

  
Sam A. Joyner  
United States Magistrate Judge

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

**FILED**

JAN 19 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

WENDY LONG,

Plaintiff,

v.

AMERICAN GOLF CORPORATION;  
GOLF CLUB, L.L.C.; and SBC ASSET  
MANAGEMENT, INC.,

Defendants.

Case No. 99-CV-78-K (J)

ENTERED ON DOCKET

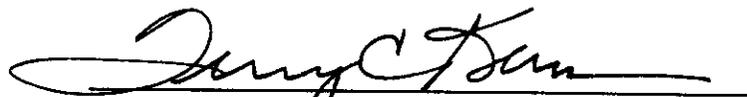
DATE JAN 20 2000

**ADMINISTRATIVE CLOSING ORDER**

The Court, having been advised by counsel for Defendant on January 18, 2000, that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

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

ORDERED THIS 19 DAY OF JANUARY, 2000.



TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

James O. Ellison  
Senior Judge

United States District Court  
Northern District of Oklahoma  
224 S. Boulder  
United States Courthouse  
Tulsa, Oklahoma 74103

(918) 581-7981

ENTERED ON DOCKET

DATE JAN 19 2000

January 18, 2000

TO: COUNSEL/PARTIES OF RECORD *per*  
RE: CASE NO. 96-C-97-E Dome  
Corporation, et al. v.  
Compton Kennard, et al.

This is to advise you that Judge James O. Ellison entered the following Minute Order this date in the above-styled case:

This matter was reversed and remanded by order of the Court of Appeals dated May 10, 1999. Upon advice of counsel for appellant, Compton Kennard, the underlying matters are moot by virtue of a previous dismissal. Nothing remains to be tried and this matter should be terminated in the records of the court Clerk.

Very truly yours,

  
\_\_\_\_\_  
Leigh A. Reaves  
Law Clerk to  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

\_\_\_\_\_ Counsel Notified

x Clerk to Notify

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

**FILED**  
JAN 18 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARSHALL GEORGE CUMMINGS, )  
)  
Petitioner, )  
)  
vs. )  
)  
RON CHAMPION, )  
)  
Respondent. )

Case No. 99-CV-215-BU (J) ✓

ENTERED ON DOCKET  
JAN 19 2000  
DATE \_\_\_\_\_

**ORDER**

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #9) entered on October 7, 1999, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that the petition for writ of habeas corpus be dismissed as moot. On October 19, 1999, Petitioner, appearing *pro se*, filed a timely objection to the Report (#10).

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.

**DISCUSSION**

In his § 2254 petition for writ of habeas corpus, filed March 19, 1999, Petitioner seeks modification of his 30-year sentence entered in Tulsa County District Court, Case No. CRF-93-720, based on the passage of House Bill 1213, known as the Oklahoma Truth in Sentencing Act ("OTISA"). When Petitioner filed his petition, the effective date of the OTISA was July 1, 1999. Specifically, Petitioner seeks an order "resentencing [him] pursuant to the new sentencing guidelines

in HB 1213 section 598 through 601.” (#2 at 11).

However, on June 30, 1999, or the day before the July 1, 1999 effective date, the Oklahoma Legislature signed a bill into law which repealed the OTISA. As a result, the Magistrate Judge concluded that Petitioner’s claim, premised on application of the OTISA, has been rendered moot.

Petitioner filed a timely objection to the Report. In his objection, Petitioner continues to argue that the OTISA is being applied unconstitutionally in violation of his rights to Due Process and Equal Protection. (#10 at 2). However, Petitioner does not recognize in his objection that OTISA has been repealed. As a result of the repeal, the OTISA no longer exists. Quite simply, the OTISA cannot be applied unconstitutionally if it no longer exists. Furthermore, the provisions which Petitioner asks this Court to apply to his sentence no longer exist. Thus, the Magistrate Judge correctly determined that Petitioner’s claim has been rendered moot. The Court finds the Report should be adopted and affirmed and the petition for writ of habeas corpus denied as moot.

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

1. The Report and Recommendation of the United States Magistrate Judge (#9) is **adopted and affirmed**.
2. The claim asserted in the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 has been rendered moot and the petition is **denied** on that basis.
3. Respondent’s motion to dismiss (#6) is **moot**.

SO ORDERED THIS 18<sup>th</sup> day of JAN, 2000.

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

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

GREGORY RIVERS, )  
)  
Petitioner, )  
)  
vs. )  
)  
RON CHAMPION, Warden, )  
)  
Respondent. )

ENTERED ON DOCKET  
DATE JAN 19 2000

No. 97-CV-381-BU (J) ✓

**FILED**  
JAN 18 2000

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

Petitioner, a state inmate appearing *pro se*, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254 (Docket #1). Respondent filed a response to the petition (#5). Petitioner has not replied in spite of being afforded a second opportunity to file a reply to Respondent's response (see #6, February 19, 1998 Order directing Petitioner to reply). As a result, the Court has reviewed this matter based on the petition and Respondent's response thereto. For the reasons discussed below, the Court finds Petitioner's application for a writ of habeas corpus should be denied without an evidentiary hearing.

**BACKGROUND**

Petitioner was convicted by a jury of Robbery with a Firearm and Unlawful Wearing of a Mask in Tulsa County District Court, Case No. CF-91-4184. He was sentenced to ten years and five years imprisonment on each count, respectively, to be served consecutively. Petitioner filed a direct appeal in the Oklahoma Court of Criminal Appeals ("OCCA"), raising three (3) allegations of error: (1) the trial judge erred by giving a flight instruction, (2) the conviction for unlawful wearing of a

mask violates double jeopardy principles, and (3) the trial court erred by not granting a severance. See # 5, Ex. A. On December 28, 1994, Petitioner's conviction and sentence were affirmed. See Rivers v. State, 889 P.2d 288 (Okla. Crim. App. 1994).

Petitioner next filed the instant petition for writ of habeas corpus on April 22, 1997. He raises three (3) issues as follows: (1) the Oklahoma Court of Criminal Appeals violated due process when it concluded the decision in Mitchell v. State, 876 P.2d 682 (Okla. Crim. App. 1993) (modifying the Oklahoma Uniform Jury Instruction on flight), did not create a change in constitutional law, (2) Petitioner's conviction for both unlawful wearing of a mask and armed robbery violated double jeopardy principles, and (3) Petitioner's convictions should be reversed because the State of Oklahoma violated due process and equal protection when the trial court refused to grant severance. (#1).

## ***DISCUSSION***

### **A. Exhaustion**

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). In the instant case, Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law.

### **B. Evidentiary hearing**

This Court is precluded from holding an evidentiary hearing on Petitioner's claims pursuant to 28 U.S.C. § 2254(e)(2), as amended by the Antiterrorism and Effective Death Penalty Act

("AEDPA"), which provides as follows:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that

(A) the claim relies on —

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Based on the record before the Court, Petitioner did not seek to develop the factual basis of these claims in his state court proceedings. Therefore, no evidentiary hearing is warranted because Petitioner's claims do not involve a new rule of constitutional law, see discussion in Part C(1) below, or newly discovered evidence that was unavailable previously. 28 U.S.C. § 2254(e)(2)(A); see also Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998).

**C. Claims considered on the merits by the Oklahoma Court of Criminal Appeals do not justify habeas corpus relief in this case based on 28 U.S.C. § 2254(d)**

The habeas corpus statute, as amended by the AEDPA, provides that:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(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 claims were considered on the merits and rejected by the OCCA on direct appeal. Therefore, § 2254(d) guides this Court's analysis of those claims. For the reasons discussed below, each claim should be denied.

*1. OCCA's rejection of Petitioner's challenge to propriety of flight instruction was not contrary to, or an unreasonable application of, clearly established Federal law*

As his first proposition of error, Petitioner contends that "the Oklahoma Court of Criminal Appeals violated due process when it concluded the decision in Mitchell v. State, 876 P.2d 682 (Okla. Cr. 1993), did not create a change in constitutional law." (#1, at 4). Petitioner's argument results from the OCCA's rejection of his claim that the trial court erred by giving an instruction on flight. Petitioner's argument on direct appeal was based on Mitchell, a decision rendered by the OCCA after Petitioner's trial but before his conviction became final. In Mitchell, the OCCA held that "instructions on flight pertaining to departure should be given only in cases where the evidence [of flight] is controverted by the defendant and as an exception rather than as a rule." Id. at 685.

In its opinion affirming Petitioner's conviction, the OCCA stated that "were we to apply the holding of Mitchell to the instant case, the giving of the flight instruction would appear to have been erroneous." Rivers, 889 P.2d at 291. However, the OCCA went on to hold that "the rule in Mitchell was an interpretation and application of state law and did not create any new constitutional right." Id. The OCCA further concluded that the holding of Mitchell would be applied only prospectively. Id. at 292. Because the standard announced in Mitchell did not apply retroactively to Petitioner's case, the OCCA determined the flight instruction given in Petitioner's trial was proper given Farrar v. State, 505 P.2d 1355 (Okla. Crim. App. 1973) (holding that the standard governing use of a flight

instruction is whether, when viewed in the context of the other evidence presented at trial, the evidence of alleged flight tends to establish guilt or innocence), the standard used prior to Mitchell.

In the instant case, Petitioner does not challenge the OCCA's conclusion that the flight instruction was properly given under Farrer. Instead, he argues that the OCCA erred in determining that Mitchell did not announce a new rule of constitutional law to be applied retroactively as required by Griffith v. Kentucky, 479 U.S. 314, 328 (1987). However, the OCCA's modification of the Oklahoma Uniform Jury Instruction on flight announced in Mitchell was not required by the federal constitution or law. Instead, the ruling involved interpretation and application of state law. The OCCA's ruling in Mitchell simply did not create any new constitutional right requiring retroactive application to Petitioner's appeal under Griffith. Because the issue of retroactive application of Mitchell is not a matter of federal law, federal habeas corpus review is not appropriate. See American Trucking Ass'ns Inc. v. Smith, 496 U.S. 167, 177 (1990) (stating that "[w]hen questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions"). Accordingly, the OCCA's finding that the modification of the flight instruction in Mitchell involved an interpretation and application of state law and its refusal to apply Mitchell retroactively to Petitioner's case were not contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. As a result, habeas corpus relief on this ground must be denied.

2. *OCCA's rejection of double jeopardy claim was not contrary to, or an unreasonable application of, clearly established Federal law*

As his second proposition of error, Petitioner argues that his conviction for both Unlawful Wearing of a Mask, in violation of Okla. Stat. tit. 21, § 1303, and Robbery with a Firearm, in violation of Okla. Stat. tit. 21, § 801, constitutes double jeopardy. In rejecting this claim on direct appeal, the OCCA cited the standard enunciated in Blockburger v. United States, 284 U.S. 200, 304 (1932), for determining whether Petitioner's convictions subjected Petitioner to double jeopardy. Under Blockburger, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." Id. The OCCA then determined that under Oklahoma law, each crime for which Petitioner was convicted plainly required proof of different facts.<sup>1</sup> As a result, the OCCA concluded that Petitioner's double jeopardy claim was without merit.

In the instant petition, Petitioner fails to show how the OCCA's adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court. After reviewing the record and the facts of this case, this Court finds that the OCCA's resolution of this claim was entirely consistent with Federal law. As a result, the Court concludes that habeas corpus relief on this claim must be denied.

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<sup>1</sup>As stated by the OCCA, Rivers, 889 P.2d 292-93, the crime of Unlawful Wearing of Mask, Okla. Stat. tit. 21, § 1303, requires proof that a person, while masked or in disguise, assaulted another with a dangerous weapon while the crime of Robbery With a Firearm, Okla. Stat. tit. 21, § 801, requires proof that a person used a firearm or an imitation firearm to rob a person or place of business. Robbery, in turn, is defined as a "wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Okla. Stat. tit. 21, § 791.

3. *OCCA's rejection of claim challenging trial court's failure to grant severance was not contrary to, or an unreasonable application of, clearly established Federal law*

As his third proposition of error, Petitioner argues that he was denied due process and equal protection of the law when the trial court did not grant a severance. Petitioner and his co-defendant were tried together after the trial court denied Petitioner's request for a severance. As a result, Petitioner states he "was deprived of his right to freely exercise his peremptory challenges and had to share peremptory challenges with his co-defendant." (#1 at 7). In rejecting Petitioner's claim on direct appeal, the OCCA relied on Neill v. State, 827 P.2d 884, 886 (Okla. Crim. App. 1992), and concluded that because Petitioner and his co-defendant did not assert mutually antagonistic defenses,<sup>2</sup> the trial court did not abuse its discretion in denying a severance. Rivers, 889 P.2d at 293.

In the instant petition, Petitioner fails to show how the OCCA's adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court. After reviewing the record and the facts of this case, this Court finds that the OCCA's resolution of this claim was entirely consistent with Federal law. According to the Tenth Circuit Court of Appeals, "whether the trial court erred in denying severance is generally a question of state law that is not cognizable on federal habeas appeal . . . a criminal defendant has no constitutional right to severance unless there is a strong showing of prejudice caused by the joint trial." Cummings v. Evans, 161 F.3d 610, 619 (10<sup>th</sup> Cir. 1998). Furthermore, in Zafiro v. United States, 506 U.S. 534, 539 (1993), the Supreme Court held that severance is required only when "there is a serious risk that a joint trial would compromise a

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<sup>2</sup>Both Petitioner and his co-defendant presented as a defense that he or she, respectively, did not commit the offense and did not know who did. Antagonistic defenses are asserted when each defendant attempts to exculpate himself and inculpate his co-defendant. Neill, 827 P.2d at 887. According to the OCCA, the defenses asserted by Petitioner and his co-defendant in the instant case were not mutually antagonistic defenses because the trier of fact was not necessarily required to disbelieve the defense of the other. Rivers, 889 P.2d at 293.

specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.”

Petitioner does not allege in this case that the jury was unable to reach a reliable judgment about his guilt or innocence because of being tried jointly with his co-defendant. Nor does he challenge the impartiality of the jury. Petitioner does argue, however, that he was prejudiced as a result of having to share peremptory challenges with his co-defendant. Petitioner’s objection is based on the number of peremptory challenges available to him. This presents a question of state law, not of constitutional dimension, precluding review by this Court. Fox v. Ward, — F.3d —, 2000 WL 6189, \*4 (10<sup>th</sup> Cir. Jan. 6, 2000) (citing Cummings, 161 F.3d at 619). As a result, the Court concludes that habeas corpus relief on this claim must be denied.

### **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 writ of habeas corpus (#1) is **denied**.

SO ORDERED this 18<sup>th</sup> day of JAN, 2000.

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

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

**FILED**

GREGORY RIVERS, )  
)  
Petitioner, )  
)  
vs. )  
)  
RON CHAMPION, Warden, )  
)  
Respondent. )

JAN 18 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 97-CV-381-BU (J) ✓

ENTERED ON DOCKET  
DATE JAN 19 2000

**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 18<sup>th</sup> day of JAN, 2000.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**  
JAN 18 2000

MARY SWATSENBARG,  
545-58-8675

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

Defendant.

Case No. 99-CV-697-B (M) ✓

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JAN 19 2000

**REPORT AND RECOMMENDATION**

On November 17, 1999, the court issued an order requiring Plaintiff to file a return of service within 30 days and advising that failure to do so would subject the case to dismissal pursuant to Fed.R.Civ.P. 4. [Dkt. 2]. Return of service was not filed within the 30 day time period. On January 4, 2000, the court issued an order directing Plaintiff to show cause, on or before January 14, 2000, why this action should not be dismissed pursuant to Fed.R.Civ.P. 4(m). [Dkt. 3]. Plaintiff failed to respond to that directive. Consequently this case is subject to dismissal.

The undersigned United States Magistrate Judge recommends that this case be DISMISSED WITHOUT PREJUDICE pursuant to Fed.R.Civ.P. 4(m) for failure to effectuate service within the time allotted by that rule.

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

appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Haney v. Addison*, 175 F.3d 1217, 1219-20 (10th Cir. 1999), *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 18<sup>th</sup> Day of January, 2000.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 19<sup>th</sup> Day of January, 2000.  
C. Portillo, Deputy Clerk

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

**FILED**

JAN 18 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GALAND L. MOORE, )  
)  
Petitioner, )  
)  
vs. )  
)  
WASHINGTON COUNTY JAIL; )  
STEVE KUNZWEILER, )  
)  
Respondents. )

Case No. 00-CV-030-BU (J) ✓

ENTERED ON DOCKET  
DATE JAN 19 2000

**ORDER**

Petitioner, a pretrial detainee in custody at the Washington County Jail, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (#1). For the reasons discussed below, the Court finds the petition should be denied.

In his petition, Petitioner states that he is a pretrial detainee awaiting trial in Washington County District Court. Petitioner states his claims as follows:

Ground One: False accusations -- Defendents (sic) led Judge to believe Plaintiff was not in court. Told the Judge Mr. Moore never showed. Was not out on bail. Regona Brackett was present.

Ground Two: Telling me and holding me saying the State of Virginia has a hold when there is no hold on me. My warrant says fugitive of justice of State of Virginia but Virginia did not file. Warrant -- Bill Pattison.

Ground Three: I were (sic) to appear in court Nov. 17, 1999. I was ordered to re-apply for counsel. I retained a private attorney. When appear or making himself noticed of being my attorney they the defendents (sic) said the appointed was still on my case. Bill Pattison.

(#1). Petitioner also attaches to his petition a copy of the warrant issued for his arrest.

The Supreme Court has established that "federal habeas corpus does not lie, absent 'special circumstances,' to adjudicate the merits of an affirmative defense to a state criminal charge prior to

a judgment of conviction by a state court." Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 489 (1973) (citing Ex parte Royall, 117 U.S. 241, 253 (1886)). To allow otherwise would permit the "derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court." Id. at 493. Although Petitioner does not specifically describe the relief he seeks in this court, it is clear that pretrial habeas corpus is not available to prevent a prosecution in state court. See Capps v. Sullivan, 13 F.3d 350, 353 (1993).

Furthermore, in the instant case, intervention by this Court at this stage in the prosecution of Petitioner by the State of Oklahoma would violate the doctrine of exhaustion. As applicable to 28 U.S.C. § 2241,<sup>1</sup> the doctrine is "a judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement.'" Braden, 410 U.S. at 490 (citation omitted). Significantly, the doctrine serves to

preserve[] the role of the state courts in the application and enforcement of federal law. Early federal intervention in state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests. Second, (the doctrine) preserves orderly administration of state judicial business, preventing the interruption of state adjudication by federal habeas proceedings. It is important that petitioners reach state appellate courts, which can develop and correct errors of state and federal law and most effectively supervise and impose uniformity on trial courts.

Id. at 490-91 (quoting Note, *Developments in the Law -- Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1094 (1970)).

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<sup>1</sup>In contrast to 28 U.S.C. § 2254, no statutory exhaustion requirement applies to § 2241, but case law holds "that although section 2241 establishes jurisdiction in the federal court to consider pretrial habeas corpus petitions, federal courts should abstain from the exercise of that jurisdiction if the issues raised in the petition may be resolved either by trial on the merits in the state court or by other state procedures available to the petitioner." Capps, 13 F.3d at 354 (citing Dickerson v. Louisiana, 816 F.2d 220, 225 (5th Cir. 1987)).

The Court notes that Petitioner recently filed a civil rights complaint in this federal district court, Case No. 99-CV-1084-H, raising similar claims and requesting as relief dismissal of all charges. In dismissing the civil rights complaint, the Court found that by seeking dismissal of pending charges, Petitioner was in effect seeking pretrial habeas corpus relief. As a result, the Court advised Petitioner that he could request pretrial habeas corpus relief in this Court via a § 2241 petition for writ of habeas corpus. However, the Court further advised Petitioner that exhaustion of state remedies was required before this Court could grant habeas corpus relief. Nothing in the petition submitted by Petitioner indicates he has exhausted available state remedies.<sup>2</sup>

As a result, the Court concludes that pretrial habeas corpus relief does not lie in this case. Petitioner must afford the courts of the State of Oklahoma the opportunity to consider and correct any violations of the Constitution by raising these issues at trial and, if convicted, on direct appeal. Prior to trial, Petitioner could seek relief by filing a state petition for writ of habeas corpus in Washington County District Court. Should that court deny relief, Petitioner would have to appeal the denial to the Oklahoma Court of Criminal Appeals in order to satisfy the exhaustion requirement.

**ACCORDINGLY, IT IS HEREBY ORDERED** that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 is **denied**.

SO ORDERED THIS 18<sup>th</sup> day of JAN, 2000.

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

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<sup>2</sup>Question #33 of the court-approved § 2241 form asks "[h]ave you previously filed any petitions, applications, or motions advancing pre-trial claims of constitutional violations?" In response to that question, Petitioner answered "no."

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

**FILED**

JAN 18 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARSHALL GEORGE CUMMINGS, )  
)  
Petitioner, )  
)  
vs. )  
)  
RON CHAMPION, )  
)  
Respondent. )

Case No. 99-CV-215-BU (J) ✓

ENTERED ON DOCKET  
DATE JAN 19 2000

**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 18<sup>th</sup> day of JAN, 2000.

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

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

**FILED**  
JAN 18 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

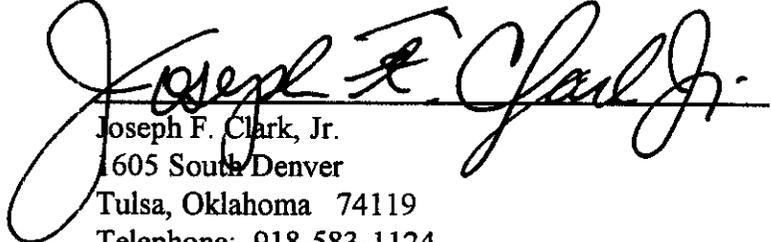
LEWIS BRUNER and SHERRY BRUNER, )  
husband and wife, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
CHAMPION HOME BUILDERS CO., INC., )  
a foreign corporation, d/b/a GATEWAY )  
MANUFACTURED HOMES, )  
 )  
Defendant. )

Case No. 98CV968BU(J) ✓

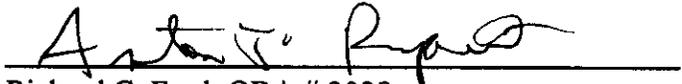
ENTERED ON DOCKET  
DATE JAN 19 2000

**RULE 41(a) STIPULATION OF DISMISSAL**

All parties to this case stipulate that it is dismissed with prejudice.

  
Joseph F. Clark, Jr.  
1605 South Denver  
Tulsa, Oklahoma 74119  
Telephone: 918-583-1124  
Fax: 918-584-1824

ATTORNEY FOR PLAINTIFFS, LEWIS BRUNER  
AND SHERRY BRUNER

  
Richard C. Ford, OBA # 3028  
Anton J. Rupert, OBA # 7827  
LeAnne Burnett, OBA # 13666  
Victor E. Morgan, OBA # 12419  
CROWE & DUNLEVY  
1800 Mid-America Tower  
20 North Broadway  
Oklahoma City, OK 73102  
Telephone: 405-235-7700  
Fax: 405-239-6651

ATTORNEYS FOR DEFENDANT

CJT

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

**FILED**

JAN 18 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

KIMBERLY A. PERRY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DOLLAR RENT A CAR SYSTEMS, INC., )  
 )  
Defendant. )

Case No. 99-CV-585-BU

ENTERED ON DOCKET  
DATE JAN 19 2000

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 18<sup>th</sup> day of January, 2000.



MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JAN 18 2000 *SA*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FARMERS INSURANCE COMPANY, )  
INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
CHRISTINA NAVECK, GABRIEL BERNAL )  
and ARTURO BERNAL, )  
 )  
Defendants. )

Case No. 99-CV-460-BU ✓

ENTERED ON DOCKET  
DATE JAN 19 2000

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 18<sup>th</sup> day of January, 2000.

*Michael Burrage*  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

DAVID M. COLLINS,

Plaintiffs,

vs.

OKLAHOMA DEPARTMENT,  
OF CORRECTIONS, an agency of  
the State of Oklahoma,

Defendant.

ENTERED ON DOCKET

DATE JAN 19 2000

Case No. 99-CV-880-H-E ✓

**F I L E D**

JAN 18 2000 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

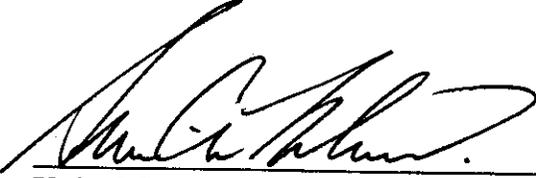
ORDER

This matter comes before the court on the defendant's motion to dismiss. Upon reviewing the motion and the plaintiff's response, the court finds that the defendant has moved for dismissal of this case for, among other reasons, grounds that it has immunity from suit in the federal courts under the Eleventh Amendment to the United States Constitution. The court finds that the defendant does enjoy immunity from suit in the federal courts under the Eleventh Amendment and, for that reason, finds that the defendant's motion should be and is hereby dismissed without prejudice to the plaintiff's right to refile his claims in the state courts.

**IT IS THEREFORE ORDERED BY THE COURT** that the defendant's motion to dismiss is sustained on grounds that the defendant has immunity from suit under the Eleventh Amendment to the United States Constitution. By doing so, the court does not rule on any other matters raised in the motion to dismiss.

**IT IS FURTHER ORDERED BY THE COURT** that this dismissal is without prejudice to the plaintiff's right to refile his claims in the state courts of Oklahoma.

Dated this 14<sup>TH</sup> day of January, 2000

  
United States District Court Judge

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

KEM CLARK,  
  
Plaintiff,  
  
v.  
  
TRAILINER CORP. and TOTAL  
INFORMATION SERVICES, INC.,  
d/b/a DAC SERVICES,  
  
Defendants.

ENTERED ON DOCKET  
DATE **JAN 19 2000**

Case No. 99-CV-0286-H (M)

**FILED**

JAN 18 2000

FBI Lombard, Clark  
U.S. DISTRICT COURT

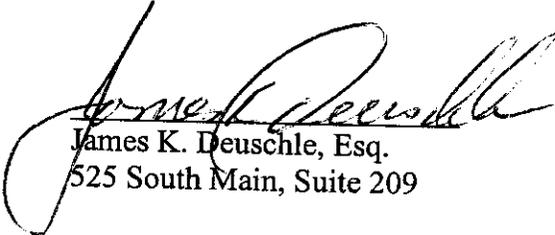
**DISMISSAL WITHOUT PREJUDICE**

This matter came before the Court on the 7<sup>th</sup> day of January, 2000, upon the joint motion for summary judgment of the Defendants on the issue of Plaintiff's standing to bring his claims. The parties appeared by counsel with Larry Henry presenting argument for both Defendants. The Court having reviewed the briefs and the evidence submitted by the parties, heard oral argument from counsel, and being fully advised in the premises finds the following:

Defendants joint motion is hereby **GRANTED**, and Plaintiff's claims are **DISMISSED WITHOUT PREJUDICE**.

  
The Honorable Sven Erik Holmes  
United States District Court Judge

Approved as to form and content:

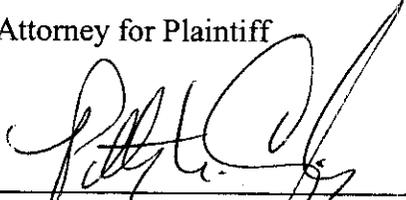
  
James K. Deuschle, Esq.  
525 South Main, Suite 209

36

1-17-00  
MT

Tulsa, Oklahoma 74103-4503  
(918) 592-2280

Attorney for Plaintiff



---

Larry D. Henry, OBA # 4105  
Patrick W. Cipolla, OBA # 15203

GABLE & GOTWALS  
A Professional Corporation

100 West 5th Street, Suite 1100  
Tulsa, Oklahoma 74103-4217  
(918) 595-4800

Attorneys for Defendant  
Total Information Service, d/b/a/  
DAC Services



---

Robert P. Redemann, OBA # 7450

Rhodes Hieronymus et. al.  
100 West Fifth Street, Suite 400  
Tulsa, Oklahoma 74121

Attorney for Defendant  
Trailer Corp.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

MICHELLE M. ARMSTEAD  
aka Michelle Armstead aka Michelle M. Malone;  
RONALD ARMSTEAD  
aka Ronald Dewayne Armstead;  
DONALD ARMSTEAD  
aka Donald Wayne Armstead, Jr.;  
TULSA DEVELOPMENT AUTHORITY  
OF TULSA;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE JAN 18 2000

**F I L E D**

JAN 14 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CIVIL ACTION NO. 99-CV-0346-H (M)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14<sup>th</sup> day of January, 2000.

~~1999~~ The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, 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; that the Defendant, Tulsa Development Authority of Tulsa, appears by its attorney Darven L. Brown; that the Defendants, Michelle M. Armstead aka Michelle Armstead aka Michelle M. Malone, Ronald Armstead aka Ronald Dewayne Armstead, and Donald Armstead aka Donald Wayne Armstead, Jr., appear not, but make default.

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Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on May 27, 1999; that the Defendant, Tulsa Development Authority of Tulsa, filed its Answer and Cross-Complaint on June 7, 1999; that the Defendants Michelle M. Armstead aka Michelle Armstead aka Michelle M. Malone, Ronald Armstead aka Ronald Dewayne Armstead, and Donald Armstead aka Donald Wayne Armstead, Jr., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on June 2, 1998, Michelle Maureen Malone filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 98-02133-R. The subject real property described below was made a part of the bankruptcy estate as shown on Schedule A - Real Property of the bankruptcy schedules. On September 14, 1998, a Discharge of Debtor was entered in this bankruptcy case. Subsequently, on October 19, 1998, Case No. 98-02133-R, United States Bankruptcy Court for the Northern District of Oklahoma, was closed.

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 Five (5), Block Fifty-four (54), VALLEY VIEW ACRES  
THIRD ADDITION to the City of Tulsa, Tulsa County, State  
of Oklahoma according to the recorded plat thereof.

The Court further finds that on April 19, 1976, Donald Wayne Armstead and Michelle M. Armstead executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$9,650.00, payable in monthly installments, with interest thereon at the rate of 9 percent per annum.

The Court further finds that as security for the payment of the above-described note, Donald Wayne Armstead and Michelle M. Armstead, husband and wife, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated April 19, 1976, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on April 20, 1976, in Book 4211, Page 1540, in the records of Tulsa County, Oklahoma.

The Court further finds that Donald Armstead and Michelle Armstead were divorced on September 6, 1979 as is evidenced by a Decree of Divorce, Case No. JFD-78-4882, District Court, Tulsa County, State of Oklahoma. The subject real property was awarded to Michelle Armstead. On April 24, 1986 the subject Decree of Divorce was recorded in Book 4937, Page 3280 in the records of Tulsa County, State of Oklahoma.

The Court further finds that Defendant, Michelle M. Armstead aka Michelle Armstead aka Michelle M. Malone, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$5,767.73, plus administrative charges in the amount of \$1,094.00, plus penalty charges in the amount of \$14.40, plus accrued interest in the amount of \$1,405.70 as of June 25, 1998, plus interest accruing thereafter at the rate of 9 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, Michelle M. Armstead aka Michelle Armstead aka Michelle M. Malone, Ronald Armstead aka Ronald Dewayne Armstead, and Donald Armstead aka Donald Wayne Armstead, Jr., are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that the Defendant, Tulsa Development Authority of Tulsa, has a lien on the property which is the subject matter of this action in the amount of \$12,000.00, together with a reasonable sum for attorney's fees and costs, by virtue of a Mortgage, dated January 26, 1990, and recorded on January 29, 1990, in Book 5233, Page 306 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against Defendant, Michelle M. Armstead aka Michelle Armstead aka Michelle M. Malone, in the principal sum of \$5,767.73, plus administrative charges in the amount of \$1,094.00, plus penalty charges in the amount of \$14.40, plus accrued interest in the amount of \$1,405.70 as of June 25, 1998, plus interest accruing thereafter at the rate of 9 percent per annum until judgment, plus interest thereafter at the current legal rate of 4.545 percent per annum until fully paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, Tulsa Development Authority of Tulsa, have and recover in rem judgment in the amount of \$12,000.00, together with a reasonable sum for attorney's fees and costs, by virtue of a Mortgage, dated January 26, 1990, and recorded on January 29, 1990, in Book 5233, Page 306 in the records of Tulsa County, Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Michelle M. Armstead aka Michelle Armstead aka Michelle M. Malone, Ronald Armstead aka Ronald Dewayne Armstead, Donald Armstead aka Donald Wayne Armstead, Jr., County Treasurer, Tulsa County, Oklahoma, and Board of County

Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

**First:**

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

**Second:**

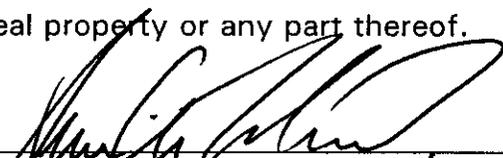
In payment of the judgment rendered herein in favor of the Plaintiff;

**Third:**

In payment of the judgment rendered herein in favor of the Defendant, Tulsa Development Authority of Tulsa.

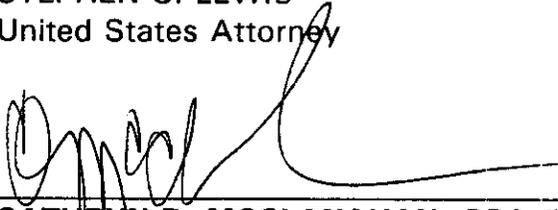
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

**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



**CATHRYN D. MCCLANAHAN, OBA #014853**  
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



**DARVEN L. BROWN, OBA #1177**

5561 South Lewis, Suite 100  
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(918) 742-6450

Attorney for Defendant,  
Tulsa Development Authority of Tulsa

Judgment of Foreclosure  
Case No. 99-CV-0346-H (M) (Armstead)

CDM:css

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

**FILED**

JAN 18 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Reese )  
 )  
Plaintiff(s), )  
 )  
vs. )  
 )  
Southwestern Bell Wire, et al )  
Defendants(s). )

Case # 98-cv-622-E

ENTERED ON DOCKET

DATE JAN 18 2000

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by February 25, 2000, 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 14<sup>th</sup> day of January, 2000.

*James D. Lewis*  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

JAN 18 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CERTAIN UNDERWRITERS AT LLOYD'S, )  
LONDON SUBSCRIBING TO POLICY NO. )  
6130, )

Plaintiff, )

vs. )

RIVERVIEW VILLAGE, INC. d/b/a )  
RIVERVIEW VILLAGE APARTMENTS )  
and KERI BLACK, an individual, )

Defendants. )

Case No. 99CV0437B (E) ✓

FILED ON DOCKET

DATE JAN 18 2000

**JOINT STIPULATION  
OF DISMISSAL WITH PREJUDICE**

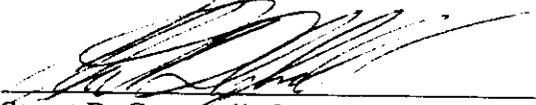
The parties, Certain Underwriters at Lloyd's, London Subscribing to Policy No. 6130 and Riverview Village, Inc., d/b/a Riverview Village Apartments, and Keri Black, an individual, hereby file this stipulation of dismissal with prejudice pursuant to Rule 41(a)(1)(ii) and (c) of the FEDERAL RULES OF CIVIL PROCEDURE. The cases which were the subject of the controversy pertaining to this Declaratory Judgment action, *Amy Peterson, individually and as natural mother of Monet Peterson, a minor child, v. Riverview Village, Inc., an Oklahoma corporation, and Keri Black, individually and as agent for Riverview Village, Inc., Case No. CJ-99-1428, Tulsa County, Oklahoma, and CJ-99-6167, Tulsa County, Brian Brewer; Angie Bowman, Individually and as Natural Mother of Majestic Ashlock, a Minor v. Keri Black; Riverview Village, Inc., a non-profit Oklahoma organization d/b/a Riverview Village Apartments*, have been settled by Lloyd's with no obligation placed upon Defendants to contribute thereto as Plaintiff has paid all settlement amounts and attorney fees

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CH

associated therewith. Plaintiff will not seek any contribution from Defendants with respect to the settlement of either of these lawsuits. For such reason, each party herein has agreed to dismiss with prejudice the claims asserted in this action. Each party to bear its own attorneys fees and costs.

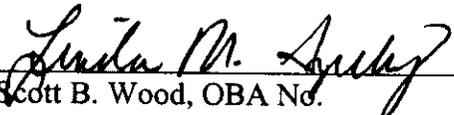
Respectfully submitted,

By: 

Stuart D. Campbell, OBA No. 11246  
Richard D. Koljack, Jr., OBA No. 11662  
GABLE & GOTWALS  
1000 ONEOK Plaza  
100 West 5th Street  
Tulsa, Oklahoma 74103-4219  
(918) 585-8141 / (918) 588-7873 fax

Attorneys for Certain Underwriters of Lloyd's  
of London Subscribing to Policy No. 6130

*and*

By: 

Scott B. Wood, OBA No.  
Linda M. Szuhy, OBA No.  
WHITTEN, MCGUIRE, WOOD, TERRY,  
ROSELIUS & DITTRICH  
3600 First Place Tower  
15 East Fifth Street  
Tulsa, Oklahoma 74103  
(918) 582-9903 / (918) 582-9905 fax

Attorneys for Riverview Village, Inc.,  
d/b/a Riverview Village Apartments, and  
Keri Black, an individual

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

**FILED**

JAN 14 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BEVERLY TAYLOR, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
COMMERCIAL FINANCIAL SERVICES, )  
INC., )  
 )  
Defendant. )

Case No. 99-CV-773-BU

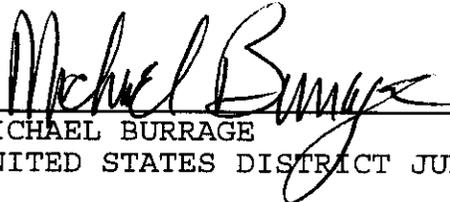
ENTERED ON DOCKET  
DATE JAN 18 2000

**ORDER**

This matter comes before the Court upon Plaintiff's unopposed Motion to Dismiss With Prejudice. Upon due consideration, the Court finds that the motion should be granted.

Accordingly, Plaintiff's Motion to Dismiss With Prejudice (Docket Entry #20) is **GRANTED**. This action is **DISMISSED WITH PREJUDICE**. Defendant's Motion for a Ruling as to its Motion to Dismiss (Docket Entry #19) and Motion to Dismiss (Docket Entry #8) are **DECLARED MOOT**.

ENTERED this 14th day of January, 2000.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE





DISMISSED. Petitioner's Motion for Transcripts (Docket Entry #7)  
is DENIED AS MOOT.

ENTERED this 14<sup>th</sup> day of January, 2000.

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

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

**FILED**

JAN 14 2000 *AL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LARRY J. RICHARDS, )  
)  
Plaintiff, )  
)  
vs. )  
)  
KENNETH S. APFEL, Commissioner )  
of Social Security, et al., )  
)  
Defendant. )

Case No. 98-CV-834-BU ✓

ENTERED ON DOCKET  
DATE JAN 18 2000

**ORDER**

On December 13, 1999, United States Magistrate Judge Claire V. Eagan issued a Report and Recommendation, wherein she recommended that Defendant's motion to dismiss for lack of jurisdiction be granted and that Plaintiff's complaint be dismissed. In the Report and Recommendation, Magistrate Judge Eagan advised Plaintiff that any objections to the Report and Recommendation must be filed within ten days after being served with a copy of the Report and Recommendation. To date, Plaintiff has not filed any written objections to Magistrate Judge Eagan's Report and Recommendation and has not filed any request for an extension of time within which to file any written objections.

With no written objections being filed, the Court, pursuant to 28 U.S.C. § 636(b)(1), accepts Magistrate Judge Eagan's Report and Recommendation in its entirety.

Accordingly, the Report and Recommendation (Docket Entry #20) issued by United States Magistrate Judge Claire V. Eagan is **AFFIRMED**. Defendant's motion to dismiss for lack of jurisdiction

(Docket Entry #18) is **GRANTED**. Plaintiff's complaint against Defendant is **DISMISSED**.

ENTERED this 14<sup>th</sup> day of January, 2000.

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

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

EAST TEXAS SEISMIC DATA, LLC, )  
an Oklahoma company and )  
CAPMAC EIGHTY-TWO LIMITED )  
PARTNERSHIP, an Oklahoma )  
limited partnership, )

Plaintiffs, )

vs. )

SEITEL DATA, INC., a )  
corporation, and FIRST SEISMIC )  
CORPORATION, a corporation, )

Defendants. )

FIRST SEISMIC CORPORATION, )  
a corporation, )

Third-Party Plaintiff, )

vs. )

SANTA FE ENERGY RESOURCES, INC. )  
and IMC GLOBAL, INC., )

Third-Party Defendants. )

**FILED**

JAN 14 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97-CV-981-BU

ENTERED ON DOCKET  
DATE JAN 18 2000

**ORDER**

This matter comes before the Court upon the following motions filed by the parties: (1) the Motion to Dismiss Third-Party Complaint filed by Third-Party Defendant Santa Fe Energy Resources, Inc. ("Santa Fe") (Docket Entry #78); (2) the Motion to Dismiss Third-Party Complaint filed by Third-Party Defendant IMC Global, Inc. ("IMC") (Docket Entry #80); (3) the Motion for Summary Judgment against Santa Fe and IMC filed by Third-party Plaintiff First Seismic Corporation ("First Seismic") (Docket Entry #91); and

(4) the Motion for Summary Judgment against Plaintiffs East Texas Seismic Data, LLC, and Capmac Eighty-Two Limited Partnership ("Capmac") filed by Defendants First Seismic and Seitel Data Ltd. ("Seitel") (Docket Entry #101). The parties have filed responses and replies to the various motions. Based upon the parties' submissions, the Court makes its determination.

#### **BACKGROUND**

Adobe Resources Corporation ("Adobe"), the predecessor of Santa Fe, Freeport-McMoRan Oil and Gas Company ("McMoRan"), the predecessor of IMC, and McKenzie Managements, Inc., ("McKenzie"), the predecessor of Capmac, were members of a joint venture which obtained the seismic data at issue. More than two years after the termination of the venture, and prior to succession by Sante Fe and IMP, Adobe and McMoran transferred their seven-eighths interest in the seismic data to First Seismic. Plaintiffs claim that their one-eighth interest was sold without consent to Defendant, First Seismic, who thereafter on June 24, 1994, sold the interest to Defendant, Seitel. Plaintiffs allege that First Seismic, and later Seitel, sold the data publicly throughout the United States, but failed to account to Plaintiffs for their share of the sale proceeds. In Count I of their Second Amended Complaint, Plaintiffs seek declaratory and monetary relief and an accounting of sales proceeds from the sale of seismic data by First Seismic and Seitel. In Count II, Plaintiffs seek actual and punitive damages from Sante Fe and IMC for the alleged conversion of their interest from the

sale by Santa Fe and IMC to First Seismic. In Count III, Plaintiffs allege a claim for conversion and actual and punitive damages against First Seismic for selling the seismic data to various purchasers and failing to paying Plaintiffs' their pro rata share of the sale proceeds.

On August 31, 1998, the Court entered an Order granting summary judgment to Defendants Santa Fe and IMC on all of Plaintiffs' claims (Docket Entry #60). The Court found that the joint venture agreement was clear and unambiguous in vesting ownership of the data in the venturers and giving them the right to sell their proportionate interests. Further, the Court found that the sales contract between Adobe, McMoran and First Seismic unambiguously conveyed only Adobe and McMoran's interest in the data. Thus, the Court concluded that Adobe and McMoran did not sell McKenzie's interest in the seismic data, so Plaintiffs had no conversion claims against Santa Fe and IMC. Upon Plaintiffs' request, the Court entered Judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure, in favor of Santa Fe and IMC against Plaintiffs East Texas and Capmac (Docket Entry #59). Plaintiffs appealed this judgment, and the Tenth Circuit Court of Appeals affirmed. East Texas Seismic Data, LLC v. Seitel Data Inc., No. 98-5181, 1999 WL 1066839 (10<sup>th</sup> Cir. Nov. 26, 1999).

On February 17, 1999, the Court granted Defendant First Seismic's motion to bring in Third-Party Defendants Santa Fe and IMC. In its Third-Party Complaint, First Seismic asserts a claim

for contractual indemnity against Sante Fe and IMC based upon a provision in the contract transferring the ownership interest in the seismic data from Adobe and McMoran to First Seismic. Paragraph ¶ 5B of that September 17, 1990 agreement provides:

McMoran and Adobe hereby indemnify and hold harmless FIRST SEISMIC from and any and all claims, costs, expenses or causes of action that may be asserted by the referenced minority owner or other owners, should they exist.

First Seismic alleges that McKenzie, East Texas and Capmac's predecessor, was the only referenced minority owner in the contract. First Seismic seeks a declaratory judgment that Sante Fe and IMC are liable to First Seismic under the contract's indemnity provision, plus monetary relief covering any damages First Seismic is held to owe Plaintiffs in the underlying action in addition to all costs and expenses of First Seismic in defending the underlying action and attorney fees incurred in prosecuting the indemnity action.

Sante Fe and IMC filed Motions to Dismiss the Third-Party Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. Sante Fe and IMC allege that the Third-Party Complaint seeks indemnification for liability and costs arising out of First Seismic's own alleged intentional wrongdoing occurring years after Santa Fe's and IMC's predecessors sold their interests in the seismic data. Santa Fe and IMC contend that as a matter of law, a

general indemnification provision like that in the sales contract cannot be construed to provide coverage for future intentional misconduct by the indemnitee.

Defendants First Seismic and Seitel move for summary judgment against Plaintiffs on two grounds. First, Defendants contend that since the Court has held that the sale of data to First Seismic did not constitute conversion or raise a duty to account to Plaintiffs, it follows that First Seismic, and later Seitel, were likewise free to sell or otherwise generate revenue from the data without committing conversion or having to account to Plaintiffs. Second, Defendants assert that all applicable statutes of limitations expired prior to the filing of the complaint. Defendants contend that the longest applicable statute of limitations is three years for accounting claims, and that therefore all claims based on conduct occurring prior to November 21, 1994, three years prior to filing suit, including the sale of the data to Seitel in June, 1994, should be barred as a matter of law. Plaintiffs respond that as cotenants in the seismic data, they are due an accounting for any profits resulting from the sale of the data. Plaintiffs also contend that the statute of limitations is not applicable with respect to an action for accounting of profits between cotenants.

In a separate motion, First Seismic moves for summary judgment against Sante Fe and IMC on the ground that in the agreement transferring their interest they agreed to indemnify First Seismic

for any claims brought by Plaintiffs. Sante Fe and IMC respond that the Court's August 31, 1998 Order forecloses any claim by Plaintiffs against First Seismic for conversion or proceeds of transfer; thus, there is nothing to indemnify. Further, they contend that if First Seismic took action to prevent Plaintiffs from exercising their rights with respect to the data, such action would constitute intentional or reckless misconduct for which First Seismic would not be entitled to indemnification.

#### **ANALYSIS**

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 (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 (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 (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).

**I. Defendants First Seismic's and Seitel's Motion for Summary Judgment with respect to Plaintiffs' claims**

Defendants contend that the Court's August 31, 1998 Order holding that the sale from Adobe and McMoran to First Seismic did not constitute conversion of Plaintiffs' one-eighth interest is the "law of the case" and applies equally to First Seismic's sale to Seitel.

The Court's August 31, 1998 Order and the Tenth Circuit opinion affirming that ruling squarely rejected Plaintiffs' claims that the seismic data was partnership property subject to fiduciary duties. The Tenth Circuit's opinion held that the ownership rights of each partner attached to the data itself, rather than to an interest in the partnership, and further stated that "[t]his [joint venture] agreement is unambiguous and grants each venturer the unrestricted right to sell its proportionate interest in the data." East Texas Seismic Data, 1999 WL 1066839 at \*1. The Court's ruling, as affirmed, disposed of Plaintiffs' claims as stated in Count II of the Second Amended Complaint for actual and punitive damages for conversion as against Sante Fe and IMC resulting from the sale of their interest in the data to First Seismic.

It follows, therefore, that Plaintiffs' claim for conversion against First Seismic must likewise fail. Plaintiffs allege in Count III of the Second Amended Complaint that First Seismic sold

the seismic data to various purchasers and failed to pay Plaintiffs their pro rata share of the sale proceeds. However, the Tenth Circuit's opinion affirming this Court's Order explicitly provides that, pursuant to the clear terms of the joint venture agreement, each partner had an unrestricted right to sell its proportionate share in the seismic data. East Texas Seismic Data, 1999 WL 1066839 at \*1-2. First Seismic, as the purchaser of Sante Fe's and IMC's interest in the data, possessed an equal unrestricted right to dispose of its interest in the seismic data without the need to share its profits with Plaintiffs.

Defendants contend that Texas law governs the disposition of Plaintiffs' claims, because Texas has the most significant relationship to the parties and the seismic data. We leave the choice of law question open because under either Oklahoma or Texas law we reach the same conclusions about Plaintiffs' claims. Oklahoma and Texas cases define conversion as an act of dominion and control wrongfully exerted over another's personal property in denial of or inconsistent with his rights. See, e.g., Installment Finance Corp. v. Hudiberg Chevrolet, Inc., 794 P.2d 751, 753 (Okla. 1990); Bandy v. First State Bank, 835 S.W.2d 609, 622 (Tex. 1992); see also Barrett v. Tallon, 30 F.3d 1296, 1300-1301 (10<sup>th</sup> Cir. 1994).

In the summary judgment context, it is the nonmovant's burden to present facts sufficient to support a reasonable jury

determination in his or her favor. Here, Plaintiffs have failed to allege facts sufficient to support a reasonable jury determination the First Seismic exerted "dominion," or "both title and possession and ... complete retention of control" over their interest in the seismic data. On the contrary, the record shows that Plaintiff Capmac sold half of its one-eighth interest to Plaintiff East Texas, thereby demonstrating that Plaintiffs retained control over its interest. Consequently, First Seismic is entitled to summary judgment on Plaintiffs' conversion claim (Count III).

Plaintiffs' remaining claims, as set forth in Count I of the Second Amended Complaint, seek a declaratory judgment that Plaintiffs own a one-eighth interest in all proceeds attributable to sales of the seismic data, an accounting of any sales proceeds from Defendants First Seismic and Seitel and money damages for Plaintiff's one-eighth share of all sale proceeds. Again, this argument is foreclosed by the Tenth Circuit's opinion affirming that "[t]he [joint venture] agreement states that the seismic data will be owned by the venturers and that the right to sell all or trade any part of the seismic data will be exclusively vested in the venturers." East Texas Seismic Data, 1999 WL 1066839 at \*1. This determination, based upon the clear language of the joint venture agreement, negates any claim by Plaintiffs that the seismic data continued to be cotenancy property for which Defendants owe them an accounting. Defendants and Plaintiffs alike were free to

sell or trade all or part of their interest in the seismic data. Accordingly, Defendants are entitled to summary judgment with respect to Plaintiffs claims as set forth in Count I of the Second Amended Complaint.

Defendants also assert that the statute of limitations has expired with respect to Plaintiffs' claims. However, because the Court determines that Defendants are entitled to summary judgment on the merits of Plaintiffs' claims, it need not resolve the statute of limitations question pertaining to this issue.

## **II. Remaining motions**

Because the Court has determined that Defendants are entitled to summary judgment as to all of Plaintiffs' claims, the motions to dismiss the Third-Party Complaint seeking indemnification and for summary judgment against Santa Fe and IMC are rendered moot. Indeed, in their Reply to Plaintiffs' Response to Motion for Summary Judgment, Defendants First Seismic and Seitel state that "...if the Court dismisses the conversion claim, the basis for Third-Party Defendants' refusal to indemnify First Seismic becomes moot." (Docket Entry #104 at 6). Accordingly, these motions will be denied as moot.

## **CONCLUSION**

Based upon the foregoing, the Motion for Summary Judgment against Plaintiffs East Texas Seismic Data, LLC, and Capmac Eighty-Two Limited Partnership filed by Defendants First Seismic and

Seitel Data Ltd. (Docket Entry #101) is **GRANTED**. The Motion to Dismiss Third-Party Complaint filed by Third-Party Defendant Santa Fe Energy Resources, Inc. (Docket Entry #78), the Motion to Dismiss Third-Party Complaint filed by Third-Party Defendant IMC Global, Inc. (Docket Entry #80), and the Motion for Summary Judgment against Santa Fe and IMC filed by Third-party Plaintiff First Seismic Corporation (Docket Entry #91) are **DENIED** as moot.

ENTERED this 14<sup>th</sup> day of January, 2000.

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

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

STELLA IRENE CARROLL, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
UNITED STATES OF AMERICA, )  
 )  
Defendant. )

ENTERED ON DOCKET

DATE JAN 18 2000

No. 98-CV-727-K

**F I L E D**

JAN 14 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 14 day of January, 2000.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JAN 13 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Exoko )  
 )  
Plaintiff(s) )  
 )  
vs. )  
 )  
Enivirotek Fuel Systems )  
Defendants(s). )

Case #97-cv-627-E ✓

ENTERED ON DOCKET

DATE JAN 13 2000

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by February 14, 2000, 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 13<sup>th</sup> day of January, 2000.

James O. Quinn  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

LAWRENCE L. MAYNARD,

Defendant.

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ENTERED ON DOCKET

DATE JAN 18 2000

No. 99CV0853K(M)

**FILED**

JAN 14 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 14 day of January, 2000, 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, Lawrence L. Maynard, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Lawrence L. Maynard, was served with Summons and Complaint on December 9, 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, Lawrence L. Maynard, for the principal amount of \$2,710.74, plus accrued

interest of \$3,971.42, plus interest thereafter at the rate of 12 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.997 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 **FILED**

DAVID PEOPLES, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 LARRY BELK, PHILLIP PUGH, and )  
 HAWKEYE SECURITY INSURANCE )  
 COMPANY, )  
 )  
 Defendants. )

JAN 14 2000

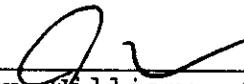
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 99-CV-015 B (M)

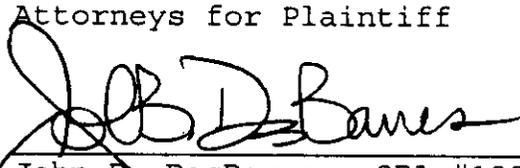
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JAN 14 2000  
DATE \_\_\_\_\_

STIPULATION OF DISMISSAL

COME NOW the Plaintiff, David Peoples, and the Defendants, Larry Belk, Phillip Douglas Pugh, and CGU-Hawkeye Security Insurance Company, a/k/a Hawkeye Security Insurance Company, and they make this Stipulation of Dismissal for the reason that the instant case has been settled.

  
\_\_\_\_\_  
Jerry Williams, OBA #9645  
Mark A. Mitchell, OBA #17321  
Melissa Mailath, OBA #16573  
The Robert Rode Law Firm  
324 South Main, Suite 600  
Tulsa, Oklahoma 74103  
(918) 599-8880  
Fax #: (918) 599-8316

Attorneys for Plaintiff

  
\_\_\_\_\_  
John B. DesBarres, OBA #12263  
1515 South Boulder Avenue  
Tulsa, Oklahoma 74119  
(918) 584-3391  
Fax #: (918) 592-2416

Attorney for Defendants

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

FILED  
JAN 14 2000  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CARYL STRAUB,

Plaintiff,

vs.

RAE CORPORATION,

Defendant.

Case No. 99-CV-480-B(E) ✓

**JOINT STIPULATION OF  
DISMISSAL WITH PREJUDICE**

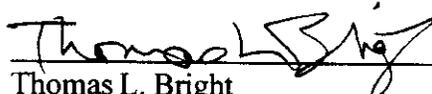
DATE JAN 14 2000

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, the parties hereto stipulate that the Plaintiff shall dismiss with prejudice this matter in its entirety.

WHEREFORE, the parties request the Court enter the Order of Dismissal with Prejudice, attached hereto as Attachment 1, and require each party to bear their respective attorney fees and costs.



Caryl Straub, Plaintiff



Thomas L. Bright  
406 South Boulder, Suite 411  
Tulsa, Oklahoma 74103-3825

Attorney for Plaintiff

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OK

  
Charles S. Plumb, OBA No. 7194  
Audra K. Hamilton, OBA No. 17872  
Doerner, Saunders, Daniel &  
Anderson  
320 South Boston Avenue  
Suite 500  
Tulsa, Oklahoma 74103-3725  
(918) 582-1211, FAX: (918) 591-5362

RAE CORPORATION

Attorneys for Defendant

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

CARYL STRAUB,

Plaintiff,

vs.

RAE CORPORATION,

Defendant.

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)

Case No. 99-CV-480-B(E)

**ORDER OF DISMISSAL WITH PREJUDICE**

This matter comes before the Court on the Joint Stipulation of Dismissal with Prejudice by the parties. The parties represent to the Court they have entered into an agreement for the entry of this Order of Dismissal with no finding of legal violation on the part of RAE Corporation.

IT IS THEREFORE ORDERED that this matter is dismissed with prejudice with no finding of any legal violation on the part of RAE Corporation. Each party shall bear their own attorney fees and costs.

\_\_\_\_\_  
JUDGE OF THE DISTRICT COURT

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

VIRGINIA ELEBY

Plaintiff,

vs.

HILLCREST HEALTHCARE  
SYSTEMS

Defendant.

**FILED**

JAN 14 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No: 99CIV1105H (E)

FILED ON DOCKET

JAN 14 2000

DATE

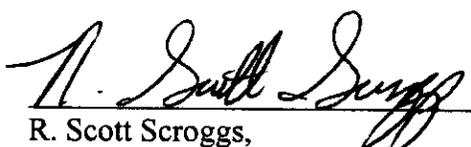
**JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE**

COME NOW, the parties, Virginia Eleby and Hillcrest Healthcare Systems and pursuant to Fed.R.Civ.P. 419(a)(1)(ii) jointly stipulate that this case may be dismissed without prejudice to re-filing.

APPROVED BY:

  
STRATTON TAYLOR OBA# 10142  
DARRELL W. DOWNS, OBA # 12272  
400 West Fourth Street; P.O. Box 309  
Claremore, OK 74018  
(918) 343-4100

**Attorney for Defendant  
Hillcrest Healthcare Systems**

  
R. Scott Scroggs,  
403 South Cheyenne, Suite 1100  
Tulsa, OK 74103  
(918) 582-9339

**Attorney for Plaintiff  
Virginia Eleby**

415

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

31550265/ls

**FILED**

JAN 14 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

✓

THE CITY OF VINITA, OKLAHOMA, )  
a municipal corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
GARON PRODUCTS, INC. and )  
LAMM CONSTRUCTION COMPANY, )  
 )  
Defendants, )  
 )  
and )  
 )  
GARON PRODUCTS, INC., )  
 )  
Defendant/Third-Party Plaintiff, )  
 )  
vs. )  
 )  
KIM CONSTRUCTION COMPANY, INC., )  
 )  
Third-Party Defendant. )

Case No. 99-CV-0296-BU(M)

FILED ON DOCKET  
DATE JAN 14 2000

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

COMES NOW the Plaintiff, The City of Vinita, Oklahoma, and Defendants, Garon Products Inc., Lamm Construction Company, and Third-Party Defendant, Kim Construction Company, Inc., all by and through their respective attorneys of record and hereby inform the Court that all claims and causes of action asserted herein have been fully compromised and resolved and settled.

All parties hereby stipulate that the Court may dismiss all Complaints, Cross-Petitions, Counterclaims and Third-Party Petitions with prejudice.

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ctj

All parties are to bear their respective attorney fees, costs and expenses.

THE CITY OF VINITA OKLAHOMA

By: Joe Johnson  
Authorized Representative

Mark Antinoro  
MARK ANTINORO, OBA #17237  
THE HARTLEY LAW FIRM  
106 East Canadian  
PO Box 553  
Vinita, OK 74301-0553  
ATTORNEYS FOR PLAINTIFF

GARON PRODUCTS INC.

By: \_\_\_\_\_  
Authorized Representative

PHILARD L. ROUNDS, JR., OBA #7780  
GLADD, SMITH, HARRIS & ROUNDS  
2642 East 21<sup>st</sup> Street, Suite 150  
Tulsa, OK 74114

Stephen C. Wilkerson  
STEPHEN C. WILKERSON, OBA #9619  
WILKERSON, WASSALL & WARMAN  
15 West Sixth Street, Suite 2301  
Tulsa, OK 74119-5412

ATTORNEYS FOR GARON PRODUCTS INC.

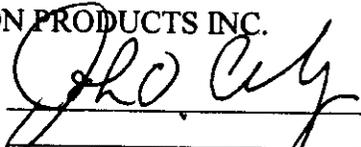
All parties are to bear their respective attorney fees, costs and expenses.

THE CITY OF VINITA OKLAHOMA

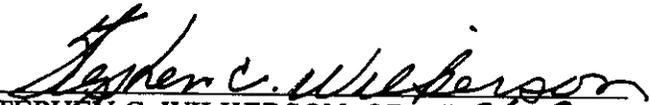
By: \_\_\_\_\_  
Authorized Representative

\_\_\_\_\_  
MARK ANTINORO, OBA # \_\_\_\_\_  
THE HARTLEY LAW FIRM  
106 East Canadian  
PO Box 553  
Vinita, OK 74301-0553  
ATTORNEYS FOR PLAINTIFF

GARON PRODUCTS INC.

By:   
Authorized Representative

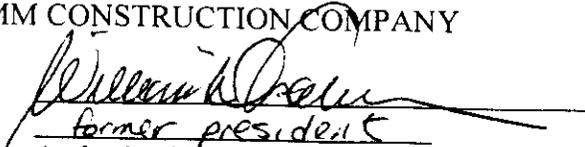
  
\_\_\_\_\_  
PHILARD L. ROUNDS, JR., OBA #7780  
GLADD, SMITH, HARRIS & ROUNDS  
2642 East 21<sup>st</sup> Street, Suite 150  
Tulsa, OK 74114

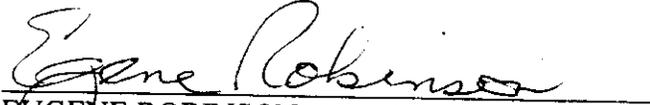
  
\_\_\_\_\_  
STEPHEN C. WILKERSON, OBA # 9619  
WILKERSON, WASSALL & WARMAN  
15 West Sixth Street, Suite 2301  
Tulsa, OK 74119-5412

ATTORNEYS FOR GARON PRODUCTS INC.

LAMM CONSTRUCTION COMPANY

By:

  
former president  
Authorized Representative

  
EUGENE ROBINSON, OBA #10119  
THE ROBINSON LAW FIRM  
15 West Sixth Street, Suite 1850  
Tulsa, OK 74119  
ATTORNEYS FOR LAMM CONSTRUCTION

KIM CONSTRUCTION COMPANY, INC.

By:

\_\_\_\_\_  
Authorized Representative

\_\_\_\_\_  
DAVID R. CORDELL, OBA #11272  
CONNER & WINTERS  
15 East Fifth Street, Suite 3700  
Tulsa, OK 74103  
ATTORNEYS FOR KIM CONSTRUCTION  
COMPANY, INC.

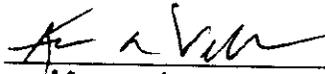
LAMM CONSTRUCTION COMPANY

By: \_\_\_\_\_

Authorized Representative

\_\_\_\_\_  
EUGENE ROBINSON, OBA #10119  
THE ROBINSON LAW FIRM  
15 West Sixth Street, Suite 1850  
Tulsa, OK 74119  
ATTORNEYS FOR LAMM CONSTRUCTION

KIM CONSTRUCTION COMPANY, INC.

By:   
\_\_\_\_\_  
KIM A. VALLOW, PRESIDENT  
Authorized Representative

  
\_\_\_\_\_  
DAVID R. CORDELL, OBA #11272  
CONNER & WINTERS  
15 East Fifth Street, Suite 3700  
Tulsa, OK 74103  
ATTORNEYS FOR KIM CONSTRUCTION  
COMPANY, INC.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 ) No. 99CV0699H(E) /  
 )  
 PAUL R. BENGLE, )  
 )  
 Defendant. )

ENTERED ON DOCKET  
DATE JAN 14 2000

**FILED**  
JAN 14 2000  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DEFAULT JUDGMENT

The Plaintiff's Application for Default Judgment comes on for hearing this 14<sup>TH</sup> day of JANUARY, <sup>2000</sup>~~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, Paul R. Bengle, appears not. The Court finds that pursuant to Rule 55 of the Federal Rules of Civil Procedure, notice of the hearing was given to the Defendant.

The Court gave due consideration to the pleadings and documents filed in support of the plaintiff's Complaint. The Court finds the plaintiff is entitled to judgment from its review of the supporting documentation.

The Court being fully advised and having examined the court file finds that Defendant, Paul R. Bengle, was served with Summons and Complaint on November 1, 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, Paul R. Benge, for the principal amount of \$5,297.11, plus accrued interest of \$4,344.28, plus interest thereafter at the rate of 9.13 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.545 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

**FILED**

JAN 13 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

REROOF AMERICA, INC., FABTEC, INC. )  
AND HAROLD SIMPSON, INC., )

PLAINTIFFS, )

VS. )

CASE No. 96-C-398-K

AMERICAN BUILDINGS COMPANY, )

DEFENDANT. )

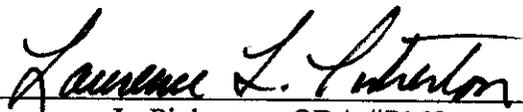
ENTERED ON DOCKET

DATE JAN 14 2000

**STIPULATION OF DISMISSAL**

COME NOW Plaintiffs, Reroof America, Inc., Fabtech, Inc. and Harold Simpson, Inc. and Defendant, American Buildings Company, through undersigned counsel, and stipulate that all of Plaintiffs' claims against the Defendant may be dismissed without prejudice pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

Done this 12th day of January, 2000.

  
\_\_\_\_\_  
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ATTORNEYS FOR PLAINTIFFS  
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and

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ATTORNEYS FOR DEFENDANT  
AMERICAN BUILDINGS COMPANY



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

**FILED**

JAN 13 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

INTELICAD COMPUTERS, INC., )  
 )  
Plaintiff(s), )  
 )  
vs. )  
 )  
MASSACHUSETTS BAY INC. CO., )  
 )  
Defendant(s). )

Case No. 97-C-912-B ✓

ENTERED ON DOCKET

DATE JAN 13 2000

ORDER DISMISSING ACTION  
BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

**IT IS ORDERED** that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

**IT IS FURTHER ORDERED** that the Clerk forthwith serve copies of this Order by United States mail upon the attorneys for the parties appearing in this action.

**IT IS SO ORDERED** this 13<sup>th</sup> day of January, 2000.

*Thomas R. Brett*  
for THOMAS R. BRETT, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

*fs*

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

**FILED**

JAN 12 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LARRY EUGENE JACKSON, )

Petitioner, )

vs. )

No. 97-CV-375-K ✓

OKLAHOMA DEPARTMENT )  
OF CORRECTIONS, )

JAMES SAFFLE, DIRECTOR; )

et al., )

Respondents. )

**ENTERED ON DOCKET**

**DATE JAN 13 2000**

**ORDER**

Petitioner, a state inmate appearing *pro se*, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254 (Docket #1). Respondent filed a response (#10), to which Petitioner replied (#13). As more fully set out below, the Court concludes that Petitioner's application for a writ of habeas corpus should be denied.

**BACKGROUND**

Petitioner Larry Eugene Jackson was convicted after a jury trial in Tulsa County District Court, Case No. CRF-92-2647, of one count of possession of marijuana-second offense, after former conviction of two or more felonies ("count two"), and one count of possession of paraphernalia ("count three").<sup>1</sup> In the second stage of trial proceedings, the jury set punishment at life imprisonment for count two and at one year in the county jail and a \$1,000 fine on count three. On March 19, 1993, the trial court sentenced Petitioner in accordance with the jury's recommendation.

The evidence at trial showed that Petitioner and three other individuals had been present in

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<sup>1</sup>Count one, charging possession of amphetamine, was dismissed before trial.

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an apartment on the evening of June 11, 1992 when the police executed a search warrant. Sandra Malone let the officers in and told them she lived at the apartment. Petitioner was in the apartment's sole bedroom when the police arrived, and he was ordered to lie prone on the floor beside the bed. After Petitioner was allowed to get up, police found a small amount of marijuana on the floor where he was lying. Officers also recovered dry cleaning receipts with Petitioner's name from clothes in the bedroom closet, as well as documents with his name on them from the bedroom dresser. Police also found in the bedroom a set of triple beam balance scales of the type commonly used to weigh illegal drugs, a syringe and other drug paraphernalia.

Defense counsel planned to call Sandra Malone as a witness but she was not in the courtroom when it was time for Petitioner to present his defense.<sup>2</sup> The trial court refused to reopen the case after the defense rested to allow this witness to testify when she was later located.

Petitioner, represented by different counsel, filed a timely appeal, raising four grounds:

1. The evidence was insufficient to sustain Petitioner's convictions;
2. The trial court's refusal to permit the Appellant to reopen to present a crucial defense witness was an abuse of discretion;
3. The trial court committed reversible error by permitting the introduction of documents (a receipt showing provision of legal services to Petitioner by an attorney) evidencing prior criminal conduct; and
4. The paraphernalia statute is unconstitutional.

(#10, Ex. B). On April 18, 1995, the Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction and sentence in an opinion addressing each issue (#10, Ex. A), and subsequently denied his petition for rehearing.

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<sup>2</sup>Sandra Malone was charged in the information with the same offenses, but she was not tried with Petitioner.

Thereafter, Petitioner, appearing *pro se*, filed an application for post-conviction relief in the district court, raising these grounds:

1. Ineffective assistance of appellate counsel, for failing to raise on appeal (a) the Flores issue, (b) the introduction of evidence of prior convictions during the first stage, and (c) the double enhancement of Petitioner's sentence;
2. The trial court improperly instructed the jury on the presumption of innocence using the "presumed not guilty" instruction invalidated in Flores v. State, 896 P.2d 558 (Okla.Cr.App. 1995);
3. Petitioner was prevented from calling a witness;
4. The State improperly enhanced the sentence with a foreign document (referring to evidence submitted during first stage proceedings to show prior conviction for possession of marijuana);
5. Imposition of a procedural bar violates intent of Oklahoma's Post-Conviction Procedure Act and Due Process.<sup>3</sup>

(#10, Ex. D). On January 9, 1997, the district court denied the application for post-conviction relief, and the denial was affirmed by the Court of Criminal Appeals on March 25, 1997 (#10, Ex. C).

In his brief in support of the instant petition for federal habeas corpus relief filed April 21, 1997, Petitioner identifies five propositions of error:

1. Evidence was insufficient to sustain Petitioner's conviction;
2. Trial court abuse [sic] his discretion in denying Petitioner to re-open and present a crucial defense witness;
3. Illegal sentence ("double enhancement") constituting cruel and unusual punishment;
4. Ineffective assistance of appellate counsel, for failing to raise on appeal (a) the Flores issue, (b) the introduction of evidence of a prior conviction during the first stage, and (c) the double enhancement of Petitioner's sentence; and

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<sup>3</sup>This ground was first raised by Petitioner in his petition-in-error filed in the Oklahoma Court of Criminal Appeals during the post-conviction appeal.

5. Imposition of a procedural bar on the Flores issue violates the intent of the Oklahoma Post-Conviction Procedure Act and Due Process.

In his response to the petition, Respondent asserts that the Oklahoma Court of Criminal Appeals denied Petitioner's claim of insufficiency of the evidence on appeal and this adjudication was not contrary to, or an unreasonable application of, clearly established federal law. Similarly, Respondent submits that the Court of Criminal Appeals determined that Petitioner's claim of ineffective assistance of appellate counsel was without merit, and that this decision was not contrary to, or an unreasonable application of, clearly established federal law. Further, Respondent contends that the trial court's alleged error in failing to re-open the case to allow presentation of a defense witness is a matter of state law which is not cognizable under § 2254.

Petitioner filed a reply in which he repeated the allegations of his petition. He also attached to his reply the affidavit of Sandra Kaye Malone, who states that she would have testified that Petitioner did not live at the apartment.

### *ANALYSIS*

As an initial matter, the Court finds that no evidentiary hearing on these claims may be held pursuant to 28 U.S.C. § 2254(e)(2), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which provides:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that

(A) the claim relies on —

- (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
- (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Based on the record before the Court, Petitioner did not seek to develop the factual basis of these claims in his state court proceedings. Therefore, no evidentiary hearing is warranted because Petitioner's claims do not involve a new rule of constitutional law or newly discovered evidence that was unavailable previously. 28 U.S.C. § 2254(e)(2)(A); see also Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998).

**A. Exhaustion**

The Court must determine whether Petitioner has met the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Coleman v. Thompson, 501 U.S. 722, 732 (1991); Rose v. Lundy, 455 U.S. 509 (1982). Although Respondent indicates in his response that Petitioner's claims are exhausted, the Court finds that Petitioner's third claim, that his sentence was subjected to "double enhancement," was never submitted to the Oklahoma Court of Criminal Appeals as a separate claim.<sup>4</sup> However, as discussed in Part B below, to dismiss the instant petition and require Petitioner to return to the state courts to exhaust this claim would be futile because the Oklahoma Court of Criminal Appeals, relying on Okla. Stat. tit. 22, § 1086, routinely imposes a procedural bar on claims that could have been but were not raised in a prior proceeding. As a result, Petitioner has no viable state remedy for this claim and it is, therefore, exhausted for purposes of federal habeas corpus review. See 28 U.S.C. § 2254(b)(1)(B).

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<sup>4</sup>The "double enhancement" issue was, however, one of the bases for Petitioner's ineffective assistance of appellate counsel claim presented to the state appellate court on post-conviction appeal.

**B. Claim 3, illegal sentence based on "double enhancement," is procedurally barred.**

As his third claim, Petitioner asserts for the first time as a separate claim that his sentence was subjected to "double enhancement" under the provisions of both the state's drug enhancement statute, Okla. Stat. tit. 63, § 2-402(b)(2), and the general felony enhancement statute, Okla. Stat. tit. 21, § 51(b). Petitioner contends that Okla. Stat. tit. 63, § 2-402(b)(2) provides its own sentence enhancement provision and that the trial court's use of the general felony enhancement statute, Okla. Stat. tit. 22, § 51(b), resulted in impermissible "double enhancement."

Although the Oklahoma Court of Criminal Appeals determined that appellate counsel did not provide ineffective assistance in failing to raise this claim on direct appeal (see #10, Ex. C at 2), that court has never had the opportunity to consider the merits of the claim itself.<sup>5</sup> However, to require Petitioner to return to state court to exhaust this claim would be futile because the Oklahoma Court of Criminal Appeals, relying on Okla. Stat. tit 22, § 1086, routinely imposes a procedural bar on claims that could have been but were not raised in a prior proceeding. Therefore, it would be futile to require Petitioner to return to state court because his procedural default of this claim.

The doctrine of procedural default prohibits a federal court from considering specific habeas claims where the state's highest court declined to reach the merits of those claims on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501

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<sup>5</sup>Of course, had Petitioner raised the instant claim as a separate claim in his application for post-conviction relief, the state courts would have imposed a procedural bar on the claim since Petitioner could have raised the claim on direct appeal. In other words, this Court would apply a procedural bar analysis even if Petitioner has "fairly presented" the instant claim to the Oklahoma Court of Criminal Appeals in his post-conviction appeal.

U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Applying these principles to the instant case, the Court concludes that Petitioner's third claim, that his sentence was improperly enhanced, is barred by the procedural default doctrine. The Oklahoma Court of Criminal Appeals' procedural bar as would be applied to Petitioner's would be an "independent" state ground because "it [would be] the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar would be an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently applied a procedural bar and has denied such claims unless the petitioner provides "sufficient reason" for his failure to raise the claim earlier. Moore v. State, 889 P.2d 1253 (Okla. Crim. App. 1995).

Because of his procedural default, this Court may not consider Petitioner's instant claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The "cause" standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The "fundamental miscarriage of justice" exception requires a petitioner to demonstrate that he is

"actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging his appellate counsel provided ineffective assistance in failing to raise this claim on direct appeal. Ineffective assistance of counsel may serve as "cause" excusing a procedural bar, Murray v. Carrier, 477 U.S. at 488, and to establish ineffective assistance of counsel a petitioner must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). However, as discussed in Part D(3)(c) below, the Oklahoma Court of Criminal Appeals considered and rejected Petitioner's claim of ineffective assistance of appellate counsel based on counsel's failure to raise this claim on direct appeal. In its order affirming the denial of post-conviction relief, the Oklahoma Court of Criminal Appeals found that Petitioner "has not established how his counsel's performance was deficient under prevailing professional norms, the first of the two-pronged test for ineffective counsel. Strickland v. Washington, 466 U.S. 668, 677-78 (1984); see also e.g. Walker v. State, \_\_ P.2d \_\_, 68 OBJ 316, 317-18 (Okl.Cr. January 23, 1997)." (#10, Ex. C at 2).

The state appellate court's conclusion on this issue did not involve an unreasonable application of the Strickland standard to the facts. See 28 U.S.C. § 2254(d)(1), discussed more fully below. Petitioner was charged with "Possession of Marijuana--Second Offense, After Former Conviction of Two or More Felonies." (#10, Ex. E). Pursuant to § 2-402(B)(2), a second or subsequent conviction of possession of marijuana is a "felony punishable by imprisonment for not less than two (2) nor more than ten (10) years." However, the general felony enhancement statute provides that "[e]very person who, having been twice convicted of felony offenses, commits a third . . . shall be punished by imprisonment in the State Penitentiary for a term of not less than twenty (20) years."

Under Oklahoma law, if the prior convictions used to enhance are non-drug related, the district attorney may elect to enhance under the general enhancement statute. See Hickman v. Spears, 160 F.3d 1269 (10th Cir. 1998) (finding that counsel's failure to object to enhancement of sentence under the general enhancement statute was not deficient performance); Jones v. State, 789 P.2d 245 (Okla. Crim. App. 1990) (stating that when both the predicate for enhancement and the new offense are drug offenses, any enhancement must be made pursuant to the provisions of Okla. Stat. tit. 63, § 2-201, et seq.; when the new offense is a drug offense, but the predicate offense is non-drug, it is proper to enhance under the general habitual offender statute, Okla. Stat. tit. 21, § 51; where the predicate offenses include both drug and non-drug convictions, it is permissible to provide for enhancement under either statute and the prosecution must elect which enhancement it wishes to pursue). In the instant case, during the guilt-innocence phase of the proceedings, the state introduced a "certified document purporting to establish" a prior conviction for possession of marijuana. (#11, Tr. Trans. at 61). During second stage proceedings, evidence of at least twelve (12) prior felony convictions was introduced. Of those twelve prior felony convictions, four (4) were drug related and eight (8) were non-drug related. Therefore, having demonstrated the commission of a felony under Okla. Stat. tit. 63, § 2-402(B)(2), it was proper for Petitioner's sentence to be enhanced under Okla. Stat. tit. 21, § 51(B). Petitioner's claim that his sentence was subjected to double enhancement is without merit. The Court concludes that the state courts' finding that appellate counsel did not provide ineffective assistance in failing to raise this claim on direct appeal claim was not contrary to and did not involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. The Court concludes that Petitioner has failed to demonstrate "cause" sufficient to overcome the procedural bar of this claim. Having failed to demonstrate "cause," the Court need

not analyze the "prejudice" component. Klein v. Neal, 45 F.3d 1395, 1400 (10th 1995).

Petitioner's only other means of gaining federal habeas review of this claim is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). The miscarriage of justice exception is explicitly tied to the petitioner's innocence. Schlup v. Delo, 115 S.Ct. 851, 864 (1995). Furthermore, a petitioner must show actual or factual innocence, as opposed to legal innocence, to come within very narrow exception for fundamental miscarriage of justice. Klein v. Neal, 45 F.3d 1395, 1400 (10th Cir.1995); see also Steele v. Young, 11 F.3d 1518, 1522 n. 8 (10th Cir.1993). Although Petitioner does claim that he is actually innocent (see #13 at 5), his claim is premised on the state's alleged failure to prove "possession" and the alleged insufficiency of the evidence to convict. Thus, his claim is one of legal innocence and does not satisfy the narrow "fundamental miscarriage of justice" exception. Therefore, Petitioner cannot overcome the procedural bar based on the fundamental miscarriage of justice exception.

Because Petitioner has failed to demonstrate "cause and prejudice" or a "fundamental miscarriage of justice," the Court concludes his claim challenging the legality of his sentence based on "double enhancement" is procedurally barred and should be denied on that basis.

**C. Claims considered on the merits by the Oklahoma Court of Criminal Appeals do not justify habeas corpus relief in this case based on 28 U.S.C. § 2254(d)**

The habeas corpus statute, as amended by the AEDPA, provides that:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(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). Each of Petitioner's claims numbered 1, 2 and 4 was considered on the merits and rejected by the Oklahoma Court of Criminal Appeals either on direct appeal or on post-conviction appeal. Therefore, § 2254(d) guides this Court's analysis of those claims. For the reasons discussed below, each claim should be denied.

*1. Claim 1, insufficiency of the evidence, does not warrant relief under § 2254(d)*

Petitioner alleges that the circumstantial evidence linking him to the illegal drugs was insufficient to sustain his conviction. Respondent asserts that § 2254(d) prevents the granting of federal habeas relief on this issue.

On direct appeal, the Court of Criminal Appeals discussed the state standards on constructive possession and the evidence linking Petitioner to the illegal drugs. The court concluded "after careful review of this record, this court feels that there was sufficient evidence presented for the jury to determine that there was no other reasonable hypotheses than that the defendant had dominion and control and therefore, possessed the drugs found on these premises." (#10, Ex. A at 5).

The Court of Criminal Appeals' decision comported with clearly established federal law requiring appellate tribunals to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); Wingfield v. Massie, 122 F.3d 1329, 1332 (10th Cir.1997) cert. denied, 118 S.Ct. 1187 (1998). This Court must

look to state law for the "substantive elements" of the relevant criminal offense, Jackson, 443 U.S. at 324 n.16). "This standard 'gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" Jackson, 443 U.S. at 319. This Court is not persuaded that the Court of Criminal Appeals' opinion addressing this issue was contrary to the federal standard enunciated above. Further, after reviewing the trial transcript, this Court cannot say that the appellate decision was an unreasonable interpretation of the facts presented at trial.

Accordingly, because Petitioner's claim of insufficiency of the evidence was adjudicated on the merits in a manner that was neither contrary to controlling federal law nor an unreasonable determination of the facts presented at trial, the Court finds that pursuant to § 2254(d), Petitioner is not entitled to habeas corpus relief on this ground.

2. *Claim 2, that the trial court abused its discretion in failing to reopen case to allow for testimony of a defense witness, does not warrant relief under § 2254(d)*

Petitioner's second claim is that the trial court abused its discretion in denying defense counsel's motion to re-open the case to allow presentation of a defense witness. Petitioner raised this issue on direct appeal and it was addressed on the merits by the Court of Criminal Appeals. Respondent argues that this claim involves an issue of state law not cognizable on federal collateral review.

Respondent correctly asserts that federal habeas corpus relief under § 2254 is available only to those held in state custody in violation of federal constitutional or statutory law; and it is not available to remedy alleged violations of state law. See Estelle v. McGuire, 502 U.S. 62 (1991); Richmond v. Embry, 122 F.3d 866, 870 (10th Cir.1997), cert. denied, 118 S.Ct. 1065 (1998). In

a habeas proceeding claiming a denial of due process, "we will not question the evidentiary or procedural rulings of the state court unless [the petitioner] can show that, because of the court's actions, his trial, as a whole, was rendered fundamentally unfair." Lujan v. Tansy, 2 F.3d 1031, 1034 (10th Cir. 1993) (quoting Tapia v. Tansy, 926 F.2d 1554, 1557 (10th Cir. 1991)).

In the instant case, the prosecution rested its case late in the day on March 10, 1993, and defense counsel requested that the matter be continued until the next day. The trial court conceded to counsel's request and recessed until the next morning. (#11 at 62). On the morning of March 11, 1993, after the court had dealt with separate matters on its docket, defense counsel made an opening statement but was unable to locate the sole defense witness, Sandra Malone, in the courtroom. (#11 at 64). Therefore, defense counsel rested its case and the trial court released the jury for lunch. (#11 at 65). The court and the parties' attorneys proceeded to review the jury instructions. Defense counsel then noted that Malone had entered the courtroom, and counsel requested leave to reopen the Petitioner's case. (#11 at 67). The court denied counsel's request to reopen or for a continuance, and the court noted that, while the court files reflected a subpoena for Malone on February 19 (the original trial date), Malone was not under subpoena to testify on March 10 or 11. (#11 at 70). Defense counsel agreed that he had not re-subpoenaed Malone for the current trial dates. (#11 at 69).

On direct appeal, the Court of Criminal Appeals concluded that the trial court had not abused its discretion in refusing to re-open the case to allow Malone to testify, citing defense counsel's failure to use due diligence to procure Malone's testimony in a timely fashion. Pursuant to § 2254(d), habeas relief cannot be granted on this claim that was adjudicated on its merits by a state court unless such decision was contrary to, or involved an unreasonable application of federal law or represented an unreasonable determination of the facts in light of the evidence presented at the state proceeding. The

Court concludes that neither of these exceptions apply here; accordingly, this Court cannot further inquire into the propriety of the state appellate court's decision on this issue. Habeas corpus relief on this claim should be denied.

3. *Ineffective assistance of appellate counsel claim does not warrant relief under § 2254(d)*

Petitioner alleges that his appellate counsel's performance was constitutionally deficient because he failed to raise on appeal: (a) the impropriety of the "presumed not guilty" instruction (the "Flores issue"); (b) the introduction of evidence of prior convictions during the first stage; and (c) the "double enhancement" of Petitioner's sentence. Petitioner raised this claim in his state application for post-conviction relief.

Respondent contends that the Court of Criminal Appeals reviewed this claim on its merits and held that effective assistance of appellate counsel was rendered. Thus, Respondent continues, § 2254(d) controls and Petitioner is not entitled to relief since the state court's decision was based on controlling federal law and was not based on an unreasonable application of the law to the facts.

The Court agrees that § 2254(d) applies to guide this Court's review of Petitioner's ineffective assistance of appellate counsel claim. The state district court examining Petitioner's application for post-conviction relief applied the Strickland standard of "reasonably effective assistance" by which an attorney's performance is judged. Strickland v. Washington, 466 U.S. 668, 687 (1984). The court cited the two-part test which the defendant must meet: first, that his attorney's performance "fell below an objective standard of reasonableness," id. at 688; and second, that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694. The court noted that counsel is not required to advance every argument on appeal, citing Cartwright v. State,

708 P.2d 592 (Okla. Crim. App. 1985) and Jones v. Barnes, 463 U.S. 745, 754 (1983), and that in the instant case Petitioner's appellate counsel carefully selected legal issues to be raised on appeal. Thus, the court concluded that Petitioner's appellate counsel was reasonably competent. (#1, unnumbered attachment, Jan. 9, 1997 decision of Tulsa County District Court). In affirming the district court's denial of Petitioner's application for post-conviction relief, the Court of Criminal Appeals stated that "Petitioner has not established how his counsel's performance was deficient under prevailing professional norms, the first of the two-pronged test for ineffective counsel," and cited Strickland. (#10, Ex. C).

It is clear that the state courts articulated the federal standard used to evaluate a claim of ineffective assistance of counsel. Next, this Court must determine whether the state court's decision represents an unreasonable application of the law to the facts under § 2254(d)(1). To do this, the Court examines each issue which Petitioner argues should have been raised by appellate counsel.

**a. The Flores issue.**

Petitioner claims that appellate counsel's failure to challenge the improper instruction on the presumption of innocence was ineffective assistance. In Flores v. State, 896 P.2d 558, 562 (Okla. Crim. App. 1995), the Oklahoma Court of Criminal Appeals held that a trial judge's deviation from the uniform jury instructions regarding the presumption of innocence and the state's burden of proof when the jury was deciding the guilt or innocence of a defendant was reversible error. In the instant case, Petitioner's trial attorney objected to jury instruction number 2, which deviated from the uniform jury instructions in that it instructed that Petitioner was "presumed not guilty." (#11 at 66). Petitioner was represented by different counsel on appeal, however, who argued four grounds but did not raise an issue relating to the jury instruction. The Court of Criminal Appeals decided Flores

on January 24, 1995, after Petitioner's March, 1993 trial, after Petitioner filed his notice of appeal, and almost one year after Petitioner's appellate counsel filed his brief-in-chief on February 28, 1994. The Oklahoma Court of Criminal Appeals entered its order affirming Petitioner's conviction on April 18, 1995, almost three (3) months after issuing the Flores decision.

As noted above, the state courts, including the same Court of Criminal Appeals which decided the Flores case, determined that appellate counsel's failure to challenge the jury instruction on direct appeal did not constitute ineffective assistance of counsel under the Strickland analysis. The state courts correctly noted that counsel need not pursue every meritorious claim in order to render reasonably effective counsel. Murray v. Carrier, 477 U.S. 478 (1986). Furthermore, the Tenth Circuit Court of Appeals has held that appellate counsel's failure to challenge the instruction at issue in Flores prior to issuance of the Flores opinion did not constitute ineffective assistance of appellate counsel. Sherrill v. Hargett, 184 F.3d 1172, 1175-76 (10th Cir. 1999). The Tenth Circuit has also stated that "counsel is not ineffective for failing to anticipate arguments or appellate issues which are based on decisions issued after the appeal was submitted." Burton v. Martin, No. 98-7034, 1998 WL 694531 (10th Cir. Oct. 6, 1998) (rejecting claim of ineffective assistance of appellate counsel for failing to raise Flores issue prior to issuance of Flores opinion and citing Lilly v. Gilmore, 988 F.2d 783, 786 (7th Cir. 1993)). Therefore, this Court concludes that the state courts' rejection of Petitioner's claim was based on a reasonable application of federal law. Accordingly, Petitioner is not entitled to habeas relief on this ground.

**b. Introduction of prior conviction evidence during first stage of trial.**

Petitioner claims that appellate counsel failed to challenge the introduction by the prosecution during the guilt-innocence stage of a certified document purporting to show that Petitioner had a prior conviction for possession of marijuana. (#11 at 61). At trial, defense counsel objected to the introduction of the prior conviction, but based only on lack of an evidentiary foundation.<sup>6</sup> As a result, the specific error Petitioner now asserts, that introduction of the prior conviction was improper and prejudicial, was not preserved for appeal and would not have been considered by the Court of Criminal Appeals absent a finding that the error constituted fundamental error. Okla. Stat. tit. 12, § 2104; see also, Bowie v. State, 906 P.2d 759, 764 (Okla. Crim. App. 1995) (citing Pickens v. State, 850 P.2d 328 (Okla. Cr. 1993), and stating that failure to object waives all but fundamental error on appeal); Simpson v. State, 876 P.2d 690, 693 (Okla. Crim. App. 1994) (holding that failure to object with specificity to errors alleged to have occurred at trial, thus giving the trial court an opportunity to cure the error during the course of trial, waives that error for appellate review unless the error

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<sup>6</sup>When the State sought to introduce the certified document purporting to establish a prior conviction for possession of marijuana, the following exchange took place between the trial court and defense counsel:

THE COURT: Any objection?

MR. ISKI: Your Honor, we'd object, first of all that proper foundation has not been laid to identify the relevance to this particular defendant by name or some type of identifying description. It does not have a name on there. We'd also object to some of the materials contained therein.

THE COURT: Anything else?

MR. ISKI: No, sir.

THE COURT: All right. State's Exhibit Number 7 will be admitted into evidence to show a previous conviction for the Possession of Marijuana. And I'll give the defendant an exception to the Court's ruling.

(#11 at 61).

constitutes fundamental error, i.e. plain error). Based on the evidence presented at trial, the Court cannot conclude that had the prior conviction evidence not been presented, the jury would have reached a different verdict. After reviewing the record, the Court finds that Petitioner has failed to demonstrate that the introduction of the evidence of his prior conviction during the guilt/innocence phase was fundamental error. As a result, Petitioner has also failed to demonstrate that appellate counsel rendered deficient performance under Strickland in failing to raise this claim on direct appeal. Accordingly, appellate counsel did not provide ineffective assistance of counsel in failing to raise this issue on appeal.

**c. Double enhancement.**

Petitioner asserts that his appellate counsel provided ineffective assistance when he failed to argue on direct appeal that Petitioner's sentence was illegal because it had been enhanced twice, once under the provisions of Okla. Stat. tit. 63, § 2-402(b)(2) and again under the general felony enhancement statute, Okla. Stat. tit. 21, § 51(B). As discussed in Part B above, the Court of Criminal Appeals' decision finding that Petitioner's appellate counsel did not perform deficiently in failing to raise this claim on direct appeal comports with Strickland. As a result, pursuant to 28 U.S.C. § 2254(d), habeas corpus relief on this ground should be denied.

**D. Claim 5, that the state courts' imposition of a procedural bar on Flores claim violates the intent of the Post-Conviction Procedure Act and Due Process, is without merit**

As his fifth ground of error, Petitioner asserts that the case of Flores v. State, 896 P.2d 558 (Okla. Crim. App. 1995), applies to his case and that the decision by the Oklahoma Court of Criminal Appeals imposing a procedural bar on his claim constitutes an abuse of discretion, and violates the

Post-Conviction Procedure Act and due process.<sup>7</sup> This claim challenges a procedural ruling by the state appellate court. As has been stated above, this federal habeas court cannot consider challenges based on errors of state law. See Estelle v. McGuire, 502 U.S. 62 (1991). In its order affirming the denial of post-conviction relief, the Oklahoma Court of Criminal Appeals, citing Ferrell v. State, 902 P.2d 1113, 1114 (Okla. Crim. App. 1995), stated that the Flores decision did not announce a new rule of law and was not declared to be retroactive. (#10, Ex. C). Quite simply, the court found that the issue concerning the "presumed not guilty" jury instruction could have been, but was not, raised on Petitioner's direct appeal. As a result, based on state law considerations, the appellate court found Petitioner had procedurally defaulted his Flores claim and had failed to provide a sufficient reason for the failure to raise the issue on direct appeal. Clearly the state appellate court's decision to impose a procedural bar rested on state law. As stated above, federal habeas corpus relief is not available to remedy alleged violations of state law and this claim should be denied on the basis that it is not cognizable under § 2254.

To the extent Petitioner alleges a violation of his right to due process resulting from the imposition of a procedural bar, the Court will examine whether the procedural ruling of the state court rendered Petitioner's post-conviction appeal fundamentally unfair. See Lujan, 2 F.3d at 1034 (10th Cir. 1993). In affirming the trial court's denial of post-conviction relief, the state appellate court considered, but rejected, Petitioner's argument that his failure to raise the claim on direct appeal was due to ineffective assistance of appellate counsel. Thus, Petitioner did have the opportunity to

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<sup>7</sup>As his fifth claim raised before the Oklahoma Court of Criminal Appeals in his post-conviction appeal, Petitioner alleged that the state district court's imposition of a procedural bar on his Flores claim violated the intent of the Post-Conviction Procedure Act and due process. However, nothing in the state appellate court's opinion indicates consideration of the claim. Nonetheless, this Court finds the claim to be without merit.

present an explanation for his procedural default prior to the court's finding of default. This Court finds no violation of due process rendering the post-conviction process fundamentally unfair and concludes Petitioner's claim is without merit.

**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** Petitioner's petition for a writ of habeas corpus is **denied**.

SO ORDERED THIS 12 day of January, 2000.

  
TERRY C. KERN Chief Judge  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 12 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GEORGE A. DOCTOR,

Plaintiff,

v.

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

Defendant.

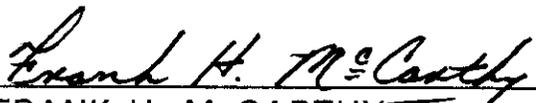
Case No. 99-CV-263-M ✓

ENTERED ON DOCKET  
JAN 12 2000  
DATE \_\_\_\_\_

ORDER

Upon the motion of the Defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

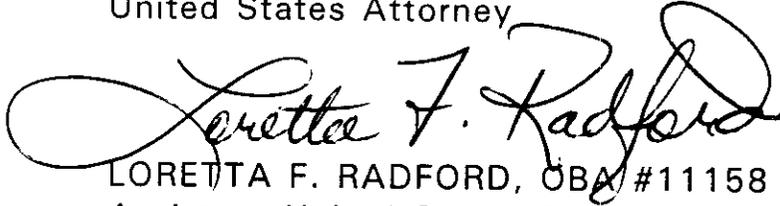
DATED this 12<sup>th</sup> day of JAN. 2000.

  
FRANK H. MCCARTHY  
United States Magistrate Judge

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SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with large, flowing loops.

LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103-3809

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

GEORGE A. DOCTOR, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KENNETH S. APFEL, )  
 Commissioner of the Social Security )  
 Administration, )  
 )  
 Defendant. )

**FILED**

JAN 12 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

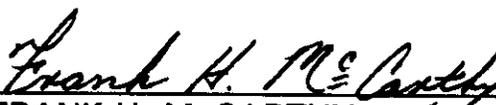
CASE NO. 99-CV-263-M ✓

ENTERED ON DOCKET

DATE JAN 13 2000

**JUDGMENT**

Judgment is hereby entered for Plaintiff and against Defendant. Dated  
this 12<sup>th</sup> day of JAN., 2000.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

JAN 12 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**LEROY D. CYPERT,**

**Plaintiff,**

**vs.**

**CITY OF GLENPOOL, OKLAHOMA,  
BOB BATES, LARRY BIBLE,**

**Defendants.**

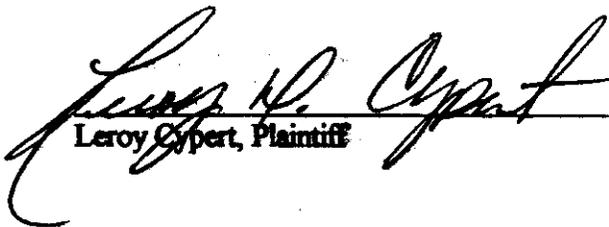
Case No. 99-CV-793-C(J)

ENTERED ON DOCKET

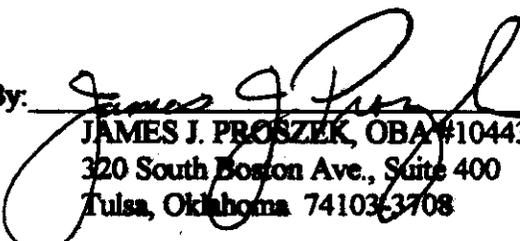
DATE JAN 12 2000

**STIPULATION OF DISMISSAL WITH PREJUDICE**

All the parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, City of Glenpool, Bob Bates and Larry Bible, are hereby dismissed with prejudice.

  
Leroy Cypert, Plaintiff

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

By:   
JAMES J. PROSZEK, OBA #10443  
320 South Boston Ave., Suite 400  
Tulsa, Oklahoma 74103-3708

**ATTORNEYS FOR PLAINTIFF**



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ELLER AND DETRICH,  
A Professional Corporation

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(918) 747-8900

ATTORNEYS FOR DEFENDANTS

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 12 2000 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ELIZABETH JACKSON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ERLANGER TUBULAR CORPORATION, )  
 )  
 Defendant. )

Case No. 99-CV-623-K(J) ✓

ENTERED ON DOCKET

DATE JAN 12 2000

REPORT AND RECOMMENDATION

The following motions are now before the Court:

1. Defendant's Motion to Dismiss, [Doc. No. 8]; and
2. Plaintiff's Motion for Leave to Amend Her Complaint, [Doc. Nos. 10 and 11].

These motions have been referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The undersigned offers this Report and recommends that Defendant's motion to dismiss be **GRANTED** and that Plaintiff's motion for leave to amend be **DENIED**.

**I. INTRODUCTION**

On July 30, 1999, Plaintiff filed this case against Defendant, her former employer. Defendant has a collective bargaining agreement with the United Steel Worker's of America, Local 9368 ("the Union"), and Plaintiff is a member of the Union.

The undersigned agrees with Defendant's observation that Plaintiff's Complaint is not a model of clarity, and that the Complaint would be more properly organized into

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separate counts. See Fed. R. Civ. P. 10(b). From a review of the Complaint, the undersigned finds that Plaintiff's Complaint purports to state the following causes of action against Defendant:<sup>1/</sup>

Count I – Wrongful termination

- Part A Plaintiff alleges she has a disability as defined by the Americans with Disability Act ("ADA"), and that Defendant terminated her employment in violation of the ADA. See 42 U.S.C. § 12112.
- Part B Plaintiff alleges that Defendant terminated her employment in retaliation for the exercise of her rights as a member of the Union. See 29 U.S.C. § 157.
- Part C Plaintiff alleges that her termination (due to her disability and her exercise of union rights) violates Oklahoma's public policy. See Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989).

Count II – Breach of Contract

Plaintiff alleges that by terminating her Defendant breached the terms of the collective bargaining agreement between the Union and Defendant. Plaintiff also alleged that Defendant's breach was malicious and in bad faith.

Count III – Tortious Interference With Prospective Economic Advantage

Plaintiff alleges that by terminating her Defendant denied her the prospective economic benefits she would have been entitled to under the collective bargaining agreement between the Union and Defendant.

Count IV – *Prima Facie* Tort

Plaintiff alleges that even if Defendant acted lawfully in the manner in which it terminated her employment, some unspecified right of hers has been injured and she is entitled to compensation under a *prima facie* tort theory.

See Doc. No. 1.

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<sup>1/</sup> The undersigned has reformulated Plaintiff's claims into Counts for clarity and ease of reference. The undersigned's reformulation is slightly different than that set forth by Defendant in its motion to dismiss.

In Count I(C) of her original Complaint, Plaintiff alleges that Defendant terminated her in violation of Oklahoma's public policy. Count I(C) does, therefore, attempt to assert a Burk claim under Oklahoma law. See Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989). For a Burk cause of action to exist, Plaintiff must establish that Defendant terminated her in violation of some public policy which is clearly articulated in the constitution, statutes or decisional law of Oklahoma. Id. In her complaint, Plaintiff identified two public policies which she alleges Defendant violated. First, Plaintiff alleges that Defendant violated the public policy expressed in 25 Okla. Stat. § 1302(A)(1), prohibiting discrimination based on disability. Second, Plaintiff alleges that Defendant violated a public policy against retaliating against employees who exercise their rights as union members. Plaintiff does not, however, cite any Oklahoma constitutional provision, statute or decision as the source of this second public policy.

Plaintiff has filed a motion for leave to amend her Complaint. Plaintiff seeks leave to add an additional allegation to Count I(C) of her Complaint. Plaintiff wishes to allege that Defendant violated an additional public policy when it terminated her. Plaintiff wishes to allege that Defendant violated the policy expressed in 40 Okla. Stat. § 1-103, dealing with the prevention of unemployment. Plaintiff does not, however, allege how it is that Defendant violated the policy articulated by the Oklahoma legislature in § 1-103. Plaintiff also seeks leave to "reform" Count II of her Complaint to add a claim against Defendant under 29 U.S.C. § 185, which authorizes, in certain

circumstances, suits in federal court for breach of contracts between an employer and a labor union.

Defendant moves to dismiss all counts in Plaintiff's original Complaint, except Count I(A) – Plaintiff's ADA claim. Defendant also argues that Plaintiff's motion for leave to amend should be denied as futile under Foman v. Davis, 371 U.S. 178 (1962). Defendant argues that Plaintiff's request to amend is futile because both of the claims she seeks to add would be subject to dismissal. The undersigned will examine each of Plaintiff's claims below -- those currently in the original Complaint and those sought to be added by amended.

## **II. DISCUSSION**

### **A. COUNT I(A) – ADA CLAIM**

Defendant does not seek dismissal of this claim.

### **B. COUNT I(B) – RETALIATION FOR EXERCISE OF UNION RIGHTS**

Plaintiff concedes that this claim should be dismissed as it is preempted by the National Labor Relations Act ("NLRA"). Claims such as those alleged in Count I(B) are to be submitted to the National Labor Relations Board. See San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959); and Sears, Roebuck and Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 197 (1978). Consequently, the undersigned recommends that Count I(B) be dismissed.

**C. COUNT I(C) – BURK<sup>2/</sup> PUBLIC POLICY CLAIMS UNDER OKLAHOMA LAW**

Defendant argues that Plaintiff's Burk claims must be dismissed pursuant to the rule recently announced in Collier v. Insignia Financial Group, 981 P.2d 321 (Okla. 1999). In Collier, the Oklahoma Supreme Court held that a Burk public policy claim is not available if there is an existing statutory remedy for the public policy violation under Oklahoma law. Id. at 323 and 325-26. Plaintiff concedes Defendant's motion to dismiss with regard to the allegations currently in her Complaint. That is, Plaintiff concedes that Oklahoma law provides statutory remedies for claims based on disability discrimination and for discrimination claims based on a the exercise of union rights. There is, therefore, no need to extend Burk to cover these claims. See, e.g., 25 Okla. Stat. §§ 1302(A)(1) and 1501-1508 (stating Oklahoma's policy regarding discrimination based on disability and providing remedies for violation of that policy). The undersigned recommends, therefore, that Count I(C) of Plaintiff's Complaint be dismissed.

Plaintiff does not concede, however, that the Burk claim she raises in her motion for leave to amend should be dismissed. Plaintiff relies on 40 Okla. Stat. § 1-103 to

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<sup>2/</sup> The undersigned uses the term Burk to refer to the public policy tort exception to the employment-at-will doctrine recognized by the Oklahoma Supreme Court in Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989).

satisfy the first prong of her Burk claim, which requires the clear articulation of a public policy. Section 1-103 provides as follows:

**Declaration of state public policy**

As a guide to the interpretation and application of [the Employment Security Act of 1980], the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with nationwide system of employment services, by devising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during periods of employment, thus maintaining purchasing power and limiting the serious social consequences of unemployment. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

42 Okla. Stat. § 1-103.

Oklahoma's legislature enacted the Employment Security Act of 1980 ("ESA"):

(1) "to promote employment security by increasing opportunities for placement through the maintenance of a system of public employment offices," designed to cooperate "with appropriate agencies of other states and the federal government"; and

(2) "to provide . . . for the payment of compensation to individuals with respect to their unemployment." 40 Okla. Stat. § 1-102 (defining the purpose of the ESA). Consistent with these purposes, the Oklahoma legislature declared in § 1-103 that it would be the policy of Oklahoma "to prevent [unemployment's] spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family." Id. Plaintiff argues that this language has established a public policy in Oklahoma which prevents the firing of any employee absent good cause.

Plaintiff argues that § 1-103 requires, as a matter of public policy, that no employee in the state of Oklahoma be fired absent good cause. Plaintiff argues further that a firing, absent good cause, would contravene this public policy. Plaintiff alleges that she was fired without cause. Plaintiff concludes, therefore, that she is entitled to bring a Burk claim for violation of the public policy expressed in § 1-103.

The initial determination of public policy is a question of law to be resolved by the court. Pearson v. Hope Lumber & Supply Co., Inc., 820 P.2d 443, 444 (Okla. 1991). The Court must first decide whether a discernable public policy is implicated by the discharge of an otherwise at-will employee to allow the employee to go forward within the Burk framework. Id. The undersigned finds no discernible public policy in 40 Okla. Stat. § 1-103 which is implicated by the facts of this case.

According to the Oklahoma Supreme Court,

Oklahoma's jurisprudence has historically evinced a great respect - which abides even to this day [May 1999] - for the common-law doctrine that an employment contract of

indefinite duration may be terminated "for good cause, for no cause, or even for cause morally wrong" with no liability for breach of contract.

Collier, 981 P.2d at 323 (citing several Oklahoma cases). If Plaintiff's interpretation of § 1-103 is correct, Burk would no longer operate as a narrow exception to Oklahoma's employment-at-will doctrine, Burk would act as a complete abrogation of the employment-at-will doctrine in Oklahoma. Plaintiff is arguing that § 1-103 subjects all employee terminations to a good cause standard in direct contravention of the employment-at-will doctrine which allows an employee to be terminated for no cause. The policy stated in § 1-103 is not sufficiently clear for this Court to find that the Oklahoma legislature intended a complete abrogation of Oklahoma's employment-at-will doctrine.

The Oklahoma Supreme Court has also consistently held that to state a tort claim under Burk, the employee must have been terminated for (a) refusing to participate in an illegal activity; (b) performing an important public obligation; (c) exercising a legal right or interest; (d) exposing some wrongdoing by the employer; or (e) performing an act that public policy would encourage or, for refusing to do something that public policy would condemn, when the discharge is coupled with a showing of bad faith, malice, or retaliation on the part of the employer. See Hinson v. Cameron, 742 P.2d 549, 552-53 (Okla. 1987); Smith v. Farmers Cooperative Ass'n of Butler, Oklahoma, 825 P.2d 1323, 1326 (Okla. 1992); Gilmore v. Enogex, Inc., 878 P.2d 360, 363 (Okla. 1994); Groce v. Foster, 800 P.2d 902, 904-905 (Okla. 1994); Burk, 770 P.2d at 28-29. Plaintiff's proposed amended complaint does not allege

facts which would place her § 1-103 public policy claim into any of these categories. Specifically, in connection with her § 1-103 claim, Plaintiff does not allege that she was terminated for refusing to do something that public policy would condemn or for performing an act that public policy would encourage. Plaintiff also does not allege the requisite bad faith, malice or retaliation by Defendant in connection with her § 1-103 public policy claim.

For the foregoing reasons, the undersigned recommends that Plaintiff's motion for leave to amend be denied as to Count I(C). Plaintiff's proposed amendment does not state a valid Burk tort claim. Permitting the amendment would, therefore, be futile.

**D. COUNT II – BREACH OF CONTRACT**

In Count II, Plaintiff alleges a breach of contract claim under Oklahoma law. Plaintiff alleges that Defendant breached its collective bargaining agreement with the Union when it terminated her. Plaintiff concedes that her state law contract claim should be dismissed because such state law claims are preempted by the Labor-Management Relations Act, 29 U.S.C. § 185. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 210-13 (1985); and Saunders v. Amoco Pipeline Co., 927 F.2d 1154, 1155 (10th Cir. 1991).

In her motion for leave to amend, Plaintiff seeks to "reform" Count II of her Complaint. Plaintiff wishes to amend her Complaint to add a federal breach of

contract claim pursuant to 29 U.S.C. § 185 (i.e., the section preempting her state breach of contract claim). Section 185 provides as follows:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (also known as Section 301 of the Labor-Management Relations Act).

To recover against an employer under § 185 for breach of a collective bargaining agreement, an employee must prove two facts: (1) that the union breached its duty of fair representation, and (2) that the employer breached the terms of the collective bargaining agreement. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564 (1990); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-71 (1976); Vaca v. Sipes, 386 U.S. 171 (1967). Plaintiff's proposed amendment alleges fact number two, but it contains no allegations which would establish fact number one. Thus, on its face, Plaintiff's proposed amendment fails to state a valid claim under 29 U.S.C. § 185.

Defendant does not dispute that under certain circumstances, Plaintiff is entitled to bring a claim under § 185 for breach of the collective bargaining agreement between Defendant and the Union. Defendant argues, however, that Plaintiff has not satisfied § 185's exhaustion requirement as recognized by the Tenth Circuit in United Food and Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc., 889 F.2d

940, 944-45 (10th Cir. 1989). See also Garvin v. American Telephone & Telegraph Co., 174 F.3d 1087, 1093 (10th Cir. 1999). An employee can only sue under § 185 if he or she has exhausted the grievance procedures provided in the collective bargaining agreement itself. Exhaustion can be excused, however, when: (1) it would be futile; (2) the employer through its conduct has repudiated the grievance procedure itself; or (3) the union has prevented the employee from utilizing the grievance process by breaching its duty of fair representation. Upon reviewing her proposed amendment, the undersign finds that Plaintiff has not plead facts sufficient to establish that she has exhausted the grievance procedures under the collective bargaining agreement between Defendant and the Union, or that she meets one of the recognized grounds for excusing a failure to exhaust. Permitting the amendment would, therefore, be futile. Consequently, the undersigned recommends that the Court deny Plaintiff's motion to amend/"reform" Count II of her Complaint.

**E. COUNT III – TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE**

In Count III, Plaintiff alleges that by terminating her, Defendant denied her the prospective economic benefits she would have been entitled to under the terms of the collective bargaining agreement between the Union and Defendant. Plaintiff concedes that her state law tortious interference claim should be dismissed. Like Plaintiff's breach of contract claim, her tortious interference claim is inextricably intertwined with the collective bargaining agreement between Defendant and the Union. Consequently, her state law tort claim is preempted by the Labor-Management Relations Act, 29 U.S.C. § 185. See Lueck, 471 U.S. at 210-13; and Saunders, 927 F.2d at 1155.

F. COUNT IV – *PRIMA FACIE* TORT

The undersigned finds that Plaintiff's *prima facie* tort claim is precluded by the Tenth Circuit's holding in Merrick v. Northern Natural Gas Co., 911 F.2d 426 (10th Cir. 1990). Merrick involved a dispute between Mr. Merrick and his former employer and his former supervisor. Mr. Merrick sued his former employer alleging age discrimination. Mr. Merrick sued his former supervisor alleging intentional infliction of emotional distress. The former supervisor, a female, counterclaimed against Mr. Merrick, alleging intentional infliction of emotional distress and *prima facie* tort on the grounds Mr. Merrick mistreated and harassed her because she was a woman and because she did not conform her religious beliefs to Mr. Merrick's. The district court dismissed the supervisor's *prima facie* tort counterclaim, and the Tenth Circuit affirmed the dismissal. Id. at 433.

"The *prima facie* tort doctrine permits the recovery of damages for conduct that does not fall within a traditional category of tort liability." Merrick, 91 F.2d at 433. The Restatement (Second) of Torts defines the cause of action as follows: "One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances." Id. at § 870. As the comments to § 870 make clear, § 870 is designed to provide a standard which courts can use to determine whether intentional conduct, which might not otherwise fall within one of the pre-existing common law torts, should be considered tortious. Section 870 actually requires courts to engage in a balancing of the interests of the injured party, the actor and society (i.e., the type of balancing

which has already occurred with respect to the currently recognized intentional torts). Section 870 provides a framework within which courts can conduct this balancing. In her brief, Plaintiff does not engage in the sort of balancing analysis which would have to occur under § 870 before the Court could determine whether that section authorized a cause of action based on the facts of this case.

In Merrick, the Tenth Circuit was called upon to specifically address the *prima facie* tort doctrine under Oklahoma law. The Tenth Circuit reviewed all relevant Oklahoma cases, including Hibbard v. Halliday, 158 P. 1158 (Okla. 1916) upon which Plaintiff solely relies. Following this review, the Tenth Circuit found that Oklahoma has only recognized *prima facie* tort liability in cases involving "malicious infliction of injury to business or property interests." Merrick, 911 F.2d at 433. The Tenth Circuit concluded by holding as follows:

Although Hibbard broadly stated that "[a]t common law there was a cause of action whenever one person did damage to another willfully and intentionally, without just cause or excuse," Hibbard, 158 P. at 1159, neither Hibbard nor any other Oklahoma Supreme Court case has extended this common law doctrine outside the context of malicious injury to business or property interests.

Id. The Tenth Circuit refused, therefore, to extend Oklahoma's *prima facie* tort doctrine to cover alleged sex and religious discrimination in the employment context. In her brief, Plaintiff offers no reason why this Court should extend Oklahoma's *prima facie* tort doctrine to cover alleged discrimination based on disability or union activities in the workplace, when the Tenth Circuit was unwilling to do so in a workplace case involving alleged sex and religious discrimination. The undersigned recommends,

therefore, that the Court grant Defendant's motion to dismiss Count IV of Plaintiff's Complaint.

### **RECOMMENDATION**

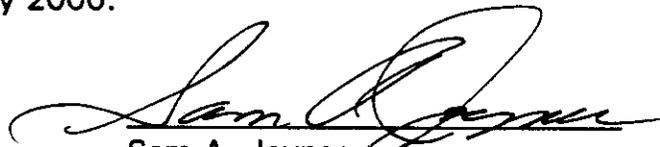
The undersigned recommends that Defendant's motion to dismiss be **GRANTED**, (doc. no. 8), and that Plaintiff's motions for leave to amend be **DENIED**. [Doc. Nos. 10 and 11]. The undersigned finds that Counts I(B), I(C), II, III and IV fail to state a claim upon which relief can be granted, and that they should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). The undersigned also finds that the claims Plaintiff wishes to assert by way of amendment also fail to state a claim upon which relief can be granted, and would, therefore, be subject to dismissal pursuant to Rule 12(b)(6). Consequently, the undersigned finds that Plaintiff's motion for leave to amend should be denied as futile pursuant to Foman v. Davis, 371 U.S. 178 (1962). Should this Report and Recommendation be adopted, the only surviving claim would be the ADA claim alleged by Plaintiff in Count I(A) of her Complaint.

Given the number of claims which Plaintiff was willing to concede should be dismissed from her Complaint, the undersigned has serious concerns about how seriously Plaintiff and her counsel take their obligations under Fed. R. Civ. P. 11 to ensure that the claims they do assert are warranted by existing law. Counsel is warned that he must ensure that future claims are on a sound legal footing before they are asserted in this case.

**OBJECTIONS**

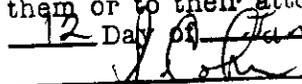
The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 12th day of January 2000.

  
Sam A. Joyner  
United States Magistrate Judge

**CERTIFICATE OF SERVICE**

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

12 Day of Jan 2000  


**FILED**

**JAN 11 2000**

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

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

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CDR ASSESSMENT GROUP, INC.,  
**PLAINTIFF,**  
v.  
CDR INTERNATIONAL, L.L.C., DAVID L.  
DOTLICH, PETER C. CAIRO and JOSSEY-  
BASS, INC.,  
**DEFENDANTS,**  
CDR INTERNATIONAL, L.L.C. and DAVID L.  
DOTLICH,  
**THIRD-PARTY PLAINTIFFS,**  
v.  
NANCY E. PARSONS, KIMBERLY R.  
BRINKMEYER and CDR ASSESSMENT  
GROUP, INC.,  
**THIRD-PARTY DEFENDANTS.**

Civil No. 99CV0729B (E)

ENTERED ON DOCKET  
DATE JAN 12 2000

**CONFIDENTIALITY AND PROTECTIVE ORDER**

Pursuant to FRCP 26C, the Court enters the following Protective Order limiting  
the use and disclosure of discovered information as provided herein.

IT IS HEREBY ORDERED as follows:

1. Scope. This Confidentiality and Protective Order ("Protective Order") shall govern discovery in this action and shall be applicable to all information provided, produced or obtained, whether formally or informally, in the course of discovery in this action, including, without limitation, information provided, produced or obtained in or through any depositions, interrogatory response, response to a request for admission, and any document or thing provided or made available for inspection and/or copying (collectively "document, thing or

1 testimony"). As used herein, the term "document" shall include all forms of information  
2 delineated in FRCP 34A.

3           2.     Protected Information. Any person or entity, whether a party or a  
4 nonparty, and whether acting on its own or through counsel (hereafter "person"), which is  
5 participating in discovery in this action may designate any document, thing or testimony either  
6 CONFIDENTIAL or CONFIDENTIAL--COUNSEL EYES ONLY (or words to that effect) so  
7 long as such person reasonably believes that such document, thing or testimony contains or  
8 discloses, respectively, information justifying a CONFIDENTIAL or CONFIDENTIAL--  
9 COUNSEL EYES ONLY designation. CONFIDENTIAL information is:

- 10                   (a)     proprietary information or specifications;
- 11                   (b)     trade secrets;
- 12                   (c)     confidential know-how;
- 13                   (d)     proprietary business and financial information and any other

14 information, the public disclosure of which is likely to have the effect of causing substantial  
15 harm to the competitive position of the person from which the information is obtained.

16 CONFIDENTIAL--COUNSEL EYES ONLY information is: CONFIDENTIAL information  
17 which is of an extremely sensitive nature and which might cause significant harm if disclosed to  
18 the disclosing party's competitors, customers or others. The information contained or disclosed  
19 in any document, thing or testimony which has been designated either CONFIDENTIAL or  
20 CONFIDENTIAL--COUNSEL EYES ONLY in accordance with this Protective Order shall be  
21 referred to collectively as "Protected Information".

22           3.     Procedure For Designating Documents. Any person desiring to subject the  
23 information contained or disclosed in any document (including, without limitation, any  
24 document responsive to a Rule 34 request or to a Rule 45 subpoena and responses to  
25 interrogatories and/or requests for admission) delivered to or served on any party to the  
26 confidentiality provisions of this Protective Order must designate such document either

1 CONFIDENTIAL or CONFIDENTIAL--COUNSEL EYES ONLY in the manner provided  
2 herein, unless the parties agree to an alternative procedure. Any document delivered to or served  
3 on any party may be designated either CONFIDENTIAL or CONFIDENTIAL--COUNSEL  
4 EYES ONLY by affixing the legend "CONFIDENTIAL" or "CONFIDENTIAL--COUNSEL  
5 EYES ONLY" respectively, to every page of the document. All correspondence, legal  
6 memoranda, motion papers, pleadings and other written material which quote or refer to the  
7 substance of any CONFIDENTIAL information and/or CONFIDENTIAL--COUNSEL EYES  
8 ONLY information shall also be treated as such in accordance with the provisions of this  
9 Protective Order, and such documents shall be marked in accordance with this paragraph.

10 4. Inadvertent Failure To Designate. If a party, through inadvertence,  
11 produces any CONFIDENTIAL information and/or CONFIDENTIAL--COUNSEL EYES  
12 ONLY information without labeling or marking or otherwise designating it as such in accordance  
13 with the provisions of this Protective Order, the designating party may give written notice to the  
14 receiving party that the document or thing produced is deemed CONFIDENTIAL information  
15 and/or CONFIDENTIAL--COUNSEL EYES ONLY information and should be treated as such  
16 in accordance with the provisions of this Protective Order. The receiving party must treat such  
17 documents and things as CONFIDENTIAL information and/or CONFIDENTIAL--COUNSEL  
18 EYES ONLY information from the date such notice is received. Disclosure, prior to the receipt  
19 of such notice, of such CONFIDENTIAL information and/or CONFIDENTIAL--COUNSEL  
20 EYES ONLY information to persons not authorized to receive CONFIDENTIAL information  
21 and/or CONFIDENTIAL--COUNSEL EYES ONLY information shall not be deemed a violation  
22 of this Protective Order; provided, however, that the party making such disclosure shall notify  
23 the other party in writing of all such unauthorized persons to whom such disclosure was made.

24 5. Procedure For Designating Deposition Testimony. If any party or  
25 nonparty believes that either CONFIDENTIAL or CONFIDENTIAL--COUNSEL EYES ONLY  
26 information belonging to it has been or may be disclosed in the course of any deposition

1 (whether through any question, answer, colloquy and/or exhibit), then such person may designate  
2 the deposition, portion thereof, or exhibit as CONFIDENTIAL or CONFIDENTIAL--  
3 COUNSEL EYES ONLY by (a) stating on the record of the deposition that such deposition,  
4 portion thereof, or exhibit is either CONFIDENTIAL or CONFIDENTIAL--COUNSEL EYES  
5 ONLY, or by (b) stating in a writing served on counsel for the other party, up to thirty (30) days  
6 after receipt of such deposition transcript by the designating person that such deposition, portion  
7 thereof, or exhibit is either CONFIDENTIAL or CONFIDENTIAL--COUNSEL EYES ONLY.  
8 The entire deposition transcript and exhibits shall be treated as CONFIDENTIAL in accordance  
9 with the provisions of this Protective Order until written designation is made or the time within  
10 which to make such written designation has expired; provided, however, that the party asserting  
11 confidentiality may, prior to the expiration of the 30 days, designate that all or a portion of the  
12 deposition or its exhibits should be deemed CONFIDENTIAL--COUNSEL EYES ONLY.  
13 Where a claim of confidentiality is made at any deposition, all persons in attendance who, by  
14 virtue of the terms of this Protective Order, do not have access to such Protected Information  
15 shall be excluded from attendance at the portion or portions of the deposition at which such  
16 Protected Information will be or might be disclosed. If any of the depositions, portions thereof,  
17 or exhibits are identified as CONFIDENTIAL or CONFIDENTIAL--COUNSEL EYES ONLY,  
18 then all originals, copies and synopses thereof, shall be marked in accordance with this Protective  
19 Order.

20           6.     Restrictions on Use and Disclosure of Protected Information. All  
21 Protected Information obtained on behalf of a party from any person through discovery in this  
22 lawsuit, and any summaries, abstracts, or indices thereof, shall be used by the persons who  
23 receive such information ("Recipients") solely for the preparation and trial of this lawsuit  
24 (including appeals) and for no other purpose whatsoever. Unless otherwise authorized by the  
25 designating person or ordered by this Court, Recipients shall not make Protected Information  
26 public, shall not use Protected Information in any other civil action or administrative proceeding,

1 and shall not disclose or divulge Protected Information to anyone except as permitted in this  
2 Protective Order.

3 7. Permitted Disclosure of Confidential Information. Any information which  
4 has been designated as CONFIDENTIAL information in accordance with this Protective Order  
5 may be disclosed to:

6 a. Partners and associate attorneys of the law firms which are then of  
7 record for the party requesting the Protected Information and any law clerks, paralegals,  
8 stenographic, support and clerical employees of such law firms whose functions require them to  
9 have access to the Protected Information;

10 b. Any outside expert or consultant for each party and any law clerks,  
11 paralegals, stenographic, support and clerical employees associated with such expert or  
12 consultant whose functions require them to have access to the Protected Information; provided,  
13 however, that all such outside experts or consultants and associated law clerks, paralegals,  
14 stenographic, support and clerical employees shall first have executed an Undertaking in the  
15 form of Exhibit 1 attached hereto, which Undertaking shall remain in the possession of counsel  
16 for the party which has retained such outside expert or consultant;

17 c. The individuals: David L. Dotlich, Peter C. Cairo, Nancy E.  
18 Parsons, and Kimberly R. Brinkmeyer;

19 d. Designated employees of Jossey-Bass whose functions require  
20 them to have access to the Protected Information, provided, however, that all such designated  
21 employees have first executed an Undertaking in the form of Exhibit 1.

22 e. The officers, directors, or employees of the party producing the  
23 Protected Information or of the person designating the Protected Information;

24 f. With respect to any particular document designated as Protected  
25 Information, any person who is named on the face of such document as having been its author or  
26 one of its recipients, or who appears from other documents or testimony to have been a recipient

1 of such document;

2 g. The Court before which this case is pending, including court  
3 personnel who are authorized by the Judges of this District Court to review such information;  
4 and

5 h. Any stenographer or court reporter present in his or her official  
6 capacity at any hearing, deposition, or other proceeding in this case.

7 8. Permitted Disclosure of CONFIDENTIAL--COUNSEL EYES ONLY  
8 Information. The provisions of paragraph 7 of this Protective Order, applicable to  
9 CONFIDENTIAL information, shall apply to CONFIDENTIAL--COUNSEL EYES ONLY  
10 information with the following exceptions:

11 a. Access to CONFIDENTIAL--COUNSEL EYES ONLY  
12 information shall not be given to the persons set forth in paragraphs 7(c) and 7(d) above, or to the  
13 law clerks, paralegals, stenographic, support and clerical employees of the persons identified in  
14 paragraphs 7(c) and 7(d) above.

15 b. Access to CONFIDENTIAL--COUNSEL EYES ONLY  
16 information may be given to the persons set forth in paragraph 7(b) above and any law clerks,  
17 paralegals, stenographic, support and clerical employees associated with the persons identified in  
18 paragraphs 7(b) above, provided that the party seeking such disclosure first gives counsel for the  
19 other parties the name of any such person to whom disclosure is sought to be made and  
20 represents that the person is not affiliated with the party seeking disclosure nor is a competitor of  
21 the party that produced the CONFIDENTIAL—COUNSEL EYES ONLY information. Upon  
22 receiving such notice, the other parties shall have ten (10) days to object to the disclosure, in  
23 which case the matter will be referred for resolution by the Court. The party seeking to disclose  
24 the CONFIDENTIAL—COUNSEL EYES ONLY information shall not make such disclosure  
25 until the ten-day period expires without objection or the court has determined that the particular  
26 disclosure should be allowed.



1 | dispute with respect to the designation of any discovery material as CONFIDENTIAL  
2 | information or CONFIDENTIAL--COUNSEL EYES ONLY information, counsel for the party  
3 | objecting to the designation shall inform counsel for the party that designated the discovery  
4 | material CONFIDENTIAL or CONFIDENTIAL--COUNSEL EYES ONLY information of the  
5 | objection and the bases therefore. If the parties are unable to resolve the dispute, the discovery  
6 | materials subject to the dispute will be presented to the Court for *in camera* inspection and  
7 | determination of the appropriate designation. The party challenging the designation shall handle  
8 | the discovery materials as initially designated until the parties agree to, or the Court orders, a  
9 | different designation.

10 |           13.    Procedure Upon Termination of Action. Within sixty (60) days of the  
11 | final determination of this action, including all appeals, and unless otherwise agreed to in writing  
12 | by counsel, each party shall (a) return any original documents and things constituting Protected  
13 | Information produced to a receiving party to the designating party, and (b) either certify in  
14 | writing that the remaining copies of such documents and things have been destroyed or return  
15 | them to the designating party, such election to be made by the designating party.  
16 | Notwithstanding the foregoing, the attorneys of record for each party may retain all pleadings,  
17 | briefs, memoranda, motions, and other documents containing their work product which refer to  
18 | or incorporate Protected Information and will continue to be bound by the terms of this  
19 | Protective Order with respect to all such retained information.

20 |           14.    Privileged Information. Nothing contained in this Protective Order shall  
21 | be construed to require production of Protected Information which is privileged or otherwise  
22 | protected from discovery. If a party, through inadvertence, produces a document or information  
23 | that it believes is immune from discovery pursuant to the attorney-client privilege and/or the  
24 | work product privilege, such production shall not be deemed a waiver of any privilege, and the  
25 | producing party may give written notice to the receiving party that the document or information  
26 | produced is deemed privileged and that return of the document or information is requested.

1 Upon receipt of such written notice, the receiving party shall immediately gather the original and  
2 all copies of the document or information of which the receiving party is aware and shall  
3 immediately return the original and all such copies to the producing party. The return of the  
4 document(s) and/or information to the producing party shall not preclude the receiving party  
5 from later moving the Court to compel production of the returned documents and/or information.

6 15. Continuing Order and Continuing Jurisdiction of This Court. The terms of  
7 the Protective Order shall survive the final termination of this action with respect to all Protected  
8 Information that is not or does not become known to the public. This Court shall retain  
9 jurisdiction, following termination of this action, to adjudicate all disputes either between the  
10 parties hereto or between a party hereto and a third party relating to or arising out of this  
11 Protective Order.

12 16. Custody of Protected Information. Documents and things designated as  
13 containing Protected Information and any copies or extracts thereof, shall be retained in the  
14 custody of the attorneys of record during the pendency of this action, except as reasonably  
15 necessary to provide access to persons authorized under the provisions of this Protective Order.

16 17. Transmission of Protected Information. Nothing in this Protective Order  
17 shall prohibit the transmission or communication of Protected Information by hand delivery;  
18 face-to-face conference; in sealed envelopes or containers via the mails or an established freight,  
19 delivery or messenger service; or by telephone, telegram, facsimile or other electronic  
20 transmission system if under the circumstances, there is no reasonable likelihood that the  
21 transmission will be intercepted and misused.

22 DATED this 11<sup>th</sup> day of January, 2000.

23  
24 S/Claire V. Eagan  
25 U.S. Magistrate  
26 CLAIRE V. EAGAN  
MAGISTRATE JUDGE OF DISTRICT COURT

1 IN THE UNITED STATES DISTRICT COURT  
2 ~~NORTHERN DISTRICT OF OREGON~~ *NORTHERN DISTRICT OF OKLAHOMA*  
3 FOR THE ~~DISTRICT OF OREGON~~ *CUE*

4 CDR ASSESSMENT GROUP, INC.,

5 **PLAINTIFF,**

6 v.

7 CDR INTERNATIONAL, L.L.C., DAVID L.  
8 DOTLICH, PETER C. CAIRO and JOSSEY-  
9 BASS, INC.,

10 **DEFENDANTS,**

11 CDR INTERNATIONAL, L.L.C., DAVID L.  
12 DOTLICH,

13 **THIRD-PARTY PLAINTIFFS,**

14 v.

15 NANCY E. PARSONS, KIMBERLY R.  
16 BRINKMEYER and CDR ASSESSMENT  
17 GROUP, INC.,

18 **THIRD-PARTY DEFENDANTS.**

Civil No. 99CV0729B (E)

19 **UNDERTAKING**

20 1. My name is \_\_\_\_\_ . I live at

21 \_\_\_\_\_ . I am employed as (state  
22 position) \_\_\_\_\_ by (state name and address of employer)

23 2. I have read the Protective Order that has been entered in this case, and a  
24 copy of it has been given to me. I understand the provisions of this Order, and agree to comply  
25 with and to be bound by its provisions.  
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3. I declare under penalty of perjury under the laws of the State of ~~Oregon~~ CND  
that the foregoing is true and correct.

Executed this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_

313069\_1

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

LEONARD A. PAGANO, et al., )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 THUMANN, INCORPORATED, et al. )  
 )  
 Defendants. )

No. 98-CV-359-K ✓

ENTERED ON DOCKET  
JAN 11 2000

FILED

JAN 11 2000

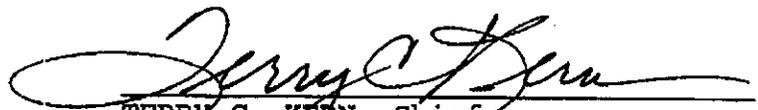
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 10 day of January, 2000.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

116

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

RON DOUGHTY,  
Plaintiff,  
vs.  
DELAWARE COUNTY BOARD OF  
COUNTY COMMISSIONERS,  
Defendants.

ENTERED ON DOCKET

DATE JAN 11 2000

No. 98-CV-981-K ✓

**FILED**  
JAN 11 2000

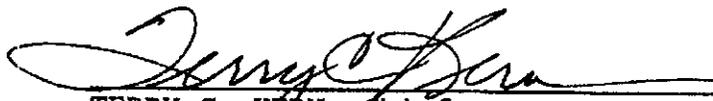
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 10 day of January, 2000.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

107

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

RANDY BORUM,

Plaintiff,

vs.

COFFEYVILLE STATE BANK and CSB  
BANCORP,

Defendant.

ENTERED ON DOCKET  
DATE JAN 11 2000

No. 98-C-431-K ✓

**FILED**

JAN 11 2000

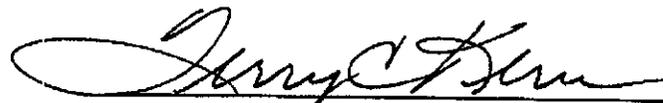
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the Defendants' Motion for Summary Judgment pursuant to Fed. R. Civ. Pro. 56. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith, the Court finds summary judgment is appropriate in favor of Defendants.

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

ORDERED this 10 day of January, 2000.



TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

137

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

**F I L E D**

JAN 11 2000

MICHAEL EUGENE PRICE, SR., )  
)  
Petitioner, )  
)  
vs. )  
)  
RON CHAMPION, Warden, )  
)  
Respondent. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 98-CV-755-B (E)

ENTERED ON DOCKET  
JAN 11 2000  
DATE \_\_\_\_\_

**ORDER**

This is a proceeding on Petitioner's 28 U.S.C. § 2254 habeas corpus petition. Petitioner is in custody of the Oklahoma Department of Corrections and appears in this matter *pro se*. Petitioner challenges his conviction in Tulsa County District Court, Case No. CRF-91-3860. Respondent has filed a response to the petition (Docket #10). Petitioner has filed a reply (#11) and a supplemental reply (#13), pursuant to the Court's Order of September 7, 1999 (#12). For the reasons discussed below, the Court finds the petition for writ of habeas corpus should be denied.

***BACKGROUND***

On February 21, 1992, Petitioner was convicted by a jury of Robbery With Firearm, After Former Conviction of Two or More Felonies, in Tulsa County District Court, Case No. CRF-91-3860.<sup>1</sup> In accordance with the jury's verdict, Petitioner was sentenced to thirty-six (36) years imprisonment. Throughout his proceedings in the state district court resulting in the thirty-six (36) year sentence, Petitioner was represented by counsel. Petitioner perfected a timely direct appeal.

---

<sup>1</sup>It appears Petitioner had other charges of Robbery With Firearm resolved in Tulsa County District Court, Case No. CRF-91-3662. The convictions resulting from those charges are not challenged in the instant petition.

On August 9, 1995, the Oklahoma Court of Criminal Appeals ("OCCA") reversed Petitioner's conviction and the case was remanded for a new trial.

On remand, Petitioner, after being warned by the trial court of the pitfalls of self-representation, proceeded to trial *pro se*. The jury found Petitioner guilty and recommended a sentence of sixty-five (65) years. According to the trial court's docket sheet, on October 5, 1995, Petitioner was sentenced in open court to sixty-five (65) years imprisonment and, at that time, Petitioner waived his right for representation for purposes of an appeal. See #10, Ex. B. The docket sheet also demonstrates that Petitioner, appearing *pro se*, did not file a notice of intent to appeal until October 30, 1995, or twenty-five (25) days after being sentenced in open court. As a result, Petitioner failed to perfect a timely direct appeal from the conviction entered after his second trial. See Rule 2.1(B), *Rules of the Court of Criminal Appeals*. The record reflects, however, that Petitioner made repeated unsuccessful attempts from October, 1995, through August, 1996, to obtain a copy of his trial transcripts. (See #10, trial court docket sheet attached to Ex. B).

On April 8, 1997, Petitioner, continuing to appear *pro se*, sought post-conviction relief in the trial court, alleging the following propositions of error:

1. The trial court erred in allowing improperly bolstered testimony in the case, not only in the 1995 trial, but also in the first trial in 1992.
2. The trial court erred in not granting a continuance in the trial so petitioner could call witnesses for the defense, thus denying petitioner a fair trial.
3. The trial court was without authority to sentence petitioner pursuant to the provisions of 21 O.S. § 51(B) "because the prior conviction's (sic) happen around the same time and was on the same inditement (sic) sheet as this charge," and because "[t]he conviction used were not 'completely executed' and thereby not fall under the purview of the enhancement statute's (sic)."
4. The trial court erred in allowing a juror to remain on the jury who on one day of jury

selection stated she did not know anyone who had been a victim of a violent crime, but on the next day admitted that she did know someone who had been the victim of a violent crime.

5. "The trial court erred in punishing the Petitioner for being successful on a direct appeal, allowed the jury to increase the sentence based on (39) other cases reversed at the same time."
6. "Governmental and prosecutor misconduct along with vindictive & selective prosecution grounds for reversal and sentence set aside. (sic) are grounds for vanishment (sic) from the state of Oklahoma."
7. "The trial court erred in giving a burden of proof instruction substituting the prosecutor's pleadings in place of the elements, after being admonished a number of times by the Court of Criminal Appeals not to give that instruction."
8. "The trial court committed egregious error more than once in the case at bar before this court today by instructing the jury that the defendant was presumed to be 'not guilty' after being ordered by the Court of Criminal Appeals to 'stop' giving his own instruction in the court."

(#10, Ex. A). On August 12, 1997, the trial court entered its Order denying Petitioner's application for post-conviction relief and finding Petitioner had waived his claims by failing to perfect a direct appeal. Petitioner did not file a post-conviction appeal in the OCCA.

Thereafter, on April 3, 1998, Petitioner filed a second application for post-conviction relief in the trial court. On May 18, 1998, the trial court entered its Order denying the second application, finding again that Petitioner had waived his claims and further stating that "[e]ven should this Court look to the substantive issues raised by the Petitioner, this Court does not understand the argument put forth by the Petitioner that he suffered the ineffective assistance of counsel and yet represented himself at trial *pro se*." (#10, attachment to Ex. B). Petitioner attempted to appeal the second denial of post-conviction relief by filing an appeal in the OCCA on June 29, 1998. However, on August 5, 1998, the OCCA entered its Order dismissing the appeal as untimely since Petitioner failed to file

the appeal within thirty (30) days of the date of the district court's Order denying relief.

Petitioner filed the instant petition for writ of habeas corpus on October 1, 1998. Petitioner claims that: (1) he was denied a direct appeal through no fault of his own, and (2) he "was denied the record to file a direct appeal in both state courts." (#1). In his response (#10), Respondent asserts that Petitioner's claims are procedurally barred. Petitioner has filed a reply (#11) and a supplemental reply (#13) addressing the procedural bar issue.

### ***ANALYSIS***

#### **A. Exhaustion/Evidentiary Hearing**

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law. Although the OCCA has never considered the merits of Petitioner's claim that he was denied a direct appeal through no fault of his own, due to Petitioner's multiple procedural defaults, the Court finds it would be futile to require Petitioner to return to state court to file a third application for post-conviction relief. The OCCA would undoubtedly impose a procedural bar on Petitioner's claims due to his failure to present his claim in prior proceedings, as required by Okla. Stat. tit. 22, § 1086. Therefore, the Court finds the exhaustion requirement of § 2254(b) is satisfied. See Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991); Harris v. Reed, 489 U.S. 255, 263 n.9 (1989).

The Court also finds that an evidentiary hearing is not necessary as Petitioner has not met his burden of proving entitlement to an evidentiary hearing. See Miller v. Champion, 161 F.3d 1249

(10th Cir. 1998). In denying Petitioner's second application for post-conviction relief, where he may have raised the claims presented in the instant petition,<sup>2</sup> the state trial court stated that "the matter under consideration does not present any genuine issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony." (#10, attachment to Ex. B). Thus, the state court denied an evidentiary hearing on Petitioner's claims and he shall not be deemed to have "failed to develop the factual basis of a claim in state court." Id. Therefore, his request is governed by standards in effect prior to enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") rather than by 28 U.S.C. § 2254(e)(2), as amended by the AEDPA. Id. Under pre-AEDPA standards, in order to be entitled to an evidentiary hearing, Petitioner must make allegations which, if proven true and "not contravened by the existing factual record, would entitle him to habeas relief." Id. Petitioner's claims in this case, as discussed below, are procedurally barred. Therefore, the Court finds that an evidentiary hearing is not necessary.

**B. Procedural Bar**

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 724;

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<sup>2</sup>Petitioner's second application for post-conviction relief as filed in the trial court is not part of the record in the instant case. However, in ¶ 14 of his petition for an appeal out of time, submitted to the OCCA after the trial court denied his second application for post-conviction relief, Petitioner asserts that he was denied a direct appeal because the law library supervisor for Tulsa County Jail failed to file his notice of intent to appeal. See #10, attachment to Ex. B.

see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

The Court finds Petitioner has defaulted his instant claims in state court two (2) times: first, when he failed to raise his claim that he had been denied a direct appeal through no fault of his own, despite having knowledge of the facts underlying the claim, in his first post-conviction application and then failed to appeal the trial court's denial of that post-conviction application; and second, when he failed to perfect a timely appeal from the trial court's denial of his second application for post-conviction relief. Applying the principles of procedural default to these facts, the Court concludes Petitioner's claims are procedurally barred from federal habeas corpus review. Based on Okla. Stat. tit. 22, § 1086, the OCCA routinely bars claims that could have been but were not raised in a first application for post-conviction relief. The state court's procedural bar as applied to these claims would be an "independent" ground because Petitioner's failure to comply with state procedural rules would be "the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar would be an "adequate" state ground because, as stated above, the OCCA consistently declines to review claims which could have been but were not raised on direct appeal or in a first application for post-conviction relief. Okla. Stat. tit. 22, § 1086.

Because of his procedural default of his claims in state court, this Court may not consider Petitioner's claims unless he is able to show cause and prejudice for the default, or demonstrate that

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

In his reply to Respondent's response (#11), Petitioner attempts to show cause for his procedural default by arguing that restrictions on access to legal materials imposed by the Oklahoma Department of Corrections ("DOC") constitute "cause" sufficient to excuse the alleged procedural default of his claims in state court. As to his failure to file a timely appeal from the denial of his second application for post-conviction relief, Petitioner alleges that the prison law library supervisor at Joseph Harp Correctional Center did not mail the petition in error to the OCCA in time to be filed by the deadline imposed by state procedural rules. (#13 at 5).

Significantly, however, Petitioner makes no effort to demonstrate "cause" for his failure to appeal the trial court's denial of his first application for post-conviction relief. Because of his failure to appeal, any subsequent request for relief raised in a post-conviction appeal would be subject to imposition of a procedural bar by the OCCA. Thus, even had Petitioner perfected a timely appeal from the trial court's denial of his second application for post-conviction relief, the OCCA would have imposed a procedural bar unless Petitioner offered a sufficient explanation for his failure to

appeal the denial of the first application. The Court concludes Petitioner has failed to demonstrate cause sufficient to excuse his procedural defaults in state court.

In addition, the Court specifically rejects Petitioner's assertion that DOC's limitations on access to the law library have interfered with preparation of his reply in the instant action and thereby constitute "cause" sufficient to excuse his procedural default. Petitioner has not demonstrated that the limitations on access to legal materials are "objective factor[s] external to the defense [which] impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Although the law library restrictions may have resulted in an increase in the amount of time required to prepare a reply in the instant case, Petitioner has not argued, and it does not appear, that the restrictions are in any way related to Petitioner's defaults in state court. Furthermore, Petitioner has not been prohibited from accessing legal materials. Instead, DOC officials have imposed restrictions on his access related to security and staffing concerns. This Court allowed Petitioner additional time to prepare a supplement to his reply and also directed that "should Petitioner need additional time to prepare a supplemental reply as a result of time or use restrictions imposed by prison officials, he should submit a timely request for additional time to the Court." (#12). Petitioner did not request additional time before submitting his supplemental reply. The Court concludes Petitioner was allowed sufficient access to legal materials to prepare his reply in this action.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 506 U.S. 390, 403-404 (1993); Sawyer v. Whitley, 505 U.S. 333, 339-341 (1992). However, in his supplemental reply (#13 at 8), Petitioner expresses an intentional choice to forego development of his claim of actual

innocence, stating that "to get into his innocence would give the respondents more room to work with should this Court rule the grounds are not barred." As a result, the Court concludes that Petitioner has failed to make a colorable showing of actual innocence and finds that the "fundamental miscarriage of justice" exception to the procedural default doctrine has no application to this case.

Petitioner has failed to demonstrate "cause and prejudice" or that a fundamental miscarriage of justice would occur if his claims are not considered. As a result, this Court is procedurally barred from considering Petitioner's claims.

**CONCLUSION**

Because Petitioner procedurally defaulted his claims in the state courts of Oklahoma and he has failed to demonstrate "cause and prejudice" or that a fundamental miscarriage of justice would occur if his claims are not considered, this Court is procedurally barred from considering Petitioner's claims. Therefore, his 28 U.S.C. § 2254 petition for writ of habeas corpus must be denied.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Petitioner's petition for writ of habeas corpus (#1) is **denied**.

SO ORDERED THIS 11<sup>th</sup> day of July, 2000.

  
THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 11 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 EMMET E. GOFF, )  
 )  
 Defendant. )

Case No. 00CV0003H(J)

ENTERED ON DOCKET

NOTICE OF DISMISSAL

JAN 11 2000

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Phil Pinnell, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 11<sup>th</sup> day of January, 2000.

UNITED STATES OF AMERICA

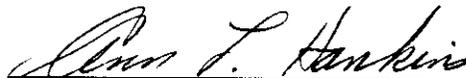
Stephen C. Lewis  
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 11<sup>th</sup> day of January, 2000, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Emmet E. Goff, 2645 N. Peoria, Tulsa, OK 74106.



Ann L. Hankins  
Financial Litigation Agent

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

**F I L E D**

JAN 11 2000

MICHAEL EUGENE PRICE, SR., )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
RON CHAMPION, Warden, )  
 )  
Respondent. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 98-CV-755-B (E)

ENTERED ON DOCKET

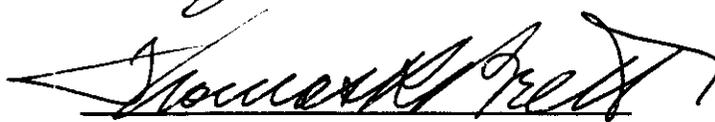
DATE JAN 11 2000

**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 11<sup>th</sup> day of Jan, 2000.



THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 11 2000

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 ) No. 99-CV-843B(J)  
 )  
 MARK E. VETETO, A/K/A MARK )  
 VETETO, A/K/A MARK EUGENE )  
 VETETO, )  
 )  
 Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE JAN 11 2000

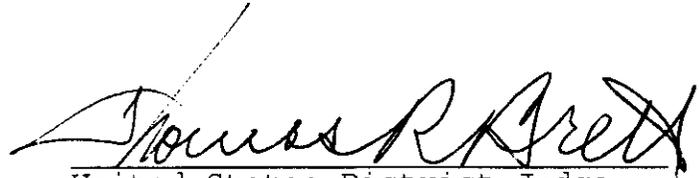
DEFAULT JUDGMENT

This matter comes on for consideration this 11<sup>th</sup> day of Jan, 2000, 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, Mark E. Veteto, a/k/a Mark Veteto, a/k/a Mark Eugene Veteto, appearing not.

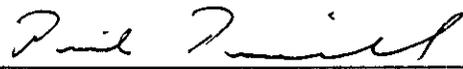
The Court being fully advised and having examined the court file finds that Defendant, Mark E. Veteto, a/k/a Mark Veteto, a/k/a Mark Eugene Veteto, was served with Summons and Complaint on December 15, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint 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, Mark E. Veteto, a/k/a Mark Veteto, a/k/a Mark Eugene Veteto, for the

principal amounts of \$1,844.64 and \$2,457.63, plus accrued interest of \$38.38 and \$58.37 respectively, plus interest thereafter at the rates of 8 percent and 9.13 percent per annum respectively until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.9979 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/dlo

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

**FILED**

JAN 10 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DEBBIE MILLS, )

Plaintiff, )

vs. )

Case No. 99-CV-0209-E(J) ✓

EQUITY RESIDENTIAL PROPERTIES )

MANAGEMENT SERVICES CORP.; )

EQUITY RESIDENTIAL PROPERTIES )

MANAGEMENT LIMITED )

PARTNERSHIP; EQUITY RESIDENTIAL )

PROPERTIES MANAGEMENT CORP.;

EQUITY RESIDENTIAL PROPERTIES )

TRUST and EQUITY RESIDENTIAL )

PROPERTIES, )

Defendants. )

ENTERED ON DOCKET

DATE JAN 11 2000

**STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiff, Debbie R. Mills, by and through her attorneys of record, and Defendants, Equity Residential Properties Management Services Corp., Equity Residential Properties Management Limited Partnership; Equity Residential Properties Management Corp.; Equity Residential Properties Trust and Equity Residential Properties Trust and Equity Residential Properties by and through its attorneys of record, stipulate to the dismissal with prejudice of all claims and causes of action brought in this case by the Plaintiff, pursuant to Fed. R. Civ. P. 41(a)(ii). The parties stipulate that they shall each bear their own attorneys' fees and costs.

Dated this 7<sup>th</sup> day of January, 2000.

47

CIT

X Debbie R. Mills

Debbie R. Mills

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