

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 18 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES R. GARRISON,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner of)
the Social Security Administration,)
)
Defendant.)

Case No. 00-CV-117-M ✓

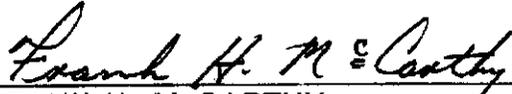
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DATE MAY 18 2000

ORDER

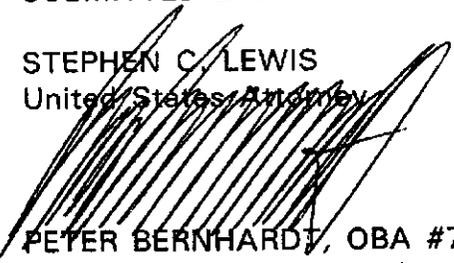
Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3).

DATED this 12th day of May 2000.


FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

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

MAY 18 2000

JAMES R. GARRISON,
Plaintiff,

v.

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

No. 00-CV-117-M

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
MAY 18 2000
DATE

ADMINISTRATIVE CLOSING ORDER

This case was remanded to the Commissioner of Social Security under sentence six of 42 U.S.C. §405(g). In accordance with N.D. LR 41, it is hereby ordered that the Clerk administratively close this action. This case may be reopened for final determination upon application of either party once the proceedings before the Commissioner are complete.

IT IS SO ORDERED.

Dated this 18th day of MAY, 2000.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MARVIN L. ROWELL,
SSN: 442-60-3114

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

MAY 18 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-CV-291-J

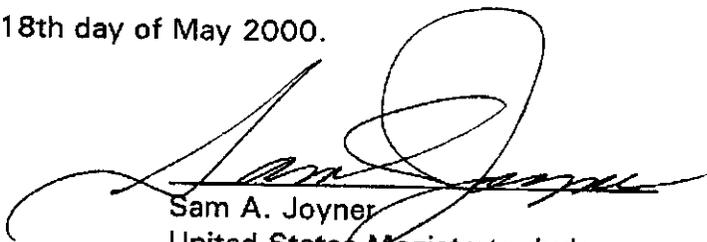
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DATE MAY 18 2000

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 18th day of May 2000.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARVIN L. ROWELL,
SSN: 442-60-3114

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

FILED

MAY 18 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-CV-291-J ✓

ENTERED ON DOCKET

DATE MAY 18 2000

ORDER^{1/}

Plaintiff, Marvin L. Rowell, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the decision of the Commissioner should be reversed because (1) the ALJ failed to properly consider Plaintiff's bilateral hand problems, (2) the ALJ ignored the opinion of Plaintiff's treating physicians and Plaintiff's medical records regarding chest pain and breathing difficulty, (3) new and additional evidence exists which should be considered on remand. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

^{1/} 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.

^{2/} Administrative Law Judge R.J. Payne (hereafter "ALJ") concluded that Plaintiff was not disabled on July 25, 1997. Plaintiff appealed to the Appeals Council. The Appeals Council declined Plaintiff's request for review on February 16, 1999. [R. at 5].

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was born February 11, 1954, and was 43 years old at the time of his hearing before the ALJ. [R. at 42]. Plaintiff completed his GED. Plaintiff testified that he was injured in November 1992 while he was working and was hit. Plaintiff states that he had neck surgery and still suffers from pain in his neck and shoulders, and from headaches related to this incident. [R. at 42].

According to Plaintiff, he had surgery in his left ear, but his hearing is still not perfect. Plaintiff also testified that he needed surgery for cataracts in his eyes. Plaintiff complained of pain in his left wrist, chest pain, and heart and lung spasms. [R. at 46].

Plaintiff stated that he injured his left eye when he was helping his son fix a truck by removing a bolt. [R. at 50]. According to Plaintiff, his eye injury still hurts him and he is unable to wear glasses. [R. at 57]. Plaintiff additionally testified that he has been hospitalized for difficulty breathing and for carpal tunnel syndrome surgery. [R. at 50-52]. Plaintiff sometimes wears ace bandages on his hands and wrists for numbness and pain. Plaintiff testified that his diabetes was controlled by diet. [R. at 56].

Plaintiff testified that he drives approximately twenty miles each day. (Plaintiff noted in his vocational report that he had been cautioned not to drive due to his blackouts. [R. at 131].) Plaintiff believes that he could sit for three or four hours if he was permitted to shift his weight, that he could stand perhaps one hour, and that he could lift 15 - 20 pounds. [R. at 60].

concluded that Plaintiff could probably not perform moderate or heavy work activities. [R. at 326].

Plaintiff was examined by Michael D. Farrar, D.O, at the request of Plaintiff's attorney. [R. at 330]. Dr. Farrar wrote that, in his opinion, Plaintiff was 100% disabled. [R. at 330].

Plaintiff was admitted for treatment of cellulitis on his thigh on January 3, 1995. [R. at 355]. Plaintiff was discharged on January 7, 1995. The record indicates that Plaintiff was working under a truck approximately three days prior to his admission when something apparently stung his leg. The area which initially began as a pinprick became worse and required hospitalization for treatment. [R. at 355].

Plaintiff was examined by James D. Dixon, M.D., on February 28, 1996. [R. at 363]. Dr. Dixon noted that Plaintiff could sit for one hour at a time and eight hours in an eight hour day, stand for ten to thirty minutes at a time and for two hours in an eight hour day, and walk for ten to thirty minutes at a time and for one hour in an eight hour day. [R. at 363].

Plaintiff had carpal tunnel surgery for his right wrist in April 1996. [R. at 396]. Plaintiff was hospitalized in May 1996 for complaints of chest pain. [R. at 397].

Plaintiff sustained an injury to his eye on February 4, 1997. [R. at 405]. Plaintiff was apparently hammering a bolt with a chisel when the chisel hit him in his left eye. [R. at 405]. Six weeks after his injury, Plaintiff unaided eyesight was reported as 20/20 in his right eye and 20/40 in his left eye. [R. at 411]. Plaintiff was encouraged to maintain a sedentary lifestyle on March 4, 1997. [R. at 413].

One of Plaintiff's doctors, M. Yvonne Goetsch, M.D., wrote a letter on Plaintiff's behalf on April 24, 1997. Dr. Goetsch noted that Plaintiff had COPD and used inhalers, a puncture wound to his right eye in February 1997, diabetes, smoking addiction, episodes of chest pressure, and a heart catheterization that was found to be normal in May 1996. [R. at 425]. The doctor noted that she treated Plaintiff for his carpal tunnel syndrome in his left wrist and his COPD which was difficult to control. [R. at 425].

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).^{3/}

^{3/} 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,

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

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

"The finding of the Secretary^{4/} 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

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

^{4/} 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."

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.

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ found that Plaintiff could perform sedentary work activity which did not require Plaintiff to repetitively push or pull arm or leg controls, crawl, or climb,. The ALJ noted Plaintiff needed a clean air environment, and that Plaintiff had a moderate limitation in his ability to grip with his dominant right hand and could only occasionally perform repetitive hand motion with his right hand and infrequent repetitive motion with his left hand. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff was not disabled.

IV. REVIEW

JAMES DECISION

Defendant assert that Plaintiff previously waived the arguments that he presents to this Court pursuant to James v. Chater 96 F.3d 1341, 1344 (10th Cir. 1996). Plaintiff does not respond to Defendant's argument. The record does indicate that the issues which Plaintiff appealed to the Appeals Council are different from the issues Plaintiff appealed to this Court.

In James, the Tenth Circuit Court of Appeals noted that "[o]rdinarily issues omitted from an administrative appeal are deemed waived for purposes of subsequent judicial review." James, 96 F.3d at 1343. The Tenth Circuit concluded that this general rule should also be applied to social security disability adjudications. In James, the claimant did not file a brief at the Appeals Council level but asserted that he was disabled and entitled to benefits. The Court concluded that "[s]uch a statement was plainly inadequate to apprise the Appeals Council of the particularized points of error counsel has subsequently argued in the courts." Id.

The Court concludes that the issues which Plaintiff asserted to the Appeals Council are insufficient to have apprised the Appeals Council of the issues which Plaintiff has raised in his current appeal to this Court. Plaintiff has therefore waived the assertion of these issue.

The Court has, however, separately addressed each of these issues below and finds that the errors raised by Plaintiff do not require reversal.

CONSIDERATION OF CARPAL TUNNEL SYNDROME

Plaintiff initially asserts that the ALJ ignored Plaintiff's ongoing difficulties associated with carpal tunnel syndrome. Plaintiff refers to his manual dexterity problems as discussed in the transcript at pages 54-56, 76-77, 396, and 403-04.

The record does indicate that Plaintiff has surgery for carpal tunnel syndrome (right hand), that he may require surgery for his left hand, and that he does have some limitations. The hypothetical question presented by the ALJ to the vocational expert included limitations for an individual who could perform no repetitive pushing or pulling of arm or leg controls, had a mild limitation on the ability to grip with the dominant right hand and a moderate limitation on the ability to grip with the non-dominant left hand, and only occasionally could perform repetitive hand motions with the right hand and only infrequently perform repetitive hand motions with the left hand. [R. at 74-75].

Plaintiff apparently asserts that the hypothetical question did not adequately include all of Plaintiff's limitations, and that Plaintiff is actually limited from performing any repetitive hand motion. Plaintiff refers to several citations to the record to support his position.

Plaintiff refers to Plaintiff's testimony [r. at 54-56]. Plaintiff testified that Plaintiff had tingling and numbness in his left hand, that he wore ace bandages, that he drops things with his hand, that pain from his hand keeps him up at night, and that he has difficulty picking up objects. Plaintiff's testimony does not require a conclusion

on the part of the ALJ that Plaintiff can perform no repetitive hand motions with either hand. In addition, an ALJ is not required to accept a Plaintiff's testimony as completely true, but rather the ALJ evaluates the Plaintiff's complaints. See, e.g., Tillery v. Schweiker, 713 F.2d 601, 603 (10th Cir. 1983). Credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). In this case, the ALJ did evaluate Plaintiff's credibility and provided reasons for discounting Plaintiff's complaints.^{5/} Plaintiff does not otherwise challenge the ALJ's evaluation of his credibility.

Plaintiff refers to the operative report for Plaintiff's carpal tunnel syndrome on his right wrist. [R. at 396]. The ALJ noted that Plaintiff had surgery for carpal tunnel syndrome. Nothing in the operative report, however, requires a finding that Plaintiff can perform no repetitive wrist motions.

Plaintiff refers to a nerve conduction study which indicates that Plaintiff has bilateral carpal tunnel syndrome, and an examination from March 1996. Again, although the nerve conduction study acknowledges the condition of bilateral carpal tunnel syndrome it does not specify any restrictions. The March 1996 examiner noted that Plaintiff had "excellent grip strength bilaterally." [R. at 404]. The examiner recommends carpal tunnel release surgery for Plaintiff's right hand and consideration

^{5/} For example, Plaintiff drives a manual truck each day. Plaintiff injured himself on two occasions while working under a truck and on a truck during time periods in which Plaintiff claimed that he was disabled. In addition, Plaintiff stated that he was disabled from "leaky heart valves." Several examinations of his heart, however, have revealed no such problems. Such factors are appropriate for an ALJ to consider when evaluating a claimant's credibility.

of the same type of surgery for Plaintiff's left hand depending upon the results of the surgery on Plaintiff's right hand. [R. at 404].

The ALJ concluded that Plaintiff had restrictions, and was limited to no repetitive pushing or pulling of arm or leg controls. In addition, the ALJ noted Plaintiff had a mild limitation on the ability to grip with the dominant right hand and a moderate limitation on the ability to grip with the non-dominant left hand. The ALJ determined that Plaintiff could only occasionally perform repetitive hand motions with the right hand and only infrequently perform repetitive hand motions with the left hand. Findings by the ALJ, if supported by substantial evidence will be upheld by the Court on appeal. Substantial evidence is such evidence that reasonable minds will accept as adequate to support a conclusion. Plaintiff has referred the Court to nothing in the record which requires a reversal of the decision of the ALJ.

TREATING PHYSICIAN AND COPD

Plaintiff asserts that the ALJ improperly ignored the medical evidence provided by Plaintiff's treating physician Dr. Goetsch. Plaintiff notes that Plaintiff had difficulty with bilateral carpal tunnel and COPD. Plaintiff asserts that the Tenth Circuit Court of Appeals has reversed cases in which the ALJ did not give appropriate weight to the opinion of a treating physician.

The opinion of a treating physician is generally accorded more weight than that of a consulting physician. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting

physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). In addition, if an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). A treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987).

In this case, the Plaintiff asserts that the ALJ ignored the medical evidence provided by Plaintiff's treating physician Dr. Goetsch. Plaintiff refers to an April 24, 1997 letter written by Dr. Goetsch. Dr. Goetsch wrote that Plaintiff was a patient for several years and had multiple medical problems including carpal tunnel syndrome, COPD, a puncture wound to the right eye, diabetes, and smoking addiction. Dr. Goetsch noted Plaintiff's current medications, indicated Plaintiff was seen on a regular basis for carpal tunnel, and that Plaintiff's COPD was not under good control.

Contrary to Plaintiff's assertion, the record does not indicate that the ALJ ignored the evidence provided by Dr. Goetsch. The ALJ did discuss Dr. Goetsch's findings, and did include limitations related to wrist movement and a clear air environment for Plaintiff. Dr. Goetsch did not list specific limitations for Plaintiff, or indicate that Plaintiff was otherwise limited in his ability to work. On review, the Court cannot conclude that the ALJ improperly ignored evidence provided by Plaintiff's treating physician.

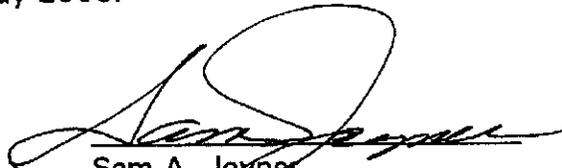
NEW AND MATERIAL EVIDENCE

Plaintiff attaches several pages of medical documents and requests a remand asserting that the new and material evidence requires a remand to the Commissioner. Defendant notes that if the evidence does not concern the relative time period, which is on or before the decision of the ALJ, it is not material. Plaintiff filed no reply brief.

The materials attached by Plaintiff related to treatment in July 1999 for Plaintiff's COPD. The ALJ's decision is dated July 1997. Nothing suggests that the medical records provided by Plaintiff pertain to the relevant time period. In addition, if the Court assumed that the records did address the relevant time period, a review of the records does not require reversal. In fact, one record attached by Plaintiff, indicates that Plaintiff should "gradually increase [his] exercise tolerance with daily walks."

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

Dated this 18 day of May 2000.


Sam A. Joyner
United States Magistrate Judge

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

MAY 18 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PETER J. KENWORTHY,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner, Social Security
Administration,

Defendant.

Case No. 99-CV-635-J ✓

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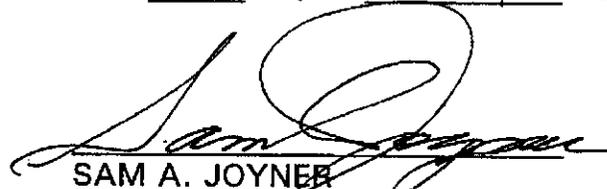
DATE MAY 18 2000

RULE 58 FINAL JUDGMENT

This action has come before the Court for consideration upon a Motion To Reverse And Remand for Further Administrative Action. An Order reversing and remanding the case to the Commissioner has been entered.

The Court enters this Final Judgment under Fed. R. Civ. P. 58 reversing and remanding this case to the Commissioner for further administrative action.

THUS DONE AND SIGNED on this 18 day of MAY 2000.


SAM A. JOYNER
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 18 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PETER J. KENWORTHY,

Plaintiff,

vs.

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

Defendant.

Case No. 99-CV-635-J

ENTERED ON DOCKET

DATE MAY 18 2000

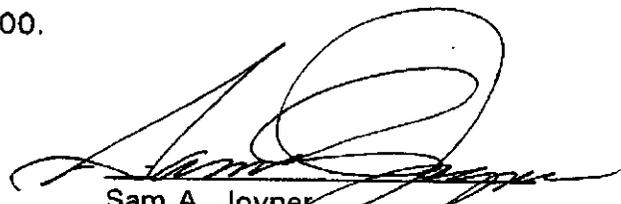
ORDER

Defendant has filed a motion to remand this case pursuant to sentence 4 of 42 U.S.C. § 405(g). Plaintiff has no objection. Defendant's motion is GRANTED. This action is hereby remanded to the Commissioner for further administrative action.

Defendant has requested that, on remand, the Commissioner assign the case to an administrative law judge for a supplemental hearing. Defendant requests that the assigned ALJ update the medical record and reevaluate Plaintiff's impairments, pain, and credibility, and issue a new decision linking his findings to specific evidence in the file.

IT IS SO ORDERED.

Dated this 18th day of May 2000.


Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAY 18 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAY A. THOMPSON,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner, Social)
Security Administration,)
)
Defendant.)

Case No. 99-CV-477-J

ENTERED ON DOCKET
DATE MAY 18 2000

ORDER

On April 3, 2000, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case to the Commissioner for further action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on May 3, 2000, and the defendant's response filed on May 11, 2000, the parties have agreed that an award in the amount of \$2,291.70 for attorney fees and \$9.16 for costs for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees under the Equal Access To Justice Act in the amount of \$2,291.70 and \$9.16 for costs. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff

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pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

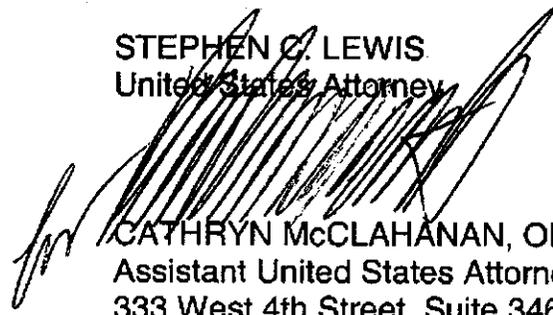
It is so ORDERED this 18 day of MAY 2000.



Sam A. Joyner
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



CATHRYN McCLAHANAN, OBA #14853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

5-16-00

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

FRED STOROZYSZYN,)
)
Plaintiff,)
)
vs.)
)
KEATH CONTROLS, KMI)
SYSTEMS, INC., and H. M.)
CONSTRUCTION, all foreign)
corporations,)
)
Defendants.)

ENTERED ON DOCKET
DATE MAY 18 2000

Case No. 99-CV-0430H (M)

FILED
MAY 18 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

**ORDER SUSTAINING H AND M CONSTRUCTION CO., INC.'S
MOTION FOR SUMMARY JUDGMENT AND ENTERING JUDGMENT**

This matter comes on for hearing this 3rd day of May, 2000, upon the Motion for Summary Judgment filed herein by the Defendant H and M Construction Co., Inc., at which time the Plaintiff was represented by his attorney Stephen Wilkerson and the Defendant H and M Construction Co., Inc. was represented by its attorney Richard Carpenter. The Court, having considered the pleadings, exhibits, affidavits on file and the briefs and arguments of counsel, finds as follows:

1. There is no genuine issue of material fact existing between the parties.
2. The Plaintiff, Fred Storozyszyn, was performing his job as an electrician as part of the installation process of a furnace during construction of the Whirlpool Range facility in Tulsa, Oklahoma.

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3. The furnace was being installed under a contract between KMI Systems, Inc. and Whirlpool. H and M Construction had no contractual relationship with any party involved in installation of the furnace.

4. The Defendant H and M Construction Co., Inc. was not in control of the work that was being performed by the Plaintiff or the pit area where the work was being performed. It owed no duty to the Plaintiff and consequently breached no duty to the Plaintiff in this case.

5. That even if it were found that H and M Construction Co., Inc. did either control the work that was being performed by the Plaintiff or the area of the premises involved, such duty would only be that connected with premises liability. In that connection, the Court finds that the area of the premises involved in Plaintiff's fall and injury, i.e., a portion of the furnace pit, constituted a condition that was open and obvious to the Plaintiff. Plaintiff admitted his full knowledge of the parameters of the furnace pit and his intimate knowledge gained through working in, over, above and around the pit for one and one-half weeks before his fall. He admitted there was nothing hidden about the area of the pit where he fell and admitted that he was knowingly backing toward the area of the pit where he fell. Under a theory of premises liability, if such theory were found to apply to H and M Construction Co., Inc., no duty existed to warn the Plaintiff of that which was open and obvious and of which he had full knowledge.

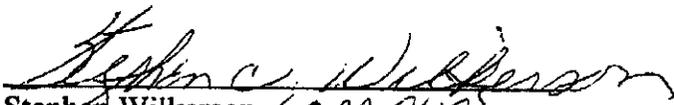
BE IT THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Motion for Summary Judgment pursuant to Federal Rules of Civil Procedure 56 filed

herein by the Defendant H and M Construction Co., Inc. is sustained and judgment is hereby entered in favor of H and M Construction Co., Inc. and against the Plaintiff, Fred Storozyszyn.



Sven Erik Holmes
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:



Stephen Wilkerson (OBA 9619)
WILKERSON, WASSAL & WARMAN
Attorney for Plaintiff



Richard Carpenter (OBA 7504)
CARPENTER, MASON & MCGOWAN
Attorney for Defendant H and M
Construction Co., Inc.

WK
5-15-00

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

FRED STOROZYSZYN,)
)
 Plaintiff,)
)
 vs.)
)
 KEATH CONTROLS, KMI SYSTEMS,)
 INC., and H. M. CONSTRUCTION,)
 All Foreign Corporations,)
)
 Defendants.)

ENTERED ON DOCKET

DATE MAY 18 2000

No: 99-CV-0430H (M)

FILED
MAY 18 2000
Clerk of Court

J U D G M E N T

This action came before the Court, the Honorable Sven Eric Holmes, District Judge, presiding, on 05/03/00, on the Motion of Defendant KMI Systems, Inc. for Summary Judgment pursuant to Federal Rule of Civil Procedure 56.

The court, being fully advised on the issues by the briefs and arguments of the parties, renders judgment in the above-styled and numbered cause as follows:

1. There is no genuine issue of material fact as to Defendant KMI's open and obvious defense, and, as a result, Defendant KMI's Motion for Summary Judgment in its favor on all of Plaintiff's claims based on KMI's open and obvious defense is granted;
2. Defendant KMI has not demonstrated in its favor that there is no genuine issue of material fact on the issue of workers' compensation exclusivity of 85 O.S. § 12, and, as a result, Defendant KMI's Motion for Summary Judgment on all of Plaintiff's claims against it alternatively based on a

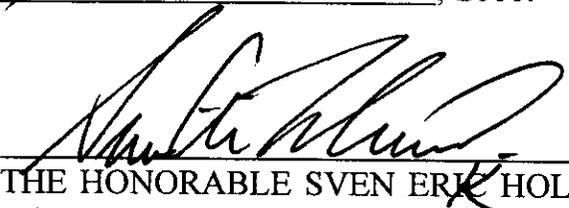
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theory of the workers' compensation exclusivity doctrine of 85 O.S. § 12
is denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff, Fred
Storozyszyn, taking nothing by reason of his claims against Defendant KMI Systems, Inc.,
and that Judgment be entered in favor of Defendant KMI Systems, Inc. and against the
Plaintiff on all Plaintiff's claims herein.

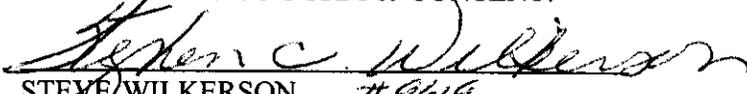
IT IS FURTHER ORDERED that Defendant KMI Systems, Inc. recover its costs
of action upon proper application pursuant to N.D.L.R. 54.1.

DATED this 17TH day of MAY, 2000.



THE HONORABLE SVEN ERIC HOLMES,
Judge of the District Court

APPROVED AS TO FORM & CONTENT:



STEVE WILKERSON, #9619
Attorney for the Plaintiff
15 West 6th Street,
Suite 2301
Tulsa, OK 74119-5412



RAY WILBURN,
Attorney for Defendant KMI Systems, Inc.
WILBURN & MASTERSON
EXECUTIVE CENTER II
7134 SOUTH YALE
SUITE 560
TULSA OK 74136-6337
(918) 494-0414

3. Summary judgment is therefore granted on the issue of Workers' Compensation Exclusivity under 85 O.S. §12 to Defendant Keith Controls in regard the injuries sustained by Plaintiff on May 21, 1995.

4. To the extent that Defendant Keith Controls owed premises related duties to Plaintiff, the "Open and Obvious" Doctrine precludes recovery by Plaintiff as a matter of law.

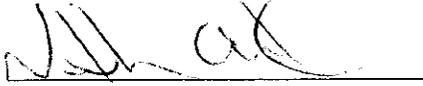
5. Summary judgment was therefore granted to Defendant Keith Controls as to his Motion for Summary Judgment on the issue of "open and obvious" assuming Plaintiff would be subsequently able to establish that there was an affirmative duty owed in the first place.

6. Summary judgment was granted as to all issues, and judgment in the matter is therefore final.

IT IS SO ORDERED.


SVEN ERIK HOLMES
United States District Judge

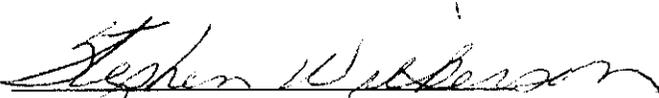
APPROVED AS TO FORM:



James K. Secrest, II

Nathan E. Clark

Attorneys for Defendant, Keith Controls



Stephen Wilkerson

Attorney for Plaintiff

autoowners\99001\p\JEJ

KK
15-00

NEC:tgh

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

FRED STOROZYSYN,)
)
Plaintiff,)
)
vs.)
)
KEATH CONTROLS,)
KMI SYSTEMS, INC.)
AND H.M. CONSTRUCTION,)
all foreign corporations,)
)
Defendants.)

MAY 18 2000
[Signature]

Case No. 99-CV-0430H (M)

**ENTERED ON DOCKET
DATE MAY 18 2000**

**ORDER GRANTING SUMMARY JUDGMENT FOR
DEFENDANT KEITH CONTROLS' MOTION FOR SUMMARY JUDGMENT
ON WORKERS' COMPENSATION EXCLUSIVITY AND
MOTION FOR SUMMARY JUDGMENT ON THE ISSUE "OPEN AND OBVIOUS"**

NOW ON THIS 17TH DAY OF MAY, 2000, this Honorable Court, after review and analysis of the pleadings, and after oral argument was received from all parties, hereby grants summary judgment to Defendant Keith Controls as to both motions pending before this Court pursuant to Fed.R.Civ.Proc. 56. In this regard, the Court specifically makes the following findings in support of the award of summary judgment:

1. Mr. Storozysyn's immediate employer was Furr Electric.
2. Keith Controls retained the services of Furr Electric, and Mr. Storozysyn in particular, in an effort to complete the Whirlpool Plant industrial application electrical demands in May 1995.
3. The evidence in the record supports each element of the applicable *Bradley v. Clark*, 1990 OK 73, 804 P.2d 425, analysis for determining "intermediate employer of the immediate employer" status for purposes of 85 O.S. §12 Workers' Compensation Exclusivity as a matter of

60

law. None of the evidence which Keith Controls submitted in this regard was controverted by Plaintiff.

4. As the *Bradley v. Clark* analysis establishes potential secondary Workers' Compensation liability for Keith Controls, the Workers' Compensation Exclusivity Doctrine of 85 O.S. §12 bars the subsequent tort action as the statute mandates that Workers' Compensation Court is the exclusive remedy available in this scenario. As a result, summary judgment per Fed.R.Civ. Proc. 56 is granted on this basis.

5. The Court further finds that to the extent tort duties were owed to Mr. Storozysyn by Keith Controls, the affirmative defense of "open and obvious" was established as a matter of law.

6. The admissions of Plaintiff that he was aware of the furnace pit and its various boundaries, even at the time of his fall, serves as uncontroverted prima facie support for this affirmative defense.

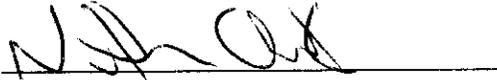
7. This Court further rejects that either *Henryetta Construction Company v. Harris*, 865 OK 88, 408 P.2d 522 or *J.J. Newberg Company v. Lancaster*, 1964 OK 21, 391 P.2d 224 allows the evisceration of the "Open and Obvious" Doctrine for circumstances such this.

8. As a result, summary judgment issue per Fed.R.Civ.Proc. 56 on the "open and obvious" is granted as well.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT: summary judgment is granted to Keith Controls as to both its Motions for Summary Judgment for Workers' Compensation Exclusivity and on the issue of the "Open and Obvious" defense. Summary judgment in this case is granted as to all pertinent issues of liability and the Defendant Keith Controls is directed to file a Journal Entry of Judgment.


SVEN ERIK HOLMES
United States District Judge

APPROVED AS TO FORM:



James K. Secrest, II

Nathan E. Clark

Attorneys for Defendant, Keith Controls



Stephen Wilkerson

Attorney for Plaintiff

Autoowners/99001/p/ord granting msjs

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 18 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ARTIE J. STANTON,)
)
Petitioner,)
)
v.)
)
STEPHEN KAISER, Warden,)
)
Respondent.)

Case No. 96-CV-0008-K (E)

ENTERED ON DOCKET

DATE MAY 18 2000

REPORT AND RECOMMENDATION

On January 4, 1996, petitioner appeared *pro se* in this matter and filed a Petition for Writ of Habeas Corpus (Docket # 1) pursuant to 28 U.S.C. § 2254. Petitioner was convicted on April 6, 1987, after a jury trial in the District Court of Creek County, State of Oklahoma, Case No. CRF-86-349. Petitioner challenges the concurrent life sentences he received after his conviction on two counts of first degree murder and the forty year sentence he received for larceny of an automobile.

This case was referred to the undersigned for a report and recommendation. See 28 U.S.C. § 636, and 28 U.S.C. § 2254, Rules 8, 10. Based on a review of the record and the parties' briefs, the undersigned proposes findings that petitioner has failed to exhaust all of his claims in state court. For the reasons set forth below, the undersigned recommends that the Respondent's Motion to Dismiss (Docket #76) be **GRANTED**, and the Reamended Petition for Writ of Habeas Corpus (Docket # 75) be **DISMISSED** without prejudice.

BACKGROUND AND PROCEDURAL HISTORY

Petitioner was convicted of killing Maxine Hunt (also known as Maxine Rambouseck) and Tom Holland. He was also convicted for taking Ms. Hunt's jewelry, purse, other items of value in her home, and her car. Evidence at trial established that these events occurred on or about October

23, 1986. Petitioner testified that he had been drinking with Mr. Holland in Ms. Hunt's home earlier in the evening. He claimed that he was drunk when the events occurred, and he did not remember what happened until he awoke, and saw C. J. Roberts, a man who went with him to the home earlier in the evening, searching through Ms. Hunt's purse. At that time, he saw that Ms. Hunt and Mr. Holland were dead. All charges against C. J. Roberts were dismissed in March 1987, and he testified against petitioner at trial. Petitioner's counsel introduced evidence at the trial in an effort to implicate Roberts in the murders.

Petitioner was convicted on April 6, 1987, and sentenced on April 27, 1987. He was represented by a court-appointed attorney, Creekmore Wallace. On April 24, 1987, petitioner filed a motion for new trial, based on juror misconduct. The trial court heard and denied that motion on May 13, 1987. Petitioner was represented at that hearing by Greg Robinson, an associate in the law office of Larry Oliver. Oliver himself entered a formal appearance on May 13, 1987, as co-counsel, and the court permitted Creekmore Wallace to withdraw as counsel on May 18, 1987.

Oliver filed an amended new trial motion on May 22, 1987. The trial court heard the amended motion and denied it on the record at a hearing on June 15, 1987. Petitioner retained new counsel, John Thomas Hall, in the fall of 1987.¹ Hall sent a petitioner in error to the Oklahoma Court of Criminal Appeals ("OCCA") on December 11, 1987, but the petition was returned by the OCCA court clerk because it was past the six-month deadline for filing.

On January 4, 1988, petitioner filed a post-conviction application in which he raised eight grounds for relief. Again, he claimed juror misconduct, but he also claimed an additional seven

¹Larry Oliver formally withdrew as petitioner's counsel on January 5, 1988.

grounds: (1) previous counsel's failure to perfect a proper appeal; (2) lack/insufficiency of evidence regarding the death of Maxine Hunt; (3) improper use of petitioner's former convictions to enhance his sentence; (4) improper introduction of his tainted confession into evidence; (5) withholding of exculpatory evidence, including petitioner's Creek County mugshot and scientific tests on fingernail scrapings, blood, and hair recovered from the crime scene; (6) excessive punishment for the larceny convictions; and (7) improper introduction into evidence of certain admissions against interest made to non-police third parties.

The trial court held an evidentiary hearing on May 9, 1988, and denied the application on May 10, 1988² on the merits. John Thomas Hall filed a petition in error on June 10, 1988, which alleged, as grounds for relief, that (1) exculpatory evidence in the form of blood, hair, and fingernail scrapings taken from the victims were withheld from the defendant; (2) insufficient evidence to show that Maxine Hunt was murdered; and (3) juror misconduct due to jurors who changed their votes after being subject to outside influence from various telephone calls in which they discussed the trial. The OCCA affirmed the denial of post-conviction relief on July 1, 1988 (Case No. PC-88-459). The affirmation was on the merits.

On March 27, 1989, petitioner, appearing *pro se*, filed a second post-conviction application in Creek County seeking an appeal out of time. Petitioner essentially alleged that his counsel failed to file a timely appeal and that the trial court should not have let an audio-tape recording of his confession be heard by the jury during deliberations. He also attached a memorandum of six "appealable issues" raising issues related to juror misconduct, the taped confession, ineffective

² The order is file-stamped June 23, 1988.

assistance of counsel, withholding of evidence (fingernail scrapings, a bloody handprint, a mugshot), and petitioner's lack of mental capacity. Petitioner filed a *pro se* petition for writ of mandamus, Okla. Cr., No. O-89-470, on May 17, 1989, in an effort to compel action by the district court on the application. The OCCA granted the writ of mandamus on June 20, 1989.

The trial court appointed attorney Russell Curt Miller to represent petitioner. Miller presented evidence at a June 27, 1989 hearing that petitioner had failed to meet the deadline for appeal through no fault of his own. Nonetheless, the trial court denied his application on July 13, 1989, finding that petitioner was at fault, and finding that the appealable issues were barred as *res judicata* because they had been previously raised and decided. Two petitions in error were filed from the trial court's decision, one by Miller and one by petitioner *pro se*. Miller alleged only that prior counsel were ineffective for failing to file a direct appeal. On August 7, 1989, the OCCA affirmed the trial court's denial. Petitioner sent a letter to the OCCA on August 2, 1989, claiming that his attorney improperly filed his appeal and failed to address the issues raised in the application and ruled upon by the trial court. Petitioner raised those issues and attached his "appealable issues" memorandum to his *pro se* petition in error. Nonetheless, the OCCA entered an order on September 7, 1989, indicating that the petitioner's *pro se* application was disposed of in the same manner in which the OCCA entered its August 7, 1989 order. On April 3, 1990, attorney Curtis A. Parks³ filed a "Petition for Reconsideration of Court's Denial of Post-Conviction Relief and Brief in Support Thereof" which the OCCA construed as a pleading seeking an appeal out of time and granted on August 17, 1990.

³Stuart Southerland also appeared for petitioner on the brief.

Petitioner then filed a direct appeal on March 18, 1991. Petitioner claimed that (1) the trial court erred in allowing the jury to listen during its deliberations to a audio-taped copy of petitioner's confession and (2) petitioner's grand larceny conviction (for larceny of Maxine Hunt's rings, television, money and coins) was improper because he was originally charged with robbery, and, under Oklahoma law, larceny is not a lesser-included offense of robbery. On April 28, 1992, the OCCA dismissed the conviction for grand larceny and affirmed the remaining convictions for two counts of first degree murder and one count of larceny of an automobile. On or about October 6, 1993, petitioner attempted to file an application for leave to file a motion to arrest judgment. His motion was allegedly based on new evidence of juror misconduct. The OCCA deputy court clerk informed petitioner on November 8, 1993, that he should first file his motion to arrest judgment in the state district court. Petitioner filed a writ of mandamus in the OCCA on November 24, 1993, asking that the OCCA court clerk be directed to file the motion, but the OCCA declined to assume jurisdiction because petitioner did not file his motion to arrest judgment in the district court before attempting to file it in the OCCA. The OCCA issued that order on December 29, 1993 (Case No. O-93-1281).

Petitioner appeared *pro se* to request habeas relief in this Court on January 4, 1996 (Docket # 1). As grounds for relief, he set forth juror misconduct and the state's withholding of exculpatory evidence regarding his confession. Respondent filed a response brief on March 4, 1996 (Docket # 5). On October 24, 1996, the Court ordered respondent to submit certain documents referenced in the response brief, including petitioner's briefs on direct appeal and on appeal from the denial of post-conviction relief, opinions of the state appellate court, and a portion of the trial transcript

(Docket # 8). Included in respondent's submission (Docket # 9) were three affidavits pertaining to petitioner's claim of juror misconduct.

Fred P. Gilbert entered an appearance as petitioner's counsel on March 23, 1997. On March 25, 1997, the Court ordered additional submissions of documents and supplemental briefing (Docket # 11). Respondent filed a supplemental response on June 12, 1997 (Docket # 16), which included significant portions of the record from the state trial and appellate courts. While petitioner filed for numerous extensions of time, he also filed affidavits of Ethel Harris, Tony Hill, Jeannie Riccardelli, and Ray Taylor (Docket # 21), Junior Rippy (Docket # 38), and a second affidavit of juror Ethel Harris (Docket # 45). Petitioner eventually filed two separate replies, one on the juror misconduct issue (Docket # 48) and one on the confession issue (Docket # 55), on February 1, 1999. He also argued that attorneys Wallace, Oliver, Hall and Parks provided ineffective assistance. (Docket # 47, "Interim Reply," at 10-12).

The juror misconduct issue arises out of petitioner's allegations that the jury foreperson made false statements on voir dire and used undue influence in the jury room. Petitioner has submitted affidavits from other jurors indicating that the foreperson told the jurors that the foreperson's father was shot by a drunkard, and, as a result, his father was permanently crippled. These jurors claim that the foreperson intimidated them into rendering a guilty verdict because of his hatred for drunkards and his opinion that petitioner was a drunkard. Petitioner has submitted other evidence in an effort to show that, before the deliberations, jurors talked about the case with each other and with non-jurors who influenced them to find petitioner guilty. In particular, one juror received a telephone call during the trial from her father-in-law, a former law enforcement official, who stated that he knew petitioner was guilty and that the jury should hurry and convict him so she could go home.

The confession issue arises out of petitioner's contention that he was drunk when he made his confession and that police officers coerced him into saying things that were untrue. His primary complaint is that the jury was permitted to listen to a copy of an audio-tape of his confession in the jury deliberation room. He also claims that a mugshot withheld by the prosecution would have shown him in his drunken condition, and it therefore constituted exculpatory evidence.

After petitioner submitted his "interim" memoranda on the juror misconduct, confession and ineffective assistance of counsel issues, the undersigned scheduled a hearing to resolve certain discovery disputes. The hearing occurred on February 17, 1999. As a result of that hearing, the undersigned permitted petitioner to file a motion for leave to amend his habeas petition.⁴ Petitioner filed the motion (Docket # 58) on March 8, 1999. Counsel for petitioner argued that the Court should grant leave to amend because petitioner, appearing *pro se*, neglected to raise several issues, emphasize certain facts, and articulate certain points of law. Counsel also pointed out that the original petition omitted petitioner's conviction and forty-year sentence for larceny of an automobile AFCF. Counsel admitted delay, but attributed it to the ineffectiveness (or underpayment) of prior counsel and a breakdown in the legal system as a whole. He denied any prejudice to respondent resulting therefrom. The motion for leave to amend was granted by order dated April 15, 1999.

The Amended Petition, filed on May 27, 1999, set forth eight grounds for relief:

- (1) lack of evidence or of sufficient evidence to prove that petitioner is guilty of (a) the murder or intentional homicide of Maxine Hunt or (b) the larceny of an automobile;

⁴ In addition, petitioner was permitted to have DNA testing performed on the blood, hair, and fingernail scrapings recovered from the crime scene. The DNA testing caused further delay in the proceedings, and was ultimately unproductive.

- (2) impermissible introduction into evidence of a tainted/involuntary confession;
- (3) jury taint/misconduct;
- (4) denial of request for production or disclosure of exculpatory evidence, including scientific analysis of the decedents' fingernail scrapings, hair found in one decedent's hand, blood on the pipe and the door jamb, the mug shot taken when petitioner was booked and interrogated in the Creek County jail, and the identity of Junior Rippey, a retired Creek County deputy who was present when petitioner was booked into the jail and interrogated;
- (5) improper use of former convictions to enhance petitioner's sentences;
- (6) allowing the tape recording of the purported confession into the jury room during deliberations;
- (7) ineffective assistance of counsel provided by Creekmore Wallace (trial counsel), Greg Robinson, Larry Oliver, John Thomas Hall, Russell Curt Miller, Stuart Southerland, and Curtis A. Parks; and
- (8) actual innocence (petitioner's counsel recognizes that this is not a substantive ground).

In the Reamended Petition for Writ of Habeas Corpus (Docket # 75), filed June 18, 1999, petitioner dropped grounds 1(b) and 5. Petitioner argued that all claims were fully exhausted except claims 7 and 8. As to claim 7, petitioner argued that the ineffective assistance of counsel claims had been explicitly exhausted as to Messrs. Wallace, Oliver, and Robinson due to his post-conviction applications; implicitly exhausted as to Messrs. Oliver, Hall, and Miller due to the OCCA's grant of an out of time appeal; and necessarily unexhausted as to Parks, the last attorney appearing in the state courts on petitioner's behalf. Petitioner made no statement as to Southerland, but Southerland worked with Parks, and, presumably, the petitioner's position is the same for Southerland as for

Parks. Petitioner argues that he is not obliged to fully exhaust his ineffective assistance of counsel claim because of the Tenth Circuit's decision in English v. Cody, 146 F.3d 1257 (10th Cir. 1998). Petitioner added to his Reamended Petition that the District Attorney and the Attorney General had been grossly ineffective in the observance of their duties, but petitioner did not state whether that claim had been exhausted. Clearly, it has not.

Respondent argues that petitioner has fully exhausted grounds 1(a), 3, and 6; that petitioner has partially exhausted grounds 4 and 7; and that petitioner has not exhausted grounds 2 or 8. As to the partially exhausted grounds, respondent argues that petitioner exhausted his Brady claim⁵ that scientific evidence was not disclosed, but that petitioner had not fairly presented his claim that the state failed to disclose the identity of deputy Junior Rippy, who has submitted an affidavit stating his observance and opinion that petitioner was intoxicated when he gave his confession. Respondent also argues that petitioner exhausted his claim that Wallace was ineffective for failing to file a direct appeal, but has not exhausted for Wallace's failure to properly handle the suppression issue, the Brady discovery matters, and the petitioner's mental status or incompetence to stand trial. Respondent contends that petitioner's ineffective assistance counsel claims as to all other attorneys have not been exhausted.

⁵ In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87.

DISCUSSION AND LEGAL ANALYSIS

Exhaustion of Remedies

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, tit. I, § 104 (1996), which established a more deferential standard of review of state court decisions in habeas corpus cases. Petitioner filed his Petition for Writ of Habeas Corpus on January 4, 1996 -- before the AEDPA became effective on April 24, 1996. Thus, the AEDPA does not apply to this decision. See Lindh v. Murphy, 521 U.S. 320, 322-23 (1997).

Under both pre-AEDPA and post-AEDPA law, federal courts are prohibited from issuing writs of habeas corpus on behalf of a prisoner in state custody unless the prisoner has exhausted the available state court remedies and if "state corrective process" is available and circumstances do not exist that render the process "ineffective" to protect the prisoner's rights. 28 U.S.C. § 2254(b)(1); Demarest v. Price, 130 F.3d 922, 932 (10th Cir. 1997). Further, "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c); see O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999).

The doctrine of exhaustion reflects the policies of comity and federalism. Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981); see also O'Sullivan, 526 U.S. at 845; Coleman v. Thompson, 501 U.S. 722, 730 (1991); Demarest, 130 F.3d at 932. A state prisoner bringing a federal habeas corpus action bears the burden of showing that he has exhausted all available state remedies. Miranda v. Cooper, 967 F.2d 392, 398 (10th Cir. 1992). To exhaust a claim, petitioner

must have "fairly presented" the facts and legal theory supporting a specific claim to the highest state court. See Picard v. Conner, 404 U.S. 270, 275-76 (1971); Demarest, 130 F.3d at 932. In Oklahoma, the highest state court for criminal matters is the OCCA.

If a petitioner submits a petition containing both exhausted and unexhausted claims, the petition is deemed a "mixed petition." Rose v. Lundy, 455 U.S. 509, 510 (1982). Under pre-AEDPA law, the Court was required to dismiss mixed petitions, leaving petitioner with an opportunity to return to state court or to amend his petition to withdraw the unexhausted claims,⁶ unless the District Court opted to hold the unexhausted claim procedurally barred. The District Court could apply a procedural bar if it was "obvious that the unexhausted claim would be procedurally barred in state court." Steele v. Young, 11 F.3d 1518, 1523 (10th Cir. 1993) (citations omitted); see Smallwood v. Gibson, 191 F.3d 1257, 1267 (10th Cir. 1999). This is known as the "futility" exception. Since petitioner has submitted a "mixed" petition and it is not obvious that all unexhausted claims would

⁶To the extent Rose v. Lundy mandated that "mixed" petitions containing both exhausted and unexhausted claims be dismissed, it was superseded by the AEDPA. See, e.g., Loving v. O'Keefe, 960 F. Supp. 46 (S.D.N.Y. 1997); Duarte v. Hershberger, 947 F. Supp. 146 (D.N.J. 1996). The AEDPA now provides: "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254 (b)(2). The Tenth Circuit has held that § 2254(b)(2) is a codification of the holding in Granberry v. Greer, 481 U.S. 129 (1987), under which a federal court that is "'convinced that the petition has no merit'" may deny the petition on the merits rather than apply the exhaustion rule. Hoxsie v. Kerby, 108 F.3d 1239, 1242-43 (10th Cir. 1997) (quoting Granberry, 481 U.S. at 134). Similarly, the Supreme Court has indicated that when an unexhausted claim is "easily resolvable against the habeas petitioner," the district court may apply § 2254(b)(2) and deny the claim on the merits. See Lambrix v. Singletary, 520 U.S. 518, 525 (1997). Thus, under § 2254(b)(2), where the district court is convinced the unexhausted claim is without merit, or that the issue is easily resolvable against the petitioner, the court may reach the merits of the claim rather than dismiss the petition. The undersigned does not propose findings that petitioner's unexhausted claims are without merit, or that the issues are easily resolvable against the petitioner.

be procedurally barred in state court, the undersigned recommends that the case be remanded to state court, as discussed in greater detail below.

The first ground asserted by petitioner is lack of evidence or of sufficient evidence to prove that petitioner is guilty of (a) the murder or intentional homicide of Maxine Hunt or (b) larceny of an automobile. Respondent agrees that petitioner has exhausted ground 1(a), and petitioner has deleted ground 1(b) from his amended petition. Therefore, the doctrine of exhaustion does not preclude the Court from issuing a writ of habeas corpus on this ground.

Respondent argues that petitioner has not exhausted the second ground: impermissible introduction into evidence of a tainted/involuntary confession. Petitioner presented this issue to the trial court by virtue of his post-conviction application, but his counsel, Hall, did not present the issue in the petition in error he filed in 1988. Petitioner urged this ground again in his 1989 application for appeal out of time which the trial court treated as an application for post-conviction relief. The trial court denied this claim as *res judicata* based on its findings in 1988. When petitioner's attorney, Miller, appealed the trial court's decision, he alleged only that prior counsel were ineffective for failing to file a direct appeal. He requested that the OCCA reverse the April 27, 1987 Judgment and remand the cause to the trial court "with instructions to vacate the Judgment and Sentence of April 27, 1987, and to re-sentence the Appellant so that his appeal time may commence anew." (July 27, 1989 Petition in Error). The OCCA summarily stated: "Having carefully examined the petition, and being sufficiently advised in the premises, this Court finds that the petitioner's allegations of error are without merit, and that the order of the District Court should be, and the same is, hereby AFFIRMED." (August 7, 1989 Order).

Thus, one could argue that no issues other than ineffective assistance of counsel were ever presented to the OCCA in the 1989 appeal from the trial court's decision on the 1989 application. However, petitioner also appealed the decision by filing a *pro se* petition in error in August 1989. In that petition, he asserted ineffective assistance of counsel and his objection to certain evidence, including the taped confession, being provided to the jury during its deliberations. He also attached the "Memorandum of Appealable Issues" brief he prepared. Significantly, petitioner recognized the infirmity in the Miller petition in error, and he sent a letter to the OCCA on August 2, 1989, claiming that his attorney improperly filed his appeal and failed to address the issues raised in the application and ruled upon by the trial court. Nevertheless, the OCCA issued an order dismissing the application by merely stating that petitioner's August 1989 petition in error was "disposed of" in the August 7, 1989 Order addressing the petition filed by Miller. (See September 7, 1989 Order). Arguably, the claims addressed by the trial court's decision on petitioner's 1989 application were presented to the OCCA by virtue of petitioner's *pro se* filing, and, arguably, the OCCA affirmed the trial court's decision that those issues were *res judicata*. (See Orders of August 7, 1989 and September 7, 1989.)

Although petitioner may have "fairly presented" his claims to the OCCA, unfortunately the OCCA did not clearly express the grounds for its disposition. The OCCA could have deemed petitioner's *pro se* application a supplemental *pro se* statement and could have expressly denied it as procedurally barred. See Smallwood, 191 F.3d at 1269. Since the OCCA did not do that, the claim could be deemed exhausted, especially given the use of plural noun "allegations" used in the OCCA's August 7, 1989 Order. Nonetheless, on remand petitioner would be wise to present the issue to the OCCA again so that the OCCA can express more clearly its intended disposition.

Both parties agree that ground three (jury taint/misconduct) has been exhausted in state court. Petitioner specifically presented it to the OCCA when he appealed the trial court's decision regarding his 1988 post-conviction application, and the OCCA affirmed the decision of the trial court on the merits.

Respondent argues that petitioner has only partially exhausted his fourth claim: the denial of his request for production or disclosure of exculpatory evidence, *i.e.* Brady materials. Respondent admits that petitioner has exhausted his Brady claim that scientific evidence was not disclosed, but respondent contends that petitioner has not fairly presented his claim that the state failed to disclose the identity of deputy Junior Rippy. Rippy submitted an affidavit stating that he was present when petitioner confessed and petitioner was intoxicated when he gave his confession. The Court agrees that this aspect of petitioner's Brady claim has not been exhausted. Smallwood dictates that the basis of petitioner's claims be the same for his habeas petition as they were on direct appeal to be considered properly raised before the state courts, and thus, exhausted. 191 F.3d at 1267; see also Demarest, 130 F.3d at 938-39.

Petitioner is no longer arguing that his fifth claim, improper use of former convictions to enhance petitioner's sentences, is a proper ground for relief. Thus, whether it has been exhausted is immaterial.

Respondent admits that petitioner has exhausted his sixth claim related to the allowance of the tape recording of the purported confession into the jury room during deliberations. That issue was presented to the trial court in petitioner's 1989 application for appeal out of time and (arguably, as set forth above) affirmed by the OCCA. It was also presented to the OCCA in petitioner's direct appeal, and the OCCA affirmed.

The seventh claim, ineffective assistance of counsel, is the most complex for purposes of exhaustion analysis. Respondent argues that petitioner has only partially exhausted it. Respondent argues that petitioner exhausted his claim that Creekmore Wallace was ineffective for failing to file a petition in error, but he did not exhaust his claim that Wallace failed to properly handle the suppression issue, the Brady discovery matters, and the petitioner's mental status or incompetence to stand trial. The record shows that petitioner argued in his 1989 application that he was "denied the right to the effective assistance of counsel when counsel failed to pursue the defense of alcohol addiction and mental defects, rendering petitioner incompetent to stand trial on the charges . . ." This was "Issue No. Four" in the "memorandum of appealable issues" attached to petitioner's application. The trial court denied this claim as *res judicata*, and (arguably, as discussed above) the OCCA affirmed.⁷ This part of the claim is exhausted, but again, petitioner would be well-advised to present it to the OCCA again on remand. However, petitioner's claim that Wallace failed to properly handle the suppression issue and the Brady discovery matters remains unexhausted.

Respondent contends that petitioner's ineffective assistance counsel claims as to all other attorneys have not been exhausted. Petitioner argues that this claim has been explicitly exhausted as to Wallace, Oliver, and Robinson. Petitioner's 1988 application for post-conviction relief included a claim that counsel was ineffective for failure to file a direct appeal. The trial court denied

⁷Further, even if it was not presented to and addressed by the OCCA in 1989, it is clear that Oklahoma courts would hold the claim procedurally barred because all instances of trial counsel ineffectiveness which could have been raised post-conviction, but were not, are deemed *res judicata* regardless of the basis of the claim. Cf. Smallwood, 191 F.3d at 1267 n. 6 (citing Hooks v. State, 902 P.2d 1120, 1122 n. 4 (Okla. Crim. App. 1995)). Note that the Tenth Circuit remanded the appeal of Hooks' habeas petition in federal court for a determination of whether Oklahoma's state procedural bar would preclude federal habeas review of Hooks' claims of ineffective assistance of counsel not raised on direct appeal. Hooks v. Ward, 184 F.3d 1206, 1217 (10th Cir. 1999).

this claim on the merits. It was not presented to the OCCA on appeal at that time. However, petitioner urged this argument again in his 1989 application for appeal out of time, and he added that Hall was ineffective for failure to file a timely appeal. The trial court denied this claim as *res judicata*, and (arguably, as discussed above) the OCCA affirmed. Petitioner's ineffective assistance of counsel claims, as to the failure of Wallace, Oliver, Robinson, and Hall to file a timely appeal, is exhausted. Again, petitioner would be well-advised to present it to the OCCA again.

Contrary to petitioner's argument, however, he did not argue in his 1989 application that Miller was ineffective. That claim is therefore unexhausted. Further, petitioner admits that his ineffective assistance of counsel claim as to Parks (and presumably Southerland, as an additional signatory to the documents signed by Parks) is unexhausted.⁸ Since they represented him on direct appeal, petitioner could have filed a third application for post-conviction relief to assert a claim that they were ineffective. His failure to do so constitutes a failure to exhaust this aspect of his ineffective assistance of counsel claim.

Finally, petitioner's claim that the District Attorney and the Attorney General were grossly ineffective in the observance of their duties has never been presented to any court, even this one, prior to petitioner's filing of the amended petition. Clearly, this claim is unexhausted.

⁸It matters not that Parks was the last attorney appearing in the state courts on petitioner's behalf. What matters is that Parks and Southerland represented him on direct appeal, as opposed to representing him in separate post-conviction proceedings. Petitioner is entitled to counsel on direct appeal. See Evitts v. Lucey, 469 U.S. 387, 394 (1985). He is not entitled to counsel in state post-conviction proceedings. See Coleman, 501 U.S. at 752. "Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Id. If Parks and Southerland represented petitioner in a post-conviction proceeding, petitioner would have no constitutional claim against them.

Petitioner's eighth ground for relief, actual innocence, is not a claim that must be exhausted; it is an argument that, in very rare circumstances, a petitioner can successfully advance to overcome a procedural bar. The undersigned now turns to the procedural bar issue.

Futility/Procedural Default

As set forth above, a federal court may hold unexhausted claims procedurally barred if it is "obvious that the unexhausted claim would be procedurally barred in state court," Steele, 11 F.3d at 1523 (citations omitted); see also Wallace v. Cody, 951 F.2d 1170, 1172 (10th Cir. 1991) ("Because exhaustion would be futile . . . the district court improperly dismissed the habeas petition.") 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. Coleman, 501 U.S. at 729; 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)).

In this instance, it is obvious that all of petitioner's unexhausted claims would be procedurally barred in state court except one. Okla. Stat. tit. 22, § 1086 provides as follows:

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

for sufficient reason was not asserted or was inadequately raised in the prior application.

The OCCA routinely refuses to hear all claims brought for the first time in an application for post-conviction relief, including ineffective assistance claims, if those claims could have been raised on direct appeal, but were not. E.g. Smallwood, 191 F.3d at 1267, 1269 n. 8. Oklahoma's procedural bar to claims not raised on initial post-conviction review is independent and adequate. E.g. Medlock v. Ward, 200 F.3d 1314, 1323 (10th Cir. 2000).

All of petitioner's claims could have been brought on direct appeal except for his claim that the attorneys who represented him on direct appeal were ineffective. But for that claim, the Court could find that it would be futile to force petitioner to return to state court and the Court could proceed with a determination as to whether petitioner can demonstrate cause for the procedural default and actual prejudice, or whether the Court's refusal to consider the merits of his claims will result in a fundamental miscarriage of justice. See, e.g., Coleman, 510 U.S. at 750. But it is not clear what the OCCA would hold if petitioner's claim of ineffective assistance of counsel by Parks and Southerland were presented to the OCCA.⁹

⁹Petitioner argues that this claim is necessarily unexhausted because these attorneys were the last to represent petitioner in state court. This argument is inapposite because petitioner has a Sixth Amendment right to counsel on direct appeal; he does not have the same right to counsel on an application for post-conviction relief. Thus, he has the option of filing an application for post-conviction relief on a claim of ineffective assistance by counsel who represented him on direct appeal; he does not have such a claim against counsel who represented him on post-conviction applications. Ineffective assistance of post-conviction relief counsel, as opposed to ineffective assistance of direct appeal counsel, cannot constitute cause for failure to raise certain claims in state court if petitioner is not entitled to such counsel in the first place. See Smallwood, 191 F.3d at 1267 n. 4, 1269; Demarest, 130 F.3d at 941 (quoting Coleman, 501 U.S. at 757). Parks and Southerland represented petitioner on direct appeal, not on applications for post-conviction relief.

To the extent that petitioner argues ineffective assistance of counsel by Parks and Southerland as "cause" for his procedural default of other claims, the Supreme Court addressed this situation in Edwards v. Carpenter, __ U.S. __, 120 S. Ct. 1587 (2000). The Supreme Court held that an ineffective assistance of counsel claim asserted as a cause for procedural default of another federal claim could itself be procedurally defaulted, and unless the state prisoner can satisfy the cause and prejudice standard for the procedurally defaulted ineffective assistance of counsel claim, that claim cannot serve as cause for another procedurally defaulted claim. Id. at 1592. The Court reiterated that the comity and federalism principles underlying the doctrine of exhaustion of state remedies requires an ineffective assistance claim to be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. Id. (citing Murray v. Carrier, 477 U.S. 478, 489 (1986)).

Statute of Limitations

Should petitioner choose to return to federal court after exhaustion of his state court remedies, the AEDPA will apply. See 28 U.S.C. § 2254. Thus, petitioner must be mindful of the one-year statute of limitations applicable to applications for writ of habeas corpus filed after the effective date of the AEDPA. 28 U.S.C. § 2544(d). Petitioner's conviction was final prior to the AEDPA. If he had not filed his petition for writ of habeas corpus prior to the effective date of the AEDPA, his time for filing would have expired on April 24, 1997. See Hoggro v. Boone, 150 F.3d 1223, 1225 (10th Cir. 1998). However, he filed his application prior to the effective date of the statute, and that application has been pending in this Court since that time because petitioner has requested (and the Court has granted) numerous extensions of time to file briefs, to amend his petition, and to seek the results of DNA evidence.

Under 28 U.S.C. § 2244(d)(2), "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." Unfortunately for petitioner, the Tenth Circuit has interpreted this provision to mean that the limitations period is tolled only while petitioner was seeking *state* court review of his post-conviction application. Rhine v. Boone, 182 F.3d 1153, 1155 (10th Cir. 1999), cert. denied, __ U.S. __, 120 S. Ct. 808, 145 L.Ed.2d 681 (2000)(holding that the limitations period for filing a habeas petition was not tolled during the period between final action on a petitioner's application for state post-conviction relief and the United States Supreme Court's denial of his petition for writ of certiorari). The Tenth Circuit is "satisfied that, in the wording of §2254(d)(2), 'State' modifies the phrase 'post-conviction review' and the phrase 'other collateral review.'" Id. at 1156. The term "pending" in § 2254(d)(2) has also been construed "to encompass all of the time during which a state prisoner is attempting, through proper use of *state* court procedures, to exhaust *state* court remedies with regard to a particular post-conviction application." Barnett v. Lemaster, 167 F.3d 1321, 1323 (10th Cir. 1999) (emphasis added).

But petitioner is not without hope that, someday, a federal court may hear his claims. The limitations period of 28 U.S.C. § 2244(d) is not jurisdictional and may be subject to equitable tolling. Miller v. Marr, 141 F.3d 976, 978 (10th Cir.), cert. denied, __ U.S. __, 119 S. Ct. 210, 142 L. Ed.2d 173 (1998). Equitable tolling has been limited historically to situations where a petitioner 'has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the [petitioner] has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'" Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990). Equitable

tolling is deemed appropriate only "in rare and exceptional circumstances," Davis v. Johnson, 158 F.3d 806, 811 (5th Cir. 1998), cert. denied, 119 S. Ct. 1474, 143 L.3d.2d 558 (1999), or where a prisoner has diligently pursued his claims, but has in some "extraordinary way" been prevented from asserting his rights. Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618-19 (3d Cir. 1998).¹⁰

While the undersigned cannot pre-judge the issue, it appears that petitioner has actively pursued his judicial remedies and this matter has involved some rather extraordinary circumstances. Petitioner's counsel filed for no fewer than fifteen extensions of time and requested leave to amend his habeas petition. The undersigned permitted petitioner to seek DNA analysis of materials that were difficult to obtain quickly from state authorities. Indeed, state authorities never found some of the requested materials that were known to exist. Since "[t]he one year time period begins to run in accordance with individual circumstances that could reasonably affect the availability of the remedy," Miller v. Marr, 141 F.3d at 978, a subsequent federal court reviewing petitioner's case could deem petitioner's one year time period to run from the date the District Court renders a decision in this matter.

CONCLUSION

For these reasons, the undersigned proposes findings that petitioner has failed to exhaust all of the claims raised in his reamended motion for writ of habeas corpus, and, since it is not obvious that all of his unexhausted claims would be procedurally barred in state court, requiring petitioner

¹⁰Of course, equitable tolling could also be appropriate where a constitutional violation has resulted in the conviction of one who is actually innocent or incompetent. Miller v. Marr, 141 F.3d 978 (citations omitted). Petitioner's actual innocence claim could be relevant in this regard.

to return to state court to exhaust his claims would not be an exercise in futility. The undersigned recommends that the Respondent's Motion to Dismiss (Docket #76) be **GRANTED**, and the Reamended Petition for Writ of Habeas Corpus (Docket # 75) be **DISMISSED** without prejudice. Further, petitioner should be granted leave to file a renewed application upon exhaustion of all state remedies. Upon his return to federal court, petitioner is to bring only exhausted claims. See Slack v. McDaniel, ___ U.S. ___, 120 S. Ct. 1595 (2000).

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Rule 8(b), Rules Governing § 2254 Cases in the United States District Courts. **The failure to file written objections 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 Thomas v. Arn, 474 U.S. 140 (1985); Haney v. Addison, 175 F.3d 1217 (10th Cir. 1999).

Dated this 18th day of May, 2000.

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

Claire V Eagan
CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

22 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 18 Day of May, 2000.

FILED

MAY 18 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

GEORGE PRATT,

Plaintiff,

-vs-

STATE FARM FIRE and CASUALTY COMPANY
and STATE FARM GENERAL INSURANCE COMPANY,

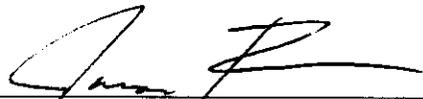
Defendants.

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) No.: CIV-00-197B/
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ENTERED ON DOCKET
MAY 18 2000
DATE _____

STIPULATED DISMISSAL WITHOUT PREJUDICE

COME NOW the attorneys for the Plaintiff and/or the Defendants, respectively, and hereby stipulate and agree the above captioned case be dismissed without prejudice to further litigation pertaining to all matters involved herein, and the said parties hereby request the Court dismiss said action without prejudice, pursuant to this stipulation. By stipulating to this dismissal, Defendants do not waive, and hereby expressly reserve, any defenses to Plaintiff's underlying claims or causes of action against Defendants.



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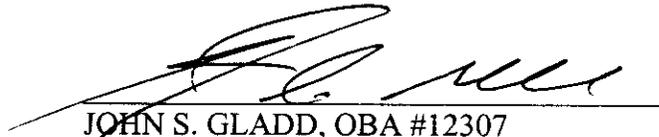
-and-

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OJ

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JACK MATTINGLY, SR., OBA #5790
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ATTORNEYS FOR PLAINTIFF

A handwritten signature in black ink, appearing to read "John S. Gladd", is written over a horizontal line.

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PHIPPS, BRITTINGHAM & GLADD
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ATTORNEYS FOR DEFENDANTS

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

FILED

MAY 18 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SANDRA J. MEANS, an individual, and)
NEVIN MEANS, an individual, and as)
husband and wife,)

Plaintiffs,)

v.)

Case No. 99 CV-0513-B (E)

FRANK S. LETCHER, M.D., an individual, and)
HILLCREST MEDICAL CENTER, an)
Oklahoma corporation,)

Defendants.)

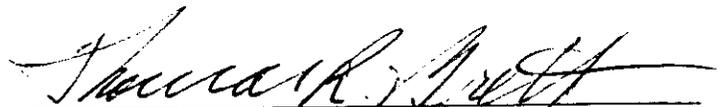
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DATE MAY 18 2000

ORDER OF DISMISSAL

NOW ON this 18th day of May, 2000, the Court entertained the parties' Joint Stipulation for Dismissal Without Prejudice. The Court, being apprised of the issues, finds, and hereby orders that Defendant Hillcrest Medical Center is dismissed from the above-captioned matter, without prejudice, and that Defendant Hillcrest Medical Center shall bear its own costs, inclusive of attorneys' fees, but not those of any other party.

IT IS SO ORDERED.



THE HONORABLE THOMAS R. BRETT

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

FILED
MAY 17 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

SANDRA J. MEANS, an individual, and)
NEVIN MEANS, an individual, and as)
husband and wife,)

Plaintiffs,)

vs.)

Case No. 99-CV-0513-B (E) /

FRANK S. LETCHER, M.D., an)
individual, and HILLCREST MEDICAL)
CENTER, an Okiahoma corporation,)

Defendants.)

ENTERED ON DOCKET
DATE MAY 17 2000

JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

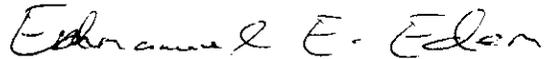
COME NOW, the parties to this action, Plaintiffs Sandra J. Means and Nevin Means, individually and as husband and wife, Defendant Hillcrest Medical Center and Defendant Frank S. Letcher, M.D., and each of them, by and through their respective counsel, as referenced herein and below, and hereby stipulate to the dismissal of Defendant Hillcrest Medical Center from this action, without prejudice, pursuant to Federal Rule of Civil Procedure 41 (a).

It is further stipulated that Defendant Hillcrest Medical Center shall bear its own costs, inclusive of attorneys' fees, but not those of any other party, in the above-captioned matter.

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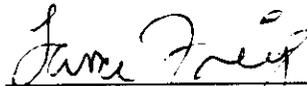
Respectfully submitted,



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-and-

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Attorneys for Defendant Frank S. Letcher, M.D.

2

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

FILED

MAY 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRANDY PETERMAN, in her individual)
capacity,)

Plaintiff,)

vs.)

RAINSOFT INC., in their professional capacity;)
and, CRYSTAL OASIS, INC., in their)
professional capacity.)

Defendants.)

CASE NO: 99-CV-0780-B (E)

ENTERED ON DOCKET

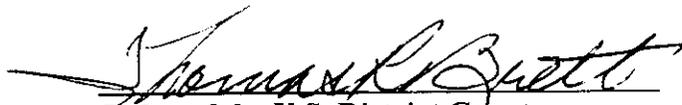
DATE MAY 17 2000

**ORDER GRANTING PLAINTIFF'S DISMISSAL WITHOUT PREJUDICE
ONLY AS TO DEFENDANT, RAINSOFT INC.**

NOW ON THIS 17th DAY OF MAY, 2000, and after being fully advised in the
premises, does hereby enter and Order granting Plaintiff's Motion to Dismiss without Prejudice
only as to Defendant, Rainsoft, Inc., with each party bearing responsibility for their own
respective costs and fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT
that Plaintiff's Motion to Dismiss only as to Defendant, Rainsoft, Inc., is hereby granted.

IT IS SO ORDERED ON THIS 17th DAY OF MAY, 2000.


Judge of the U.S. District Court

Aundrea R. Smith, OBA #18470
John M. Butler, OBA #1377
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Counsel for Plaintiff, Brandy Peterman

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

FILED
MAY 16 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

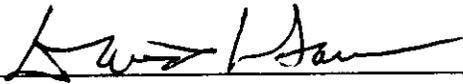
PRAFULLBA CHUDASAMA,)
)
Plaintiff,)
)
vs.)
)
ALLSTATE INDEMNITY)
COMPANY, an Illinois)
Corporation,)
)
Defendant.)

Case No. 99-CIV-0552E (J)

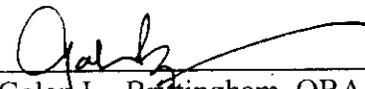
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DATE MAY 17 2000

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff and hereby dismisses the above-styled action with prejudice. The parties advise the Court that a settlement has been reached. The Defendant does not object to this dismissal.



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CIT

F I L E D

MAY 16 2000

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

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

MARY ELAINE PARMLEY,)
)
Petitioner,)

vs.)

JAMES SAFFLE,)
)
Respondent.)

Case No. 99-CV-163-B (M)

**ENTERED ON DOCKET
DATE MAY 17 2000**

HOMER LEE PARMLEY,)
)
Petitioner,)

vs.)

JAMES SAFFLE,)
)
Respondent.)

Case No. 99-CV-164-B (M)

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge entered on March 29, 2000, in these 28 U.S.C. § 2254 habeas corpus actions. The Magistrate Judge recommends that Petitioners' motions to amend (Docket #11 in Case No. 99-CV-163 and Docket #10 in Case No. 99-CV-164) be granted; that Respondent's motions to dismiss (Docket #6 in Case No. 99-CV-163 and Docket #4 in Case No. 99-CV-164) be granted; and that the petitions for writ of habeas corpus be dismissed. On April 14, 2000, Petitioners, represented in these cases by counsel, filed an objection to the Report. On May 3, 2000, Petitioners also filed a "motion for temporary stay of proceedings to permit reasonable inquiry into charges of perjury and evidence tampering by Deputy Sheriff affiant."

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 Petitioners have objected, and concludes that, for the reasons discussed below, the Report should be adopted and affirmed.

As a preliminary matter, the Court finds Petitioners' motion for temporary stay of these proceedings to permit reasonable inquiry into charges of perjury and evidence tampering by Delaware County Deputy Sheriff Bill Stout should be denied.¹ Even if Petitioners determine that actions of Deputy Sheriff Stout provide a basis for challenging their Delaware County convictions, it is fundamental that a federal court cannot consider requests for habeas corpus relief by state prisoners unless they have exhausted available state remedies. 28 U.S.C. § 2254(b). In this case, Petitioners have an available remedy, a state application for post-conviction relief, by which they could challenge their convictions in the state courts of Oklahoma based on Petitioners' most recent allegations involving Deputy Sheriff Stout. The Court refuses to stay these proceedings to allow Petitioners to investigate unexhausted claims after the Magistrate Judge has recommended dismissal of the petitions.

DISCUSSION

In their § 2254 petitions for writ of habeas corpus, filed March 1, 1999, Petitioners challenge their convictions for Unlawful Possession of Marijuana With Intent to Distribute, entered in Delaware County District Court, Case No. CRF-92-137. In his Report, the Magistrate Judge concludes Petitioners' claims that their "fundamental rights to due process and equal protection of

¹In November, 1998, approximately four (4) months prior to the filing of the instant petitions, it was reported in the Tulsa World that former Delaware County Supervisor Bill Stout, the affiant who procured the search warrants leading to the prosecutions at issue in these cases, had been suspended from his duties and was being investigated for evidence tampering in an unrelated drug case. On April 28, 2000, it was reported that Stout had been charged in Delaware County District Court with perjury and evidence-tampering.

the law were violated because [their] convictions were based entirely on evidence seized in violation of [their] Fourth and Fourteenth Amendment rights against unreasonable searches and seizures” (see Docket #1 at 3) are barred by Stone v. Powell, 428 U.S. 465 (1976).

In their objection to the Report, Petitioners argue that the Magistrate’s Report “improperly focuses on the ‘fullness’ of the state proceedings, while completely ignoring their ‘fairness,’” that the issue of the search warrant’s “particularity” has been exhausted in the state courts, contrary to the Magistrate’s finding, and that the deference mandated by Stone v. Powell should not apply in this case because the Oklahoma Court of Criminal Appeals rejected Petitioners’ Fourth Amendment in an opinion issued in “summary” format.

After careful review of the record and Petitioners’ objection to the Report, the Court finds that the Magistrate Judge correctly determined that Petitioners’ claims are barred from review in this federal habeas corpus proceeding by the doctrine announced in Stone v. Powell, 428 U.S. 465 (1976). In Stone, 428 U.S. at 494, the Supreme Court stated that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial. The Tenth Circuit has reiterated that a federal habeas corpus court need not address a Fourth Amendment question as long as the state court has given the petitioner a full and fair opportunity for a hearing on the issue. Miranda v. Cooper, 967 F.2d 392, 400-01 (10th Cir. 1992).

In this case, Petitioners received several opportunities in the state courts to fully, fairly, and adequately discuss the admissibility of the evidence in question. Petitioners challenged the constitutionality of the search warrants and the seizure of property both through motions to suppress in the trial court, and on direct appeal. See Case No. 99-163-B, Docket #7, Ex. B at 2, 10-17. Both

the trial court, after holding a hearing on Petitioners' motions to suppress, and the Oklahoma Court of Criminal Appeals rejected Petitioners' arguments.

Therefore, based on the record, the Court concludes that Petitioners had a full and fair opportunity to litigate their Fourth Amendment claims in the state courts. As a result, this Court is precluded from considering the issues raised in Petitioners' applications for writs of habeas corpus based on Stone v. Powell, 428 U.S. 465, 494 (1976). The Court finds the Report should be adopted and affirmed and the petitions for writ of habeas corpus dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the United States Magistrate Judge (Docket #15 in Case No. 99-CV-163-B and Docket #13 in Case No. 99-CV-164-B) is **adopted and affirmed**.
2. Petitioners' motions to amend (Docket #11 in Case No. 99-CV-163 and Docket #10 in Case No. 99-CV-164) are **granted**.
3. Respondent's motions to dismiss (Docket #6 in Case No. 99-CV-163 and Docket #4 in Case No. 99-CV-164) are **granted**.
4. The petitions for writ of habeas corpus are **dismissed**.
5. Petitioners' motions "for temporary stay of proceedings to permit reasonable inquiry into charges of perjury and evidence tampering by deputy sheriff affiant" (Docket #17 in Case No. 99-CV-163-B and Docket #15 in Case No. 99-CV-164-B) are **denied**.

SO ORDERED THIS 15th day of May, 2000.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

F I L E D

MAY 16 2000

MARY ELAINE PARMLEY,)
)
Petitioner,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

vs.)

Case No. 99-CV-163-B (M)

JAMES SAFFLE,)
)
Respondent.)

ENTERED ON DOCKET

HOMER LEE PARMLEY,)
)
Petitioner,)

DATE ~~MAY 17 2000~~

vs.)

Case No. 99-CV-164-B (M)

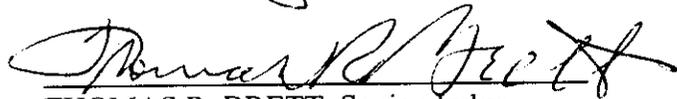
JAMES SAFFLE,)
)
Respondent.)

JUDGMENT

This matter came before the Court upon Petitioners' 28 U.S.C. § 2254 petitions 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 Petitioners.

SO ORDERED THIS 16th day of May, 2000.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

MW

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 THREE THOUSAND SEVEN HUNDRED)
 DOLLARS AND NO/100 (\$3,700.00) IN)
 UNITED STATES CURRENCY; et al.)
)
 Defendants.)

FILED
MAY 15 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

NO. 99-CV-840-B(E)

ENTERED ON DOCKET
DATE MAY 17 2000

STIPULATION OF PARTIAL DISMISSAL

COMES NOW the Plaintiff, the United States of America, and Jon Streat, the Claimant in the above-captioned civil action to the following defendant property, and stipulate that the defendant property:

State of Oklahoma Official Depository Oklahoma State Penitentiary Trust Fund Check 009452 in the amount of One Hundred Thirty Dollars and no/100 (\$130.00)

which was seized and arrested by the United States Marshals service in this action, be, and it is, likewise, dismissed from the above-captioned civil action with prejudice and without costs.

Claimant Jon Streat stipulates and agrees that he has no claim to any of the other defendant properties which are subject to this forfeiture action.

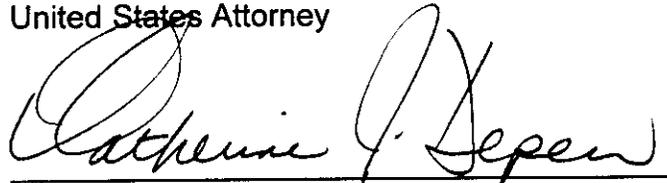
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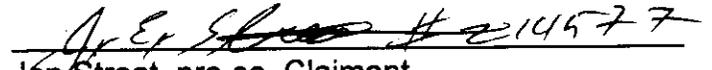
The Government stipulates and agrees that the sum of \$130.00 representing the Trust Fund check 009452 should be released from the hold that was placed upon it and returned to Jon Streat.

Respectfully submitted,

STEPHEN C. LEWIS
United States Attorney



CATHERINE J. DEPEW OBA #3836
Assistant United States Attorney
3460 United States Courthouse
333 West Fourth Street
Tulsa, OK 74103
(918) 581-7463



Jon Streat, pro-se, Claimant
#214577
Oklahoma State Penitentiary
P.O. Box 97
McAlester, OK 74501

DEAR MRS. D. PEW,

I HAVE signed & returned
THE STIPULATION FOR PARTIAL DISMISSAL
you sent. I would like to know if
you would be kind enough to send
me a copy of THE completed Filed order
for my records in case there's any
problem on this end. I would greatly
appreciate it. THANK you for your
ASSISTANCE.

yours truly

SON STREAT
#214577
P.O. Box 97
MCALESTER, OK.
74502

Received

0000

US ATTORNEY
N.D. OKLAHOMA

F I L E D
MAY 16 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

VERONICA WILSON and PETE TERRELL WILSON,)
)
Plaintiffs,)
)
vs.)
)
KENNETH MUCKALA, M.D., COLUMBIA DOCTORS)
HOSPITAL OF TULSA, INC., d/b/a COLUMBIA)
DOCTORS HOSPITAL,)
)
Defendants.)

Case No. 97-C-910-E

ENTERED ON DOCKET
MAY 17 2000
DATE _____

ORDER

Now before the Court is the Motion to Dismiss Pursuant to Rule 50 (Docket #264) of the Defendant, Columbia Doctor's Hospital, and the Rule 50 Motion of the Defendant Kenneth Muckala, M.D., made orally at trial at the close of evidence.

Plaintiff Veronica Wilson was employed as a nurse assistant with the defendant hospital. She claimed that she was sexually harassed by defendant Dr. Muckala who was vice chief and chief of staff at the hospital while she worked there. She brought claims for negligent infliction of emotional distress and sexual harassment against her employer, the hospital, and claims for tortious interference with business relationship, sexual assault and battery, and invasion of privacy against Dr. Muckala. With respect to the claims against the hospital, the jury returned a verdict in favor of the hospital on the sexual harassment claim and in favor of Plaintiff, in the amount of \$15,000.00 on the negligent infliction of emotional distress claim. With respect to the claims against Dr. Muckala, the jury returned a verdict in favor of Dr. Muckala on the sexual assault and battery claim the tortious interference with contract claim, and the invasion of privacy claim, and a verdict in favor of Plaintiff, in the amount of \$25,000.00 on the negligent infliction of emotional distress claim.

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Both defendants argue that they should be granted judgment as a matter of law on the negligent infliction of intentional distress claim because there is no evidence of physical harm with the emotional distress, because Oklahoma does not recognize a separate tort for negligent infliction of emotional distress, and because a negligent infliction of emotional distress claim was not alleged against Dr. Muckala.

The Court is satisfied that the evidence at trial, in light of the claims alleged by plaintiff, is sufficient to support the verdict. Moreover, because the issue of whether Oklahoma recognizes a separate tort for negligent infliction of emotional distress was not raised until after the jury was instructed on this claim, the Court will not consider it at this time. Lastly, the court is satisfied that Dr. Muckala was not unfairly surprised or prejudiced in any way by the instruction of the jury on the negligence claim.

The Rule 50 Motion of the hospital (docket #264), and the Rule 50 Motion of Dr. Muckala are denied.

IT IS SO ORDERED THIS 16TH DAY OF MAY, 2000.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

MAY 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VERONICA WILSON and PETE TERRELL WILSON,)

Plaintiffs,)

vs.)

KENNETH MUCKALA, M.D., COLUMBIA DOCTORS)
HOSPITAL OF TULSA, INC., d/b/a COLUMBIA)
DOCTORS HOSPITAL,)

Defendants.)

Case No. 97-C-910-E /

ENTERED ON DOCKET
DATE MAY 17 2000

J U D G M E N T

In accord with the Order denying the Rule 50 motions of Defendants filed this date, and the jury verdict in favor of plaintiff, judgment is entered in favor of the Plaintiff Veronica Wilson, and against the Defendant, Columbia Doctors Hospital of Tulsa, Inc., d/b/a Columbia Doctors Hospital in the amount of \$15,000.00. Judgment is entered in favor of the Plaintiff Veronica Wilson, and against the Defendant, Kenneth Muckala, in the amount of \$25,000.00.

DATED this 16th day of May, 2000.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

280

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

ROBERT AND CHERYL MCCARTNEY,)
as parents and next friend of)
their minor daughter, ALLISON)
MCCARTNEY, et al.,)

Plaintiffs,)

vs.)

MAYES SCHOOL DISTRICT NO. 32)
OF MAYES COUNTY, a/k/a)
CHOUTEAU PUBLIC SCHOOLS;)
et al.,)

Defendants.)

ENTERED ON DOCKET
DATE MAY 17 2000

Case No. 99-CV-660-BU(J) ✓

FILED

MAY 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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 90 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this 17th day of May, 2000.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GAY SCOTT HEARN,)
)
Plaintiff,)
vs.)
)
FURNITURE FACTORY OUTLET,)
INC., an Arkansas Corporation, and)
GARY MASNER, an Individual,)
)
Defendants.)

99-CV-0891-K (J)

ENTERED ON DOCKET

DATE MAY 17 2000

**STIPULATION FOR DISMISSAL WITHOUT PREJUDICE
OF THE DEFENDANTS' COUNTERCLAIM**

It is stipulated by and between the parties to this action, by their attorneys of record, that the counterclaims alleging perjury and civil conspiracy brought by the Defendants, FURNITURE FACTORY OUTLET, INC. ("FFO") and GARY MASNER, be and are hereby dismissed without prejudice, and that an order to that effect be made without further notice.

Dated this 15th day of May, 2000.

Mark D. Lyons
Mark D. Lyons, OBA #5590
Kevin Danielson, OBA #12258
LYONS, CLARK, DANIELSON & O'MEILIA
616 S. Main, Suite 201
Tulsa, Oklahoma 74119
(918) 599-8844; Fax: (918) 599-8585
Attorneys for the Defendants

Randall L. Iola
Randall L. Iola, OBA #13085
First Place Tower
15 East Fifth Street, Suite 2750
Tulsa, OK 74103-4334
(918) 582-7030
Attorneys for the Plaintiff

OT

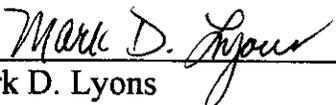
CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2000, I caused a true and correct copy of the above and foregoing instrument to be delivered via U.S. First Class Mail, with proper postage fully pre-paid thereon, to the following:

Randall L. Iola
First Place Tower
15 East Fifth Street, Suite 2750
Tulsa, Oklahoma 74103-4334

R. Tom Hillis
Barkley, Titus, Hillis & Reynolds
First Place Tower
15 East Fifth Street, Suite 2750
Tulsa, Oklahoma 74103

Philip J. Milligan
Milligan Law Offices
805 Garrison Avenue
P.O. Box 2347
Fort Smith, AR 72902-2347



Mark D. Lyons

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

FILED

MAY 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JERRY LYNN MCCRACKEN,)
)
Petitioner,)
)
v.)
)
RON WARD, Warden,)
Oklahoma State Penitentiary,)
)
Respondent,)

Case No. 97-CV-945-BU(M)

ENTERED ON DOCKET
DATE **MAY 17 2000**

JUDGMENT

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

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

ORDERED THIS 15th DAY OF MAY, 1999


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

4/10

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

JERRY LYNN MCCRACKEN,)
)
Petitioner,)
)
v.)
)
RON WARD, Warden,)
Oklahoma State Penitentiary,)
)
Respondent,)

ENTERED ON DOCKET

DATE MAY 17 2000

Case No. 97-CV-945-BU(M)

FILED

MAY 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

This matter is before the Court for consideration of a petition for writ of habeas corpus filed by Oklahoma death row inmate Jerry Lynn McCracken pursuant to 28 U.S.C. § 2254. Petitioner, who appears through counsel, challenges his convictions and sentences in Tulsa County District Court, Case No. CF-90-4347. The Respondent has filed a response denying the allegations in the petition.

The Court has reviewed (1) the Preliminary and Amended Petitions for Writ of Habeas Corpus filed by Petitioner; (2) the Response to the Petitions filed by the State of Oklahoma; (3) the Reply to the Response filed by Petitioner; (4) the transcript of the Preliminary Hearing held in Tulsa County District Court on January 15, 1991; (5) the transcript of the Jury Trial held in Tulsa County District Court on September 16, 17, 18, 19, 20, 23, & 24, 1991; (6) the transcript of the Sentencing Proceeding held in Tulsa County District Court on October 7 & 15, 1991; (7) the state direct appeal record; and (8) the state

post-conviction appeal record. As a result, the Court finds that the records, pleadings, and transcripts of the state proceedings provide all of the factual information necessary to resolve the matters in the petition and, therefore, Petitioner's requests for an evidentiary hearing and oral argument are denied. 28 U.S.C. § 2254(e)(1); *see also* Steele v. Young, 11 F.3d 1518 (10th Cir. 1993) and cases cited therein.

I. PROCEDURAL BACKGROUND

Jerry Lynn McCracken, Petitioner, was convicted on four counts of First Degree Murder, and one count of Possession of a Firearm after Former Conviction of a Felony in 1991, following a jury trial in the District Court of Tulsa County, Case No. CF-90-4347. During the sentencing phase of the trial, the jury found the existence of six aggravating circumstances: (1) Petitioner had previously been convicted of a felony involving violence; (2) Petitioner knowingly created a great risk of death to more than one person; (3) the murders were committed while Petitioner was serving a sentence on a felony conviction; (4) there exists the probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society; (5) the murders of Carol Ann McDaniels and Timothy Sheets were especially heinous, atrocious, or cruel; and (6) the murders were committed for the purpose of preventing lawful arrest and prosecution. Thereafter, the jury recommended a death sentence as punishment for each of the four murders. Additionally, the jury recommended a sentence of ten (10) years imprisonment on the possession of a firearm charge. The trial court sentenced Petitioner accordingly.

Petitioner filed a direct appeal of his conviction in the Oklahoma Court of Criminal Appeals (OCCA), Case No. F-89-508. In a published opinion, the OCCA rejected Petitioner's allegations of error and affirmed the conviction and sentence. McCracken v. State, 887 P.2d 323 (Okla. Crim. App. 1994), *cert. denied*, 516 U.S. 859 (1995). Upon the Supreme Court's denial of certiorari, Petitioner filed an Application for Post-Conviction Relief in the OCCA on July 31, 1996, Case No. PC-96-934. By published opinion, the OCCA denied relief on September 18, 1997. McCracken v. State, 946 P.2d 672 (Okla. Crim. App. 1997).

Petitioner filed a request for appointment of counsel with this Court on October 20, 1997, which the Court granted on October 27, 1997. Petitioner, through appointed counsel, filed a preliminary petition for writ of habeas corpus with this Court on December 12, 1997. On February 11, 1998, Petitioner filed an amended petition for writ of habeas corpus. Respondent, represented by the State Attorney General's Office, filed a response on August 31, 1998. Petitioner's Reply was filed on September 17, 1998.

II. FACTUAL BACKGROUND

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

The record reveals that [Petitioner] was on pre-parole release from the Oklahoma Department of Corrections and was residing at a facility run by the Tulsa Action Group. On Monday, October 9, 1990, [Petitioner] purchased a .22 caliber gun from a co-worker. On the evening of October 13, 1990, [Petitioner] and co-defendant, David Lawrence, were at the Ferndale Lounge

in Tulsa, Oklahoma. One witness, Dee Dee Nelson, testified that she had been working at the Lounge earlier that evening and noticed that [Petitioner] and Lawrence appeared "nervous." Another witness, Patricia Harrington, testified that she was at the lounge at approximately 7:30 p.m. that evening until approximately 12:30 a.m. While there, she witnessed a confrontation between [Petitioner] and another patron named Randy Dunn, who she described as drunk. She saw Mr. Dunn slam a knife on the bar and say to [Petitioner], "if you want some shit, you can get it right here," to which, [Petitioner] picked up the knife and echoed the same sentiment. Ms. Harrington, who owned the bar, described both [Petitioner] and Mr. Lawrence as "very drunk."

Donald Tillerson testified that he was at the Lounge that evening for approximately fifteen minutes before he departed at about 12:55 a.m. Tillerson testified that he observed and heard [Petitioner] and Mr. Lawrence engage in what he called, "institutional talk," saying to each other that they were not afraid of "getting an ass whuppin" and they weren't afraid to shoot somebody. When he left the Lounge, there were six people there, the four victims, [Petitioner] and Mr. Lawrence. Witness, Cathrine Dacre, testified that she left simultaneously with Mr. Tillerson and the same six people remained.

Witness Leonard Helton testified that he was at the Lounge between 12:15 and 12:30 a.m. He left and returned a little after 1:00 a.m. when as he entered, he saw one of the victims, Steve Smith, lying up against a wall, covered with blood on his head and chest. He went across the street and reported what he saw to three Tulsa police officers who had stopped at the convenience store.

[Petitioner] testified that he had purchased a .22 caliber gun [the day] before the incident to protect himself from the gangs in the neighborhood and to protect his girlfriend. He planned on selling the gun after his release from pre-parole prior to his return to his home in Tennessee.

[According to Petitioner's testimony], [o]n the night in question, [Petitioner] and Mr. Lawrence arrived at the Lounge between 7:00 and 8:00 p.m. During the course of the evening, Mr. Lawrence asked to see the gun and inquired as to whether [Petitioner] would "sell it to him, let him keep it for awhile." [Petitioner] let Mr. Lawrence have the gun. [Petitioner] recalled that Mr. Lawrence kept joking about robbing the place, but he did not take him seriously. He testified that Lawrence went to the bathroom and when he came back, Lawrence started the robbery by pointing the gun up in the air and

declaring, “this is a robbery.” He described in detail how Lawrence shot the four victims.

Mr. Lawrence pled guilty earlier to the crime charged and testified that it was [Petitioner] who committed the robbery and who shot the four victims.

McCracken, 887 P.2d at 326-327.

III. GROUNDS FOR RELIEF

Petitioner asserts fourteen (14) grounds for relief in his Amended Petition for Writ of Habeas Corpus. Specifically, Petitioner asserts his constitutional rights were violated by the following propositions of error: (1) the trial court’s use of the “presumed not guilty” instruction was constitutionally improper; (2) Petitioner’s competency to stand trial was not properly investigated or challenged; (3) the trial court failed to properly instruct the jury on the correct burden of proof at the guilt stage of trial; (4) the trial court failed to properly instruct the jury on the correct burden of proof at the sentencing stage of trial; (5) the trial court’s refusal to instruct the jury on the meaning of life without parole was improper; (6) the trial court’s failure to instruct the jury on the lesser included offense of First Degree Manslaughter violated Petitioner’s constitutional rights under the Sixth, Eighth, and Fourteenth Amendments; (7) Petitioner was denied the right to confront the witnesses against him; (8) the “continuing threat” aggravating circumstance is unconstitutionally vague and overbroad; (9) there was insufficient evidence to prove the “especially heinous, atrocious, or cruel” aggravating circumstance; (10) there was insufficient evidence to support the “great risk of death to more than one person” aggravator; (11) the aggravating circumstance that the murders were committed while Petitioner was serving a sentence of imprisonment was

improperly applied; (12) the jury was not properly instructed that one who does not kill, intend to kill, contemplate that life be taken, or act with reckless disregard for the life or lives of another or others is not death-eligible; (13) the jury was improperly instructed regarding mitigation evidence; and, (14) Oklahoma's post-conviction procedures are unconstitutional.

IV. STANDARD OF REVIEW

On April 25, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This Act made significant changes to federal habeas corpus law, specifically delineating the circumstances under which a federal court may grant habeas relief. The Tenth Circuit has recognized that the AEDPA increases the deference to be paid to a state court's factual findings and legal determinations. Houchin v. Zavaras, 107 F.3d 1465 (10th Cir. 1997). Additionally, the Tenth Circuit has applied the new standard of review to cases commenced after the effective date of the AEDPA, regardless of whether the crime or state trial occurred prior to the effective date. *See, e.g.,* White v. Scott, 141 F.3d 1187 (Table, text available at 1998 WL 165162)(10th Cir. Apr. 9, 1998); Dodson v. Scott, 139 F.3d 911 (Table, text available at 1998 WL 50957) (10th Cir. Feb. 9, 1998); and United States v. Coleman, 125 F.3d 863, (Table, text available at 1997 WL 608762)(10th Cir. Oct. 3, 1997), *cert. denied*, 523 U.S. 1033, 118 S.Ct. 1328, 140 L.Ed.2d 490 (1998).

Since Petitioner initially filed a request for appointment of a habeas corpus attorney,

154, however, those provisions (which apply to § 2254 proceedings in capital cases if the state holding the condemned prisoner has met certain conditions) do not apply to this case. Lindh v. Murphy, 521 U.S. 320 (1997).

Under the Act, in order to obtain federal habeas relief once a state court has adjudicated a particular claim on the merits, Petitioner must demonstrate that the adjudication:

(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.A. § 2254(d)(1-2).

The Supreme Court recently addressed the standard for obtaining relief under the AEDPA. See Williams v. Taylor, ___ U.S. ___, 120 S.Ct. 1495, 68 USLW 4263 (2000). In Williams, the Court concluded that “§2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner’s application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.” Id. at 1523. Williams establishes that under 28.U.S.C.A. § 2254(d)(1), the “contrary to” and “unreasonable application” clauses must be given independent meaning. See id. at 1519. In order to grant a writ under the “contrary to” clause, a court must find that the state court (1) arrived at a conclusion opposite to that reached by the Supreme Court on a question of law; or (2) decided a case differently than the Supreme Court on a set of materially indistinguishable facts. See id. at

holding that it unconstitutionally diluted the presumption that guilt is to be proven beyond a reasonable doubt). Hence, Petitioner claims he is entitled to habeas relief because of the error attributable to the “presumed to be not guilty” instruction given to the jury.

Petitioner raised this claim for the first time in his post-conviction appeal. Thus, Respondent argues the claim is procedurally barred because of Petitioner’s failure to raise the proposition in his direct appeal. Although the Court holds the claim is not procedurally barred, the Court concludes it does not provide grounds for habeas corpus relief on the merits.

A. PROCEDURAL DEFAULT

Respondent contends Petitioner waived this claim when he failed to raise it in his direct appeal. On post-conviction review, the OCCA barred Petitioner’s allegation based on the authority of 22 O.S.Supp. 1995, § 1089. Under section 1089(C)(1), Petitioner’s claim is barred unless he can demonstrate that it “could not have been raised in [his] direct appeal.” Petitioner’s challenge to the presumed to be not guilty jury instruction “could not have been raised” if it:

(a) was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before [the] date [Petitioner’s direct appeal brief was due], or (b) is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of [the state of Oklahoma]...

22 O.S.Supp. 1995, § 1089 (D)(9)(a) & (b). Citing the new statute, the OCCA found that the issue was waived when Petitioner failed to raise it in his direct appeal and barred consideration of the claim. McCracken, 946 P.2d at 674-75.

Petitioner argues his claim should not be barred because section 1089(C)(1) was enacted after his direct appeal; thus, the OCCA incorrectly relied upon it when they determined Petitioner's claim was waived. The new post-conviction rules, including section 1089(C)(1), were enacted on November 1, 1995. Petitioner's direct appeal brief was filed on July 13, 1992, and his original application for post-conviction relief was filed on July 31, 1996. In other words, the procedural rules in place at the time of his post-conviction appeal, and relied upon by the OCCA to bar his claim, were not the same as the rules in place at the time of his original direct appeal. Petitioner argues that he should not be barred by the new procedural rule which came into effect during the interim between his original appeal and his subsequent post-conviction appeal. Under the procedural rules in place at the time of his direct appeal², Petitioner claims he would have been able to raise the deficient instruction claim in his post-conviction appeal, irrespective of his failure to raise the claim in the initial direct appeal. Hence, Petitioner asserts his claim should not be barred, and the Court should consider it on the merits. The Court agrees with Petitioner.

The Court must first assess the effect given to the state court's application of the 1995 amendments to an alleged default that occurred before those amendments were enacted.

²22 O.S. 1991 §1086.

When a federal habeas petitioner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred absent a showing of cause and prejudice or of a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). "The Supreme Court of the United States has made it clear that a state's procedural rule used to bar consideration of a claim 'must have been "firmly established and regularly followed" by the time as of which it is to be applied.'" *Fields v. Calderon*, 125 F.3d 757, 760 (9th Cir.1997) (quoting *Ford v. Georgia*, 498 U.S. 411, 423-4, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991)). The Tenth Circuit recently held that "the proper time for determining whether a procedural rule was firmly established and regularly followed is the time of the purported procedural default." *Gary Alan Walker v. Attorney General for the State of Okla.*, 167 F.3d 1339, 1344-5 (10th Cir.) (citations omitted) (quotations omitted), *cert. denied*, 120 S.Ct. 449, 145 L.Ed.2d 366 (1999). The Tenth Circuit continued, "[a] defendant cannot be expected to comply with a procedural rule that does not exist at the time, and should not be deprived of a claim for failing to comply with a rule that only comes into being after the time for compliance has passed." *Id.* (citations omitted) (quotations omitted).

In the present case, the OCCA held that Petitioner's Flores challenge to the presumed not guilty instruction was procedurally barred by his failure to raise it in his direct appeal based on 22 O.S. 1995, §1089. Prior to the 1995 amendments to the state post-conviction procedures, however, it was settled law in Oklahoma that an intervening change in the law constituted sufficient reason for a petitioner's failure to raise an issue on direct appeal. *See*

Gary Alan Walker v. Ward, 934 F. Supp. 1286, 1293 (N.D. Okla. 1996) (citing cases). Moreover, Oklahoma has held that a decision qualified as an intervening change in the law even if it was based on previously announced principles so long as it constituted the Supreme Court's definitive resolution of the matter. *See id.* at 1293-94. The OCCA specifically noted in Jack Dale Walker v. State, 933 P.2d 327, 337 n.42 (Okla.Crim.App.1997), that a Flores claim would have constituted an intervening change in the law under prior capital post-convictions statutes.³ Since, based on the footnote cited above, it appears Petitioner's proposition would not have been barred by the OCCA under the pre-1995 standard, the Court holds that Petitioner is not procedurally barred from seeking habeas relief on his Flores claim due to his failure to raise it in his direct appeal.⁴ *See Gary Alan Walker*, 167 F.3d at 1345 (holding the petitioner's Cooper claim was not barred because the OCCA, in footnote seven of Valdez v. Oklahoma, 933 P.2d 931, 933 n. 7 (Okla.Crim.App. 1997), stated that Cooper constituted an intervening change in the law under the old standard). The Court now turns to the merits of the claim.

B. THE MERITS OF THE CLAIM

Petitioner asserts the trial court's use of the "presumed to be not guilty" instruction violated the Fourteenth Amendment by distorting the principle that defendants are presumed

³22 O.S. 1991 §1086.

⁴The Court notes the Tenth Circuit has held Flores claims in non-capital cases barred under 22 O.S. 1991 §1086, the prevailing capital post-conviction statute in place at the time of Petitioner's original default. *See, e.g., Sherril v. Hargett*, 184 F.3d 1172 (10th Cir. 1999). However, this creates a perceived inconsistency at the Circuit Court level. Should the Tenth Circuit decide Petitioner's Flores claim is procedurally barred, it would not affect the outcome of this decision, but, in the interests of efficiency, the Court will consider the merits of the claim in case the Tenth Circuit decides the claim should not be barred in capital cases following the same analysis in Gary Alan Walker regarding Cooper claims.

innocent until the state proves them guilty beyond a reasonable doubt. Furthermore, Petitioner argues the instruction constitutes a “structural error,” which would entitle him to habeas relief without the need to conduct any form of harmless review. *See Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The Court disagrees and for the reasons discussed below finds the “presumed not guilty” instruction was not “structural error.” Therefore, if the Court were to find the trial court’s use of the “presumed not guilty” instruction constituted a federal constitutional violation, the Court would review for harmless error using the standard discussed in *Kotteakos v. United States*, 328 U.S. 750, 665 S.Ct. 1239, 90 L.Ed. 1557 (1946). *See, e.g. United States v. Hernandez-Muniz*, 170 F.3d 1007, 1010 (holding that the applicable harmless error standard in the Tenth Circuit is the one articulated in *Kotteakos*). Furthermore, under *Kotteakos*, the Court concludes the alleged error was harmless.⁵

A federal court, within the jurisdiction of the Tenth Circuit, reviewing a “state court error in a habeas proceeding should not grant relief unless the court finds the trial error ‘had substantial and injurious effect or influence in determining the jury’s verdict.’” *Crespin v. New Mexico*, 144 F.3d 641, 649 (10th Cir.) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 1721, 123 L.Ed.2d 353 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))), *cert. denied*, 119 S.Ct. 378, 142 L.Ed.2d 313 (1998). Nonetheless,

⁵Whether the “presumed not guilty” instruction is actually federally unconstitutional is questionable, and the Court need not decide that issue in this case; because, as discussed *infra*, the error, if any, was harmless. *See Sherrill v. Hargett*, 184 F.3d 1172 (10th Cir. 1999). *Compare Flores*, 896 P.2d 558 (Okla. Crim. App. 1995) (wherein the OCCA held the “presumed not guilty” instruction unconstitutional because it diluted the presumption that guilt is to be proven beyond a reasonable doubt) with *State v. Pierce*, 927 P.2d 929, 936 (Kan. 1996) (wherein the Kansas Supreme Court held that a “not guilty” instruction preserved defendant’s presumption of innocence).

the Supreme Court has determined that certain "structural errors" so undermine the constitutionality of a criminal trial that automatic reversal of a conviction is required. *See Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The Supreme Court has observed that classification of an error as structural, and therefore not subject to review for harmlessness, is "the exception and not the rule." *Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Id.* at 579. Structural errors are errors that affect the "entire conduct of the trial from beginning to end," and therefore cannot be harmless. *Arizona v. Fulminante*, 499 U.S. 279, 306-10, 111 S.Ct. 1246, 1263-5, 113 L.Ed.2d 302 (1991). As the Fourth Circuit stated:

Correctly applied, harmless error and structural error analyses produce identical results: unfair convictions are reversed while fair convictions are affirmed. Expanding the list of structural errors, however, is not mere legal abstraction. It can also be a dangerous endeavor. There is always the risk that a sometimes-harmless error will be classified as structural, thus resulting in the reversal of criminal convictions obtained pursuant to a fair trial. Given this risk, judges should be wary of prescribing new errors requiring automatic reversal. Indeed, before a court adds a new error to the list of structural errors (and thereby requires the reversal of every criminal conviction in which the error occurs), the court must be certain that the error's presence would render every such trial unfair.

Sherman v. Smith, 89 F.3d 1134, 1138 (4th Cir. 1996) (citing *Fulminante*).⁶

⁶Examples of cases involving structural defects in the constitution of the trial mechanism, which defy analysis by "harmless error" standards, include: total deprivation of the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); a judge who was not impartial, *Tumey v. Ohio*, 273 U.S. 510 (1927); unlawful exclusion of members of defendant's race from a

In Sullivan, the Supreme Court found the trial court's use of an unconstitutional instruction defining "reasonable doubt" to be one such "structural error" and granted relief absent any harmless error analysis. Id. Petitioner argues the erroneous "presumed not guilty" instruction is analogous to the unconstitutional instruction defining "reasonable doubt" in Sullivan because both are intertwined within the maxim that defendants, in the American criminal justice system, are "innocent until proven guilty." Hence, Petitioner claims the trial court's use of the unconstitutional "presumed not guilty" instruction is structural error. The Court disagrees.

The Supreme Court has consistently distinguished the importance of the two standards. As an example, this Court looks to Justice White's dissent in the Fulminante case to better understand the difference between the importance of the two instructions:

[The Supreme Court has] held susceptible to harmless-error analysis the failure to instruct the jury on the presumption of innocence, Kentucky v. Whorton, 441 U.S. 786 ... (1989), while finding it impossible to analyze in terms of harmless error the failure to instruct a jury on the reasonable-doubt standard, Jackson v. Virginia, 443 U.S. 307, 320, n. 14 ... (1979). These cases cannot be reconciled by labeling the former "trial error" and latter not, for both concern the exact same stage in the trial proceedings. Rather, these cases can be reconciled only by considering the nature of the right at issue and the effect of an error upon the trial. A jury instruction on the presumption of innocence is not constitutionally required in every case to satisfy due process, because such an instruction merely offers an additional safeguard beyond that provided by the constitutionally required instruction on reasonable doubt. *See Whorton, supra* 441 U.S., at 789 ... ; Taylor v. Kentucky, 436 U.S. 478, 488-490 ... (1978). While it may be possible to analyze as harmless the omission of a

grand jury, Vasquez v. Hillery, 474 U.S. 254 (1986); the right to self-representation at trial, McKaskle v. Wiggins, 465 U.S. 168, 177-78 n. 8 (1984); and the right to a public trial, Waller v. Georgia, 467 U.S. 39, 49 n. 9 (1984). Arizona v. Fulminante, 499 U.S. 279, 309-10. These errors are "structural defects affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. at 310.

presumption of innocence instruction when the required reasonable-doubt instruction has been given, it is impossible to assess the effect on the jury of the omission of the more fundamental instruction on reasonable doubt.

Fulminante, 499 U.S. at 291 (WHITE, J., dissenting). Thus, it stands to reason, that although the Sullivan court found the improper “reasonable doubt” instruction “structural error,” the purported unconstitutional “presumption of guilt” instruction in this case would not be “structural error.” Therefore, this Court will review the error under the harmless-error analysis originally described by Kotteakos.

As mentioned previously, the Kotteakos harmless-error standard states that habeas relief shall not be granted unless the error “had a substantial and injurious effect or influence in determining the jury’s verdict.” 328 U.S. at 776. In the present case, Petitioner and his co-defendant were the only witnesses who walked out of the Ferndale Lounge alive. Both testified at trial that the other was the shooter. Since the jury was able to hear from both Petitioner and his co-defendant, the jury was able to maintain its “core function”; which is the making of credibility determinations in criminal trials. Determining the weight and credibility of witness testimony has long been held to be the “part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.” Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891). Based on the jury’s conviction and sentence of death, it appears obvious to the Court that the jury believed the co-defendant’s testimony over Petitioner’s; consequently, the jury believed Petitioner was the gunman. Thus, the Court holds it was the jury’s ability to weigh the veracity of the testimony of both Petitioner and his co-defendant that was the

determining factor in the jury's decision of guilt, not the semantic difference between "presumed innocent" and "presumed not guilty." Thus, assuming the use of the "presumed not guilty" instruction was error, that error was harmless. The Court, accordingly, denies habeas relief on this claim.

VI. PROCEDURAL DEFAULT

The OCCA held that Petitioner waived three⁷ of his thirteen remaining claims, when he did not raise the issues in his direct appeal. McCracken, 946 P.2d at 674-5.⁸ In accordance, Respondent asserts the claims are procedurally barred from consideration by this Court.

Generally, if a petitioner has failed to present a claim to the state courts in the manner prescribed by the procedural rules of the state, the state court may deem the claim defaulted. Wainright v. Sykes, 433 U.S. 72 (1977). Where a state prisoner defaults his federal claims in state court based upon an "independent and adequate" state procedural rule, federal review of his habeas claims will be barred. Coleman v. Thompson, 501 U.S. 722, 729 (1991). If the state court's finding is separate and distinct from federal law, it will be considered "independent". See Ake v. Oklahoma, 470 U.S. 8, 75, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53 (1985); Duvall v. Reynolds, 139 F.3d 768 (10th Cir.), *cert. denied*, 119 S.Ct. 345 (1998). If the finding is applied "evenhandedly to all similar claims", it will be considered

⁷The claims, as numbered in Petitioner's Amended Petition for Writ of Habeas Corpus, are Third, Fourth, and Sixth Propositions.

⁸The OCCA based the procedural bar on the rule set forth in 22 O.S. § 1086.

“adequate”. Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995) (citing Hathorn v. Lovorn, 457 U.S. 255, 263, 102 S.Ct. 2421, 2426, 72 L.Ed.2d 824 (1982)). As noted in Jackson v. Shanks, 143 F.3d 1313, 1317 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 378, 142 L.Ed.2d 312 (1998), the procedural default rule is not a jurisdictional rule; rather, it is based upon the principles of comity and federalism.

The Tenth Circuit has held Oklahoma’s post-conviction statute,⁹ which bars review of claims that could have been raised on direct appeal including issues involving fundamental, constitutional rights, is an “adequate, as well as independent, state ground” which can effectively bar federal habeas review. Steele v. Young, 11 F.3d 1518, 1521-2 (1993). Thus, the OCCA’s bar of Petitioner’s current Third¹⁰, Fourth¹¹, and Sixth¹² Propositions, was “independent and adequate.”

In the situation where “a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claim is barred unless the prisoner” can show either “cause and prejudice,” or, alternatively, a “fundamental miscarriage of justice.” See Coleman v. Thompson, 501 U.S. 722, 750 (1991). Therefore, unless Petitioner can show that either the “cause and prejudice” or

⁹22 O.S. § 1086.

¹⁰In Proposition Three, Petitioner claims the trial court erred in instructing the jury the State had to prove beyond a reasonable doubt “all the material allegations contained in the Information...”

¹¹In Proposition Four, Petitioner claims the jury was erroneously instructed that the State’s burden of proof in the second stage was to prove the “material allegations” of the Bill of Particulars.

¹²In Proposition Six, Petitioner claims his rights were denied when the trial court failed to instruct the jury on the lesser included offense of First Degree Manslaughter.

“fundamental miscarriage of justice” exception to the procedural bar rule is applicable to his claims, the Court will not adjudicate the merits of Petitioner’s claims. See Coleman, 501 U.S. at 750. Petitioner does not argue that he has shown a fundamental miscarriage of justice to override his procedural default; instead he relies on the “cause and prejudice” exception.

Petitioner attempts to demonstrate “cause and prejudice” via an ineffective assistance of appellate counsel claim. Ineffective assistance of appellate counsel may constitute cause for state procedural default where counsel’s performance falls below the minimum standard established in Strickland. See Murray v. Carrier, 477 U.S. 478, 488-489, 106 S.Ct. 2639, 2645-6, 91 L.Ed.2d 397 (1986). However, Petitioner appellate counsel was not ineffective for failing to raise the claims at issue. See, discussion *infra* Section XVI, B. Hence, Petitioner cannot establish the “cause and prejudice” exception to the procedural bar, and the Third, Fourth, and Sixth Propositions are procedurally barred from consideration by the Court.

**VII. JUDGE’S RESPONSE TO JURY’S QUESTION RE:
MEANING OF LIFE WITHOUT PAROLE**

In his Fifth Proposition of error, Petitioner states the trial judge committed constitutional error, when he declined to elaborate on the meaning of life without parole after the jury submitted a question about the sentences available under the instructions. Specifically, after hearing a day and a half of testimony at the sentencing stage of the proceedings, and having deliberated for almost three (3) hours, the jury sent out the following note: “‘Does life without parole mean exactly that,’ question mark. ‘No chance

of parole whatsoever.’ question mark. ‘He would never,’ underlined, ‘under any circumstances, get out of prison.’ question mark.” (J.T. at p. 738). The trial court answered: “I will instruct you again to look at your instructions. The law in Oklahoma provides a person convicted of murder in the First Degree is punishable by death, by life without parole or life.” Id. Defense counsel neither objected to the court’s response nor requested any other type of instruction at that time. Thereafter, the jury deliberated for almost three (3) more hours before rendering a verdict of death.

Petitioner argues that Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), required the judge to inform the jury he would not be eligible for parole if sentenced to “life without parole.” Unlike the present case, however, the jury in Simmons was only given two sentencing options, either 1) life imprisonment or 2) a sentence of death. In Simmons, South Carolina statutes prevented the petitioner from being eligible for parole because of prior convictions; thus, a sentence of “life imprisonment” for the petitioner in Simmons was the equivalent of “life without parole.” Id., U.S. at 156. The Simmons trial court, however, refused to inform the jury that the petitioner would not be eligible for parole, should they decide to give him a sentence of “life imprisonment.” Id., U.S. at 160. After deliberating petitioner Simmons’ sentence for approximately 90 minutes, the jury sent a note to the judge asking: “Does the imposition of a life sentence carry with it the possibility of parole?” The court responded by telling the jury they were not to consider parole or parole eligibility in reaching their decision and that “the terms life imprisonment and death sentence” should be “understood in their plain [sic] and ordinary meaning.” Id. In granting

habeas relief, the Supreme Court held where a “defendant’s future dangerous is at issue, and state law prohibits the defendant’s release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible.” Id. (emphasis added).

In reaching its decision in Simmons, the Supreme Court relied upon the fact that twenty-six states, including Oklahoma, actually provided for life imprisonment without parole as an alternative to capital punishment. Id., U.S. at 168, n. 7. Further, the concurring opinion of Justice O’Connor, makes it clear the rule in Simmons applies only in those cases where “the only available sentence to death is life imprisonment without possibility of parole.” Id., U.S. at 178 (emphasis added).¹³

Here, Petitioner’s jury was given three sentencing options: 1) life imprisonment, 2) life imprisonment without parole, and 3) death. Since the jury at Petitioner’s trial was given the options of “life imprisonment” or “life imprisonment without parole,” the due process problems which arose in Simmons do not apply. Finally, the Court in Simmons stated: “In a State in which parole is available, how the jury’s knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of information regarding parole.” Id., U.S. at 168. The Court, accordingly, finds the judge’s response to the jury’s question about the meaning of life without parole did not violate Petitioner’s constitutional rights. Habeas relief based on Petitioner’s Proposition Five is denied.

¹³Courts confronted with the issue of whether to extend Simmons to require more information to be given a sentencing jury, in other situations, have declined to do so. See Townes v. Murray, 68 F.3d 840, 850 (4th Cir. 1995); Keel v. French, 162 F.3d 263 (4th Cir. 1998); Burgess v. State, 450 S.E.2d 680 (Ga. 1994).

VIII. “CONTINUING THREAT” AGGRAVATOR

In Proposition Eight, Petitioner claims the “continuing threat” aggravating circumstance is unconstitutionally vague. Before addressing the merits of this contention, it must be noted that it is not altogether clear that Petitioner presented this specific issue to the Oklahoma courts. In his direct appeal, Petitioner challenged the sufficiency of the evidence to support the “continuing threat” aggravator, and alleged this aggravator duplicated another aggravating circumstance. Petitioner claims the direct appeal argument and citation of authority “encompassed a vagueness and overbreadth challenge.” (Am. Pet. at p. 126). Petitioner did not, however, raise this as a separate issue; thus, the OCCA did not treat it as such, and Respondent claims it is now unexhausted.

Assuming *arguendo* the issue was properly raised and exhausted in the state courts, the Court looks to the merits of the claim.¹⁴ Upon review, there is no merit to Petitioner’s claim that the “continuing threat” aggravator, as used in Oklahoma, is unconstitutional. The Tenth Circuit has repeatedly held that the “continuing threat aggravator as applied in the Oklahoma sentencing scheme does not violate the Eighth Amendment.” Trice v. Ward, 196 F.3d 1151, 1172 (10th Cir. 1999) (citing Ross v. Ward, 165 F.3d 793, 800 (10th Cir.), *cert. denied*, 120 S.Ct. 208 (1999)); Castro v. Ward, 138 F.3d 810, 816 (10th Cir.), *cert. denied*, 119 S. Ct. 422 (1998); Nguyen v. Reynolds, 131 F.3d 1340, 1352-54 (10th Cir. 1997), *cert.*

¹⁴Likewise, assuming *arguendo* the claim is unexhausted, the Court could consider the allegation on the merits for the purpose of denying relief. 28 U.S.C. § 2254(b)(2) (stating “[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State”); *see also*, Hoxsie v. Kerby, 108 F.3d 1239, 1242-1243 (10th Cir. 1997) (denying unexhausted claims on the merits as prescribed by §2254(b)(2)).

denied, 119 S. Ct. 128 (1998). Accordingly, Proposition Eight of the Amended Petition is denied.

**IX. “ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL”
AGGRAVATING CIRCUMSTANCE**

Petitioner claims there was insufficient evidence submitted at trial to prove the “especially heinous, atrocious or cruel” aggravating circumstance. At trial, the jury found the aggravator in regards to the murders of two of the victims, Carol Ann McDaniels and Timothy Sheets. The evidence admitted in support of the aggravator showed that when the police arrived both victims were still alive and conscious, each suffering from a single gunshot wound to the head. Petitioner argues “[t]he fact that two of the victims did not die immediately or within a short time after the infliction of the fatal wounds does not demonstrate that the murders were preceded by torture or serious physical abuse, which was consciously intended by the perpetrator.” After reviewing the evidence, the Court concludes there was sufficient evidence for the jury to find the aggravator existed beyond a reasonable doubt for these two murders.

The relevant question in determining whether the evidence was sufficient to support a finding of the “especially heinous” aggravating circumstance is to ask 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 [aggravating circumstance] beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). 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.” Id. The Tenth Circuit has emphasized that, under Jackson, “review is ‘sharply limited’ and a court ‘faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.’” Messer v. Roberts, 74 F.3d 1009, 1013 (10th Cir. 1996)(quoting Wright v. West, 505 U.S. 277, 296-97, 112 S.Ct. 2482, 2491-92, 120 L.Ed.2d 225 (1992)).

In applying the Jackson standard, the Court looks to Oklahoma law to determine the “substantive elements” of the aggravating circumstance. The OCCA has determined that the “serious physical abuse” element requires proof of “conscious physical suffering.” Stafford v. State, 832 P.2d 20, 23 (Okla. Crim. App. 1992)(quoting Battenfield v. State, 816 P.2d 555, 565 (Okla. Crim. App. 1991)) (“absent evidence of conscious physical suffering of the victim prior to death, the required torture or serious physical abuse standard is not met”). However, the OCCA has stated that there are no “specific, uniform criteria, applicable to all murder cases, which would make the application of the ‘heinous, atrocious or cruel’ aggravator a mechanical procedure.” Robinson v. State, 900 P.2d 389, 401 (Okla. Crim. App. 1995). “Rather, the examination of the facts of each and every case is necessary in determining whether the aggravator was proved.” Id. Therefore, the Court must focus its inquiry on the particulars of this case, rather than this case’s similarity to another, to resolve the sufficiency of the evidence claim supporting the “heinous, atrocious or cruel” aggravating circumstance. See id.

While evaluating the particular evidence introduced at Petitioner's trial, the Court must "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir. 1993).

The evidence at trial showed that both victims were conscious when the police arrived at the scene. (Jury Trial Tr. at 38.) According to Officer Nixon, one of the first officers on the scene, Mr. Sheets "was breathing and had a pulse. He had thrown up and there was blood all over him. He was convulsing." Id. Similarly, Officer Steele testified that Ms. McDaniel was conscious and even told him her name. Id. at 71. In addition, Karen Crosier, an Emergency Medical Technician who arrived at the scene shortly after the police, stated that Ms. McDaniel was "talking, moving her arm, stating that her arm hurt, and [Ms. McDaniel] had a pulse and she was breathing." Id. at 180.

Based upon this evidence, the jury held the "especially heinous, atrocious, or cruel" aggravating circumstance existed in the murders of these two victims; wherein both experienced "conscious physical suffering" prior to death. Due to the testimony of the emergency personnel on the scene, the Court holds it reasonable for a jury to determine Mr. Sheets and Ms. McDaniel were conscious and suffering for several minutes after Petitioner shot each of them in the head. Hence, "after viewing the evidence in the light most favorable to the prosecution," the Court holds that "any rational trier of fact could have found the

essential elements”¹⁵ of the heinous, atrocious, or cruel aggravating circumstance beyond a reasonable doubt. Jackson, 443 U.S. at 319.

Petitioner also argues that the “especially heinous, atrocious, or cruel” aggravating circumstance was applied in an unconstitutional manner. However, a look at the record shows the trial court submitted a limiting instruction to the jury for this aggravator.¹⁶ This limiting instruction has been approved by the Supreme Court in Walton v. Arizona, 497 U.S. 639, 652-5, 110 S.Ct. 3047, 3056-8, 111 L.Ed.2d 511 (1990), and, as stated above, this Court must defer to the resolution of the jury, which found sufficient evidence to support the finding of the “heinous, atrocious, or cruel” aggravating circumstance as limited by the approved instruction. Habeas relief based upon Petitioner’s Ninth Proposition, accordingly, is denied.

X. OKLAHOMA’S POST-CONVICTION PROCEDURES

Petitioner asserts Oklahoma’s post-conviction application procedure denies capital defendants equal access to the courts and deprives them of due process in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and is an ex post facto law in violation of both federal and state constitutions. This claim is not supported by any constitutional analysis. Rather, it amounts to a wholesale attack on Oklahoma’s post-conviction application procedure, including Petitioner’s protests that post-

¹⁵As stated, *supra*, the OCCA has determined that the “serious physical abuse” element requires proof of “conscious physical suffering.” Stafford v. State, 832 P.2d 20, 23 (Okla. Crim. App. 1992)(quoting Battenfield v. State, 816 P.2d 555, 565 (Okla. Crim. App. 1991)) (“absent evidence of conscious physical suffering of the victim prior to death, the required torture or serious physical abuse standard is not met”).

¹⁶*See* (Instruction No. 7, O.R. at p. 224).

conviction proceedings in Oklahoma “create a maze of ‘Catch-22s’ that have the effect of making post-conviction proceedings in capital cases all but meaningless,” (Am. Pet. at p. 155), and since Oklahoma’s post-conviction proceedings are “not an opportunity to raise new issues, resubmit claims which were determined on direct appeal or to submit issues which could have been raised on direct appeal,” Moore v. State, 889 P.2d 1253, 1255 (Okla. Crim. App. 1995), *cert. denied*, 516 U.S. 881 (1995), the proceedings are an empty process, ineffective to protect the rights of the applicant. (Am. Pet. at pp. 147-59).

Despite Petitioner’s multitude of contentions, the Court fails to discern from Petitioner’s argument a cognizable federal habeas claim. No constitutional provision requires that states provide post-conviction review. Pennsylvania v. Finley, 481 U.S. 551, 557, 107 S.Ct. 1990, 1994, 95 L.Ed.2d 539 (1987); *see also*, Murray v. Giarratano, 492 U.S. 1, 10, 109 S.Ct. 2765, 2770-1, 106 L.Ed.2d 1 (1989). “Federal habeas review of state convictions has traditionally been limited to claims of constitutional violations occurring in the course of the underlying state criminal proceedings.” Herrera v. Collins, 506 U.S. 390, 416, 113 S.Ct. 853, 868, 122 L.Ed.2d 203 (1993). A claim of procedural error or procedural deficiency in a state’s post-conviction relief proceedings, even in a capital case, does not rise to the level of a federal constitutional claim cognizable in federal habeas proceedings. Steele v. Young, 11 F.3d 1518, 1524 (10th Cir. 1993). Since Petitioner’s argument attacks only the possible procedural deficiencies of Oklahoma’s post-conviction process, and raises no distinct federal constitutional claims, habeas relief on Proposition Fourteen of the Amended Petition is unwarranted.

**XI. "GREAT RISK OF DEATH TO MORE THAN ONE PERSON"
AGGRAVATING CIRCUMSTANCE**

Petitioner, in his Tenth Proposition for relief, contends that insufficient evidence was presented to support the jury's finding that the defendant knowingly created a great risk of death to more than one person. Specifically, Petitioner argues that the aggravator should not be applied in a multiple murder case. Petitioner also claims the OCCA has applied the aggravating circumstance in an unconstitutional manner. Furthermore, Petitioner asserts the circumstance duplicates the aggravating circumstance that the murder was committed to avoid arrest of prosecution. The issues were presented to the OCCA on direct appeal; wherein, the state court found the claims to be without merit. McCracken, 887 P.2d at 332.

The relevant question in determining whether the evidence was sufficient to support a finding of the great risk of death to more than one person aggravating circumstance is to ask 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 [aggravating circumstance] beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). 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." Id.

In applying the Jackson standard, the Court looks to Oklahoma law to determine the "substantive elements" of the aggravating circumstance. The OCCA has consistently interpreted the "great risk of death to more than one person" aggravating circumstance in two

ways. The state court has held that more than one person need not be killed, only that the defendant knowingly creates a great risk of death to more than one person. *Accord Trice v. Ward*, 196 F.3d 1151 (10th Cir. 1999) (holding that evidence supported the jury's finding of the great risk of death to more than one person aggravator, where the petitioner murdered one victim and delivered life threatening blows to a second victim). In addition, the OCCA has held the fact that more than one person is killed will satisfy this aggravator. *Slaughter v. State*, 950 P.2d 839, 858 n.10 (Okla. Crim. App. 1997) (citing *Hain v. State*, 919 P.2d 1130, 1147 (Okla.Crim.App. 1996); *Cargle v. State*, 909 P.2d 806, 832 (Okla.Crim.App. 1995); *Hooker v. State*, 887 P.2d 1351, 1364 (Okla.Crim.App. 1994); *Stafford v. State*, 853 P.2d 223, 225 (Okla.Cr.1993); *Sellers v. State*, 809 P.2d 676, 691 (Okla.Crim.App. 1991); *Stafford v. State*, 665 P.2d 1205, 1217 (Okla.Cr.1983)). In the present matter, Petitioner shot and killed four victims. Such facts are more than sufficient to support the jury's finding of the aggravating circumstance.

Furthermore, the circumstance is not being applied by the OCCA in an unconstitutionally vague or overbroad manner. In *Tuilaepa v. California*, 512 U.S. 967, 971-4, 114 S.Ct. 2630, 2634-6, 129 L.Ed.2d 750 (1994), the Supreme Court discussed the two aspects of the capital decision making process. Those aspects are the eligibility decision and the selection decision. *Tuilaepa*, 512 U.S. at p. 971. A defendant may be considered constitutionally eligible for the death penalty if he is convicted of a crime "for which the death penalty is a proportionate punishment." *Id.* (citation omitted). To be eligible for the death penalty in a homicide case, a defendant must first be convicted of murder, and the

existence of an aggravating circumstance must be found. Tuilaepa, 512 U.S. at 972 (citations omitted). The aggravating circumstance must meet the following requirements: (1) “the circumstance may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder; and (2) the aggravating circumstance may not be unconstitutionally vague.” Id. (citations omitted).

The Tenth Circuit has explicitly held that Oklahoma’s aggravating circumstance of “great risk of death to more than one person” is not unconstitutionally vague or overbroad. Breechen v. Reynolds, 41 F.3d 1343 (10th Cir. 1994); *see also* Ross v. Ward, 165 F.3d 793, 800 (10th Cir. 1999). In Breechen, the Tenth Circuit found the construction of the circumstance provided consistent guidance to the jury so as to limit its discretion, because the circumstance “cannot reasonably be said to apply to every defendant convicted of murder.” Id. at 1360; *see also* Arave v. Creech, 507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) (holding that to satisfy the Eighth and Fourteenth Amendments, a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty).

Concerning claims of vagueness, the Supreme Court has stated that its review is “quite deferential” as “‘the proper degree of definition’ of eligibility and selection of facts often ‘is not susceptible of mathematical precision.’” Tuilaepa, 512 U.S. at 973. The Supreme Court further noted that “a factor is not unconstitutional if it has some ‘common sense core of meaning . . . that criminal juries should be capable of understanding.’” Id. (quoting Jurek v. Texas, 428 U.S. 262, 279 (1976) 279 (White, J., concurring)). In Breechen, the Tenth Circuit stated that language, of the “great risk of death” aggravator, has a “common sense

core of meaning” that juries can understand. Breechen, 41 F.3d at 1361. Consequently, the Tenth Circuit found the statutory language of the circumstance to be clear and objective, and held that the “great risk of death to more than one person” aggravating circumstance is not unconstitutionally vague. Id. This Court, accordingly, holds the “great risk to more than one person” aggravator, as used by the Oklahoma courts, is not unconstitutional for vagueness or because of overbroad application.

Finally, Petitioner contends the aggravating circumstances of “great risk of death to more than one person” and “murder to avoid arrest or prosecution” were duplicative, because the same evidence was used to support both aggravators. In United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996), the Tenth Circuit held that aggravating circumstances cannot be “double counted” as it may “skew the weighing process” and create a risk that the sentence of death will be imposed arbitrarily. However, even if the Court found the aggravators to be duplicative¹⁷, Petitioner would not be entitled to relief because the error was harmless.

“In federal habeas review of a state court trial in which an error occurred in the submission of aggravating factors to a jury which must weigh aggravating and mitigating factors, [the Court] may conduct a harmless error analysis.” Davis v. Executive Dir. Of Dep’t of Corrections, 100 F.3d 750, 773-774 (10th Cir. 1996) (citations omitted). “Applying the Brecht standard, [the Court] must determine whether, in light of the entire record, the

¹⁷Rather than determining whether the aggravating circumstances used at Petitioner’s trial actually are duplicative, the Court is assuming *arguendo* the trial court’s submission of both aggravators to the jury was error, but resolving the issue against Petitioner under the harmless error test.

submission of the two aggravators addressing the same basic conduct had a ‘substantial and injurious effect or influence’ on the jury’s verdict.” *Id.* at 774 (citing Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (wherein the Supreme Court held the Kotteakos harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type)). As stated near the beginning of this order, the jury found the existence of six aggravating circumstances, including the two at issue here. Thus, had the trial court only submitted one of the two similar aggravating circumstances to the jury, the jury would have had five aggravators to weigh against the mitigation evidence. Upon review of the entire record, the Court finds the submission of the alleged duplicative aggravators did not have a “substantial or injurious effect or influence” upon the jury’s verdict; therefore, even it was error, the error was harmless.

Since Petitioner’s claims relating to the “great risk of death to more than one person” aggravating circumstance are without merit, habeas relief on Proposition Ten of the Amended Petition is denied.

XII. “WHILE SERVING A TERM OF IMPRISONMENT” AGGRAVATING CIRCUMSTANCE

In his Eleventh Proposition for relief, Petitioner contends the “while serving a term of imprisonment” aggravating circumstance was improperly applied in this matter. The claim was presented to the OCCA on direct appeal. The OCCA found that, although Petitioner was under the Pre-Parole Conditional Supervision Program(PPCSP), he was still ““serving a

sentence of imprisonment on conviction of a felony.” McCracken, 887 P.2d at 331. Thus, the OCCA found the aggravating circumstance was properly applied. Id. The Court agrees.

In Davis v. Executive Dir. of Dep’t of Corrections, 100 F.3d 750 (10th Cir. 1996), the appellant challenged the application of an aggravating circumstance. The Tenth Circuit discussed the limitations which the Supreme Court had placed on states in determining when the death penalty may be imposed. The Tenth Circuit noted, absent a compelling argument that the state court’s interpretation of an aggravating circumstance violates the federal constitution, such interpretation will not be disturbed. Id., at 771. The Tenth Circuit stated:

As the Supreme Court has made clear, unless the aggravator is unconstitutionally vague on its face, or otherwise impedes the requirement that sentencing determinations be individualized, states are free to select whatever substantive criteria they wish to determine who is eligible for the death penalty.

Id. (citing Spaziano v. Florida, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984)).

Petitioner has failed to show that the OCCA’ interpretation and application of the “while serving a term of imprisonment” aggravating factor violates the federal constitution.

The OCCA explained:

It seems obvious the Legislature enacted this aggravator in order to protect persons who, even though they may be incarcerated, are still members of society. It makes little sense to hold the aggravator can be used to protect one segment of society, while not protecting an even greater segment of that same society.

Cooper v. State, 889 P.2d 293, 316 (Okla.Crim.App. 1995), *rev’d on other grounds*, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996) (citing to Whisenhunt v. State, 555 So.2d

219, 229, 231 (Ala. Cr. App. 1984), *aff'd* 555 So.2d 235 (Ala. 1989) (wherein the court held the evidence was sufficient to support the aggravator, even though the defendant committed the murder while on parole). In addition, the OCCA has consistently held that those who are in the PPCSP are still "incarcerated." Cooper, 889 P.2d at 316 (citations omitted).

Petitioner contends the OCCA's interpretation of the evidence makes the circumstance unconstitutionally vague and overbroad. An aggravating circumstance is not unconstitutional if it has a "common-sense core of meaning ... that criminal juries should be capable of understanding." Tuilaepa v. California, 512 U.S. at 973 (quoting Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J. concurring)). The phrase "while serving a sentence of imprisonment: has a "common-sense core of meaning" that criminal juries are fully capable of understanding. As the OCCA has held, it would be illogical for anyone to assume that an escapee or a parolee, while out of prison but still serving a sentence, would not be subject to this circumstance. Duckett v. State, 919 P.2d 7, 25 (Okla. Crim. App. 1995).

Furthermore, the circumstance does not apply to every defendant convicted of first degree murder. It applies only to a subclass of defendants convicted of murder. *See Tuilaepa*, 512 U.S. at 972. Accordingly, the circumstance as used in the Oklahoma sentencing scheme does not violate the Eighth Amendment.

The constitutional validity of an aggravating factor is a question of law. *See McCullah*, 76 F.3d at 1107. Petitioner has failed to demonstrate that the decision of the OCCA was contrary to clearly established federal law. Petitioner, therefore, is not entitled to habeas relief on Proposition Eleven of the Amended Petition.

XIII. FAILURE TO INSTRUCT PURSUANT TO ENMUND V. FLORIDA

In his Twelfth Proposition for relief, Petitioner contends his death sentence is improper because the jury was not instructed pursuant to Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).¹⁸ The issue was presented to the OCCA on direct appeal. The OCCA found any error in failing to give such an instruction was harmless “in light of the sufficient aggravating circumstances which outweigh the mitigating circumstances.” McCracken, 887 P.2d at 332. This Court, for the reasons discussed below, now finds the proposition is without merit.

In the present matter, an instruction pursuant to Enmund was not warranted. Although Petitioner was charged alternatively with malice aforethought murder and felony murder, the record reveals that the jury was instructed only on the elements of malice aforethought murder. The trial court instructed the jury that Petitioner could not be convicted of Murder in the First Degree unless the following elements were proven by the State beyond a reasonable doubt:

1. The death of a human;
2. The death was unlawful;
3. The death was caused by the defendant;
4. The death was caused with malice aforethought.

¹⁸In Enmund, the Supreme Court held that a defendant convicted of felony murder cannot be sentenced to death unless the defendant (1) killed; (2) attempted to kill; or (3) knew the killing would take place, or that lethal force would be used. In Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), the Supreme Court, to an extent, modified Enmund, by holding that a defendant who was a major participant in the underlying felony and who displayed reckless indifference to life, may receive a sentence of death.

(Instruction No. 3, O.R. at p. 250). In addition, the jury was told that “[m]alice is that deliberate intention, unlawfully, to take away the life of a human being.” (Instruction No. 4, O.R. at p. 251). A jury is presumed to follow its instructions. See Shannon v. United States, 512 U.S. 573, 585 (1994). Accordingly, it is apparent the jury found Petitioner had the requisite intent to kill and was guilty of malice aforethought murder, not felony murder. Thus, an instruction pursuant to Enmund was not warranted, and habeas relief based upon Proposition Twelve of the Amended Petition is denied.

XIV. MITIGATING INSTRUCTIONS

Petitioner, in Proposition Thirteen, claims the sentencing instructions given during the second stage of trial violated several fundamental constitutional rights guaranteed a defendant in a capital murder case; in particular, Petitioner complains 1) the instructions required the jury to unanimously find any mitigating circumstances, 2) the trial court improperly failed to instruct the jury that sympathy for the defendant could be considered at the sentencing stage, and 3) the instructions denied Petitioner his right to have the jury fully and fairly consider his mitigating evidence. Respondent argues Petitioner has failed to show that the OCCA’s adjudication of these claims resulted in a decision that “was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.” 28 U.S.C. § 2254 (d)(1). The Court agrees with Respondent and finds federal habeas corpus relief on this proposition is unwarranted.

In United States v. Frady, 456 U.S. 152, 169, 102 S.Ct. 1584, 1595, 71 L.Ed.2d 816 (1982), the Supreme Court held a petitioner is not entitled to collateral relief based on a

challenge to a jury instruction, unless the petitioner is able to show, as stated by the Supreme Court, that the instruction itself “so infected the entire trial that the resulting conviction violates due process.” (citations omitted) (quotations omitted).

Relying primarily on McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), and Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 100 L.Ed.2d 384 (1988), Petitioner asserts the jury was erroneously instructed that they must unanimously find a mitigating circumstance to exist beyond a reasonable doubt before each juror could consider the mitigating circumstance in determining whether to impose the death penalty. The Tenth Circuit recently considered this argument in Duvall v. Reynolds, 139 F.3d 768 (10th Cir. 1998), and held the sentencing instructions given to the jury were sufficient and, consequently, denied relief to the petitioner.

The petitioner in Duvall also relied on McKoy and Mills to support his claim. Similarly, the instructions used by the trial court in Duvall, relevant to the mitigating and aggravating circumstances, were similar, and in some portions identical, to the ones used at Petitioner’s trial. *Compare* Duvall, 139 F.3d at 791-92 *with* (Instructions Nos. 6, 8-10, O.R. at pp. 223, 225-228). In Duvall, the Tenth Circuit held, “that there is no reasonable likelihood that the jury applied these instructions in a way that required them to agree unanimously upon the existence of a mitigating circumstance before considering it.” 139 F.3d at 792. Hence, the Court follows the precedent set by Duvall and finds Petitioner is not entitled to habeas relief on this issue.

Next, Petitioner claims the trial court erred in failing to instruct the jury that sympathy for the defendant could be considered. Petitioner contends the trial court's failure to so instruct the jury prevented the jury from considering all of the mitigating circumstances which were presented. The OCCA noted the jury received the following instruction:

Mitigating circumstances are those which in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.

McCracken, 887 P.2d at 333. The OCCA explained that such an instruction was adequate to inform the jury that they could use mercy and fairness. Id. (citing Fox v. State, 779 P.2d 562 (Okla.Crim.App. 1989)).

Furthermore, in Castro v. Ward, 138 F.3d 810 (10th Cir. 1998), the Tenth Circuit noted that instructions, similar to the ones given in this matter, were sufficient. Specifically, the Tenth Circuit found that when the instructions were read fairly,

...there was no reasonable likelihood that the jury applied the challenged instructions in a way that prevent it from considering constitutionally relevant evidence, ... The instructions "did not preclude any of the jurors from giving effect to all of the mitigating circumstances in [the petitioner's] favor.

Id., 138 F.3d at 824 (citation omitted). Accordingly, this Court finds the jury was properly instructed regarding mitigating evidence, and habeas relief on this proposition is unwarranted.

Lastly, Petitioner claims that, because Oklahoma does not require capital sentencing juries to reduce to writing the mitigating circumstances which it finds, meaningful state, and

presumably federal, appellate review is impossible.¹⁹ However, the Oklahoma courts have consistently upheld the validity of this instruction on several occasions. *See, e.g., Revilla v. State*, 877 P.2d 1143, 1154 (Okla. Crim. App. 1994); *Paxton v. State*, 867 P.2d 1309, 1326 (Okla. Crim. App. 1993) (“The absence of a list of mitigating evidence found by the jury has in no way hampered [effective appellate] review.”). In addition, the Tenth Circuit has consistently upheld the constitutionality of this instruction. *See, e.g., Castro v. Ward*, 138 F.3d 810, 824 (10th Cir. 1998) (upholding the trial court’s use of an instruction which did not require the jury to reduce to writing any mitigating circumstances). Thus, no habeas relief is warranted on this claim.

Since Petitioner has failed to show that the OCCA’s adjudication of this claim was contrary to federal law as contemplated by 28 U.S.C. § 2254(d)(1), the Court denies habeas corpus relief based upon Proposition Thirteen of the Amended Petition.

XV. RIGHT OF CONFRONTATION

Petitioner, in Proposition Seven, claims his right to confront the witnesses against him was denied when the trial court refused to permit Petitioner’s trial counsel to impeach co-defendant and state’s witness, David Lawrence, with his prior video-taped statement to the police. Respondent claims Petitioner has failed to show that the OCCA denial of this claim

¹⁹The relevant instruction stated in part:
The law does not require you to reduce to writing the mitigating circumstances you find, if any.
(Instruction No. 10, O.R. at p. 104).

was contrary to clearly established federal law. The Court agrees with Respondent and finds habeas corpus relief based upon this proposition is unwarranted.

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." This right is secured for defendants in state as well as in federal criminal proceedings. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The Supreme Court has stressed that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2D 934 (1965). Furthermore, the Supreme Court has emphasized the importance of cross-examination because it is "the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). Indeed, the Supreme Court has recognized that cross-examination is the "greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970) (quoting 5 J. Wigmore, Evidence § 1367, p. 29 (3d ed. 1940)).

The right to cross-examination, protected by the Confrontation Clause, is basically a "functional" right designed to promote reliability in the truth-finding functions of a criminal trial. The cases that have arisen under the Confrontation Clause reflect the application of this functional right. These cases fall into two broad, albeit not exclusive, categories: "cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination."

Delaware v. Fensterer, 474 U.S. 15, 18, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (per curiam).

Petitioner argues his Confrontation Clause rights were violated when the trial court refused to allow the jury to view a previously videotaped statement made by David Lawrence, the co-defendant and state's witness. Petitioner's trial counsel wanted to show the videotape as part of the cross-examination in order to aid in his impeachment of Mr. Lawrence's in court testimony. Although the trial court decided not to let the jury view the videotaped statement, Petitioner's counsel was allowed to use the transcript of that statement during his cross-examination of Mr. Lawrence. Because the trial court imposed a restriction on the scope of defense counsel's cross-examination of Mr. Lawrence, the issue falls into the second category discussed by the Supreme Court in Fensterer.

The Tenth Circuit has further divided this category by holding "that errors in limiting cross-examination are of two types." United States v. Valentine, 706 F.2d 282, 287(10th Cir. 1983). Certain errors preclude "inquiry into an entire **area** of relevant cross examination," while others merely limit the "**extent** of cross-examination." Id. (citations omitted) (emphasis added).

Petitioner now argues, the trial courts decision to deny defense counsel the chance to show the jury the videotaped statement went to the **area** of Mr. Lawrence's credibility. Petitioner states that although defense counsel was allowed to use a transcript of the videotaped statement to impeach Mr. Lawrence, "the videotape was the only means the

defense had to further discredit Lawrence and show him to be a liar in front of the jury by demonstrating that his demeanor, attitude, and the setting of the interview were not as he described.” (Am. Pet. at p. 105). Citing Valentine, Petitioner argues that when the trial court errs by limiting cross-examination “into an area of relevant cross-examination, the right of confrontation is **infringed.**” 706 at 287-88 (citation omitted) (emphasis added). Accordingly, Petitioner argues relief should be granted based on this infringement of his Sixth Amendment right to confront the witnesses against him. The Court disagrees.

Petitioner was given the opportunity to cross-exam the relevant area of Mr. Lawrence’s veracity by using the transcript of the videotaped statement. The additional request by Petitioner’s counsel to show the jury the video taped statement merely goes to the extent of cross-examination allowed by the trial court. The Supreme Court has held “the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (citation omitted). Furthermore, the Tenth Circuit stated that possible errors limiting the extent of cross-examination are usually a matter of the trial judge’s discretion and “will not lead to reversal unless an abuse of discretion, clearly prejudicial to the defendant, is shown.” Valentine, 706 F.2d at 288.

The OCCA, after viewing the tape in question, found that “any error in failing to allow the jury to view the tape was harmless in light of the overwhelming evidence of [Petitioner’s] guilt.” McCracken, 887 P.2d at 328. Additionally, the OCCA determined the

tape did not reflect what Petitioner stated and that Petitioner had the opportunity to properly cross-exam Mr. Lawrence by using the transcript of the tape. Id.

Petitioner has failed to show that the decision of the OCCA was contrary to federal law as determined by the Supreme Court. Rather, the OCCA's decision acknowledged the trial court's discretion to limit cross-examination and found that this specific limitation was not an abuse of discretion nor was it clearly prejudicial. Accordingly, the Court denies Petitioner habeas corpus relief based upon Proposition Seven of the Amended Petition.

XVI. INEFFECTIVE ASSISTANCE OF COUNSEL

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the legal standards which apply to claims of ineffective assistance of counsel in a criminal proceeding. "First, the defendant must show that counsel's performance was deficient.... Second, the defendant must show that the deficient performance prejudiced the defense." Id. at 687. Failure to establish either prong of the Strickland standard will result in a denial of Petitioner's Sixth Amendment claims. Id. at 696.

To prevail on his ineffective assistance of counsel claim, Petitioner must first show that counsel's performance was deficient. Deficient performance is established by showing counsel committed serious errors in light of "prevailing professional norms" to the extent that the legal representation fell below "an objective standard of reasonableness." Id. at 688. The petitioner must overcome a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance [that] 'might be considered sound trial

strategy.” Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 165, 100 L.Ed.2d. 83 (1955)). In other words, Petitioner must overcome a presumption that his counsel’s conduct was constitutionally effective. See United States v. Haddock, 12 F.3d 950, 955 (10th Cir. 1993). “A claim of ineffective assistance “must be reviewed from the perspective of counsel at the time.” Duvall, 139 F.3d at 777 (quoting Porter v. Singletary, 14 F.3d 554, 558 (11th Cir. 1994)). Every effort must be made by a reviewing court to “eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland at 689. The Court considers “not what is prudent or appropriate, but only what is constitutionally compelled.” United States v. Cronin, 466 U.S. 648, 655 n. 38, 104 S.Ct. 2039, 2050 n. 38, 80 L.Ed.2d 657 (1984).

Even if the petitioner is able to show constitutionally deficient performance, he must also show prejudice before a reviewing court will rule in favor of an ineffective assistance of counsel claim. “Prejudice” in this context means that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Strickland at 687. Stated differently, Petitioner must prove that “there is a ‘reasonable probability’ that the outcome would have been different had those errors not occurred.” United States v. Haddock, 12 F.3d 950, 955 (10th Cir. 1993)(quoting Strickland, 466 U.S. at 694). The Court, accordingly, will review these issues in light of the standards enunciated in the previous discussion.

A. TRIAL COUNSEL

As Proposition Two, Petitioner claims his trial counsel was ineffective for failing to investigate and develop evidence of Petitioner's mental illness which Petitioner claims would have aided his defense at the three stages of trial: 1) pre-trial- according to Petitioner a mental health examination would have shown Petitioner was incompetent to stand trial, 2) guilt stage- Petitioner claims a mental health expert would have discovered Petitioner's own history of mental illness which "would have significantly aided the defense in the first stage of trial with respect to the question of intent," 3) sentencing stage- Petitioner asserts a mental health expert would have discovered evidence of Petitioner's abusive upbringing and mental illness which "would have been powerful evidence in mitigation of punishment." (Am. Pet. at pp. 51-52). Respondent asserts Petitioner has failed to prove ineffective assistance of trial counsel under the standards set forth in Strickland. The Court agrees with Respondent and denies Petitioner habeas corpus relief based upon his ineffective assistance of trial counsel claim.

Petitioner initially raised this claim in his post-conviction appeal, and the OCCA found the claim procedurally barred because Petitioner failed to raise the claim in his direct appeal. McCracken, 946 P.2d at 675-76. In the years since the OCCA's disposition of Petitioner's post-conviction appeal, the Tenth Circuit has created an exception to Oklahoma's general procedural default rule when the claim is for ineffective assistance of trial counsel. Specifically, the Tenth Circuit has stated that a claim for ineffective assistance will not be barred if the Petitioner had the same counsel at trial and on direct appeal. *See*,

e.g., English v. Cody, 146 F.3d 1257, 1264 (10th Cir. 1998). A review of the facts shows the same counsel represented Petitioner at trial and on direct appeal. Therefore, the Court finds the claim is not barred and will consider the issues on the merits.

Petitioner argues that had his trial counsel hired a mental health expert to evaluate him before trial, Petitioner would have been found to be incompetent to stand trial. Regardless of whether trial counsel's decision not to hire a mental health expert rendered his assistance deficient, Petitioner has shown no prejudice. Under Oklahoma law, a defendant is competent to stand trial if he has "sufficient ability to consult with his attorney" and "a rational and actual understanding of the proceedings against him." Lambert v. Oklahoma, 888 P.2d 494, 498 (Okla. Crim. App. 1994) (quoting Middaugh v. Oklahoma, 767 P.2d 432, 434 (Okla. Crim. App. 1988)); see also Bryson v. Oklahoma, 876 P.2d 240, 249 (Okla. Crim. App. 1994), *denial of habeas corpus aff'd by sub nom Bryson v. Ward*, 187 F.3d 1193 (10th Cir. 1999). Under the United States Constitution, a defendant is competent to stand trial if "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960) (per curiam) (internal quotations omitted). Petitioner does not present any evidence that would show he fell below this standard. A look at the trial transcript indicates Petitioner was competent to stand trial. Indeed, Petitioner's testimony during trial was comprehensible and, at times, explicit, and showed Petitioner understood the charges against him. See, e.g., Hatch v. State, 58 F.3d 1447, 1456-58 (10th Cir. 1995) (signaling that

evidence of a petitioner's lucid and intelligible testimony at trial can be used to refute a claim of prejudice by trial counsel's failure to attempt an incompetency defense before the start of trial). In Strickland, the Supreme Court stated that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will be often so, that course should be followed." 466 U.S. at 697. Since Petitioner has not provided the Court with substantial evidence of his incompetency at the time of trial, Petitioner has failed to show that he was prejudiced by his trial counsel's failure to acquire a mental health expert who could have evaluated Petitioner before trial. The Court, therefore, denies this portion of Petitioner's ineffective trial counsel claim.

Petitioner, next, argues a mental health expert would have discovered Petitioner's own history of mental illness which "would have significantly aided the defense in the first stage of trial with respect to the question of intent." (Am. Pet. at p. 51). Consequently, Petitioner claims his trial counsel was ineffective at the guilt stage of trial for failing to have Petitioner's mental state evaluated and then offering the results of said evaluation to the jury. The first prong of the Strickland test requires a showing that "counsel's performance was deficient." 466 U.S. at 687. There is "no particular set of detailed rules for counsel's conduct," because "any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 688-689 (citing United States v. Decoster, 199 U.S.App.D.C. 359, 371, 624 F.2d 196, 208). At all times during the guilt stage of trial, the defense claimed Petitioner did not commit the murders. It is obvious from the record, the defense's trial strategy was

to argue innocence and nothing else. The strategic choice between presenting evidence that Petitioner may not have been mentally capable of forming the required intent at the time of the murders and not presenting it while maintaining Petitioner was not the shooter, is one that reasonable counsel could debate. In short, trial counsel's decision not have Petitioner's mental state evaluated for use as a defense to specific intent was not deficient under the standards discussed in Strickland. Accordingly, this allegation is denied.

Lastly, Petitioner claims the evidence of his family's history of mental illness, and Petitioner's own mental health problems, as well as evidence of Petitioner's troubled and abusive upbringing, would have aided the defense in sentencing. Petitioner asserts this evidence would have been significant mitigating evidence, and his trial counsel was ineffective for failing to properly investigate and uncover the evidence. As proof, Petitioner submits the results of Dr. Watson's evaluation of Petitioner, an evaluation that took place while Petitioner was at the post-conviction appellate stage of the state proceedings. Dr. Watson concluded that Petitioner "has a number of psychiatric disorders including a bipolar II disorder (recurrent major depressive episodes with hypomanic episodes), substance dependence and borderline and antisocial personality disorders. He has a genetic vulnerability to both bipolar illness and alcoholism." (Addendum to Application for Post-Conviction Relief, Vol. II, tab. 12, Psychological and Neuropsychological Evaluation, p. 7). Hence, Petitioner asserts that "[h]ad this and other like evidence been deployed on [Petitioner's] behalf, there is a reasonable probability that the outcome of the penalty phase would have been different." (Am. Pet. at p. 59). The Court disagrees.

While not deciding whether Petitioner's trial counsel's actions were constitutionally deficient, the Court finds that Petitioner has failed to prove there is a reasonable probability that, but for trial counsel's failure to introduce the additional mitigating evidence, "the result of the proceedings would have been different." Strickland, 466 U.S. at 694. In reaching this conclusion, the Court has reviewed the entire trial transcript, including the first and second stage testimony, as well as the exhibits submitted throughout Petitioner's state appellate proceedings. The Court finds that, based upon the circumstances surrounding the murders of Tyrell Lee Boyd, Steve Allen Smith, Timothy Edward Sheets, and Carol Ann McDaniels, and the strength of the other evidence supporting the numerous aggravating circumstances, there is no reasonable probability that the jury would have returned a verdict less than death had this additional mitigating evidence been introduced. Hence, Petitioner has failed to show he was prejudiced by his trial counsel's decision not to investigate and present evidence of Petitioner's mental state.

As discussed above, all portions of Petitioner's claim that he received ineffective assistance of counsel at trial are denied, hence Proposition Two of the Amended Petition is denied.

B. APPELLATE COUNSEL

In Propositions One, Three, Four, and Six, Petitioner claims he received ineffective assistance from his appellate counsel who failed to raise those specific claims in the direct appeal. The OCCA procedurally barred all four claims on post-conviction citing Petitioner's failure to raise them on direct appeal following Oklahoma procedural rule 22 O.S.Supp. 1995,

§ 1089.²⁰ McCracken, 946 P.2d at 674. Petitioner argues that “an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a ‘dead-bang winner,’ even though counsel may have presented strong but unsuccessful claims on appeal.” Banks v. Reynolds, 54 F.3d 1508, 1515 (10th Cir. 1995)(citing United States v. Cook, 45 F.3d 388, 394-95 (10th Cir. 1995)). Although the Tenth Circuit Court of Appeals has not defined “dead-bang winner,” it has “concluded that it is an issue which is obvious from the trial record and one which probably would have resulted in a reversal on appeal.” Banks at 1515 n. 13 (citing Cook at 394-395). If Petitioner can show that any one of the barred claims would have been a “dead-bang winner,” appellate counsel’s failure to raise that claim would constitute ineffective assistance under the Strickland standard.²¹ Thus, in order to determine whether appellant counsel’s performance constitutes ineffective assistance, the Court must examine the merits of the four barred claims.

Proposition One, wherein Petitioner claimed the trial court’s use of the “presumed not guilty” instruction” violated his constitutional due process rights, has been discussed in another section of this order.²² The Court found the claim was not procedurally barred based on other factors, and denied the claim on the merits; therefore, Petitioner was not prejudiced by appellate counsel’s failure to raise this claim on direct appeal. “[T]here is no reason for

²⁰The claims would have been barred by 22 O.S. §1086, as well.

²¹As discussed, *supra*, the Strickland test requires a showing of both deficient performance by appellate counsel and prejudice to Petitioner’s defense. 466 U.S. at 687. Failure to establish either prong of the Strickland standard will result in a denial of the claim. Id. at 696.

²²See infra Section V.

a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” Strickland, 466 U.S. at 697. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will be often so, that course should be followed.” Id. Since counsel’s actions with respect to this claims did not prejudice the defense, no ineffective assistance is shown.

In Proposition Three, Petitioner claims the trial court erred by failing to properly instruct the jury on the correct burden of proof, and that appellate counsel was ineffective for failing to raise this claim on direct appeal. The instruction in question reads:

You are instructed that the burden of proof in this case is upon the State to establish by evidence, beyond a reasonable doubt, all the **material allegations contained in the Information** and unless the State has met it’s [sic] duty in this respect, you cannot find the defendant guilty, but must acquit him.

(Instruction No. 1, O.R. 245-75) (emphasis added). Petitioner argues the trial court’s use of this instruction constituted “structural error” because it did not inform the jury that the state had to prove all of the essential elements of the crimes charged beyond a reasonable doubt. Petitioner contends the instruction relieved the state of its burden of proving beyond a reasonable doubt whatever allegations in the Information the jury deemed “non-material,” even if they were essential elements of the offenses charged. Further, Petitioner claims appellate counsel provided ineffective assistance when he failed to raise this claim on direct appeal.

The Tenth Circuit has recently dealt with this very issue on two separate occasions. See DeYonghe v. Scott, 141 F.3d 1184, 1998 WL 166075 (10th Cir. Apr. 10, 1998); Hampton v. Scott, 185 F.3d 874, 1999 WL 436275 (10th Cir. June 29, 1999). In both cases, the state trial court submitted an instruction identical to the one in question here. Deyonghe, 1998 WL 166075, at *4-5; Hampton, 1999 WL 436275, at *6. Likewise, the petitioner in those cases raised an ineffective assistance of appellate counsel claim because the appellate counsel had failed to raise the issue in the direct appeal. Deyonghe, 1998 WL 166075, at *4-5; Hampton, 1999 WL 436275, at *6. In both instances, the Tenth Circuit held that appellate counsel was not ineffective for omitting a claim challenging the “all material allegations” instruction. Deyonghe, 1998 WL 166075, at *4-5; Hampton, 1999 WL 436275, at *6. Accordingly, this Court finds appellate counsel’s actions did not constitute ineffective assistance as defined by Strickland.

Next, Petitioner claims he received ineffective assistance of appellate counsel when his attorney failed to challenge a “all material allegations” instruction given at the sentencing phase of trial. However, this exact claim was raised by the appellant in Ledbetter v. State, 933 P.2d 880, 897-98 (Okla.Crim.App. 1997). The OCCA, in Ledbetter, found the allegation to be without merit. The OCCA held that in the sentencing stage “the phrase ‘material allegation’ more appropriately encompasses what the prosecution must prove.” Id., 933 P.2d at 898. Thus, the claim was not a “dead-bang winner” and appellate counsel was not ineffective in failing to raise the issue.

Petitioner, in Proposition Six, argues the jury should have been instructed on the lesser included offense of first degree manslaughter. Petitioner bases his argument on a voluntary intoxication defense which could have negated the specific intent required for malice murder²³ and reduced his culpability to first degree manslaughter. In support, Petitioner cites Oxendine v. State, 335 P.2d 940, 944 (Okla. Crim. App. 1958), wherein the OCCA cited with approval the rule that:

A person who commits a homicide while so drunk as to be incapable of forming a premeditated design to kill, if he had formed no purpose to commit the crime prior to the time he became so intoxicated, is not guilty of murder, but is guilty of manslaughter in the first degree.

(quoting Beshirs v. State, 174 P. 577, 579 (Okla. Crim. 1918)). *See also*, Brogie v. State, 695 P.2d 538 (Okla.Crim.App. 1985); Jones v. State, 648 P.2d 1251 (Okla.Crim.App. 1982) (recognizing that the voluntary intoxication “defense” and a defense of insanity are distinct).

A defendant is entitled to any good faith or theory of the defense instruction if it is supported by sufficient evidence for a jury to find in defendant's favor. Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 887, 99 L.Ed.2d 54 (1988). A defendant is not entitled to an instruction which lacks a reasonable factual and legal basis. United States v. Bryant, 892 F.2d 1466, 1468 (10th Cir.1989), *cert. denied*, 496 U.S. 939 (1990). Under Oklahoma law, a defendant is entitled to a voluntary intoxication instruction when sufficient, prima facie evidence is presented which meets the requirements for the defense of voluntary intoxication. “A defense of voluntary intoxication requires that a defendant, first, be

²³Although Petitioner was charged alternatively with malice aforethought murder and felony murder, the record reveals the jury was instructed only on the elements of malice aforethought murder.

intoxicated and, second, be so utterly intoxicated, that his mental powers are overcome, rendering it impossible for a defendant to form the specific criminal intent or special mental element of the crime.” Jackson v. State, 964 P.2d 875, 892 (Okla. Crim. App. 1998), *cert. denied*, 119 S.Ct. 1150 (1999) (citing O.U.J.I. Cr.2D, 8-36 & 8-39 (1996)).

At trial, there was substantial evidence admitted to support Petitioner’s contention that he had been drinking beer and bourbon for at least five hours prior to the time the murders were committed, *see, e.g.*, (Jury Trial, Tr. at 105, 141, 272, 274, 276, 339-40, 411-3), but none of this evidence constitutes sufficient, *prima facie* evidence showing that Petitioner was “so utterly intoxicated, that his mental powers [were] overcome, rendering it impossible for [Petitioner] to form the specific criminal intent or special element of the crime.” Jackson, 964 P.2d at 892. Rather, Petitioner gave precise testimony of his version of how the crime occurred, and his actions following the murders. (Jury Trial, Tr. at 416-21.) The OCCA has held that a defendant’s ability to give a detailed description of the crime and surrounding circumstances “demonstrates that he was in control of his mental faculties and was not in the advanced state of intoxication [Petitioner] attempts to assert.” Turrentine v. State, 965 P.2d 955, 969 (Okla. Crim. App. 1998); *see generally*, Charm v. State, 924 P.2d 754, 761 (Okla. Crim. App. 1996) (determining jury instruction on voluntary intoxication defense was not warranted by evidence, when defendant was subsequently able to describe murder in detail). Because the evidence does not suggest Petitioner was so utterly intoxicated that his mental powers were overcome, Petitioner was not entitled to a voluntary intoxication instruction. Thus, Petitioner’s rights were not violated by the trial court’s failure to submit a voluntary

instruction to the jury, nor were his rights violated when his appellate counsel failed to raise the issue on direct appeal.

Petitioner argues his constitutional right to a fair trial was violated when the trial court failed to instruct the jury on the lesser included offense of first degree manslaughter. A capital defendant is constitutionally entitled to instructions on offenses that state law recognizes as lesser included offenses of the charged crime, *see Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.ED.2d 392 (1980), but only when such instructions are supported by the evidence, *see Hopper v. Evans*, 456 U.S. 605, 610, 102 S.Ct. 2049, 2052, 72 L.ED.2d 367 (1982); *see also Hopkins v. Reeves*, 524 U.S. 88, 118 S.Ct. 1895, 141 L.ED.2d 76 (1998); *Hatch v. Oklahoma*, 58 F.3d 1447, 1453-54 (10th Cir.1995).

Petitioner was convicted of committing first degree murder by causing the deaths of four individuals with malice aforethought. Petitioner claims the jury should have been given the opportunity to consider a first degree manslaughter instruction based on Petitioner's inability to form specific intent because of his claimed intoxication. Since the Court has above determined the intoxication defense instruction was unwarranted, so too is an instruction on first degree manslaughter. Hence, the claim is without merit and appellate counsel's omission of it on direct appeal was not improper, and appellate counsel's assistance was not ineffective.

XVII. CONCLUSION

After a thorough review of the Preliminary Petition for Writ of Habeas Corpus and the Amended Petition for Writ of Habeas Corpus, Appendix to Petition, Respondent's

Response, Petitioner's Reply, and the state court records filed herein, this Court finds Petitioner has failed to establish that he is currently in custody in violation of the Constitution or laws of the United States as required by 28 U.S.C. § 2254(a). Accordingly, the Petition for Writ of Habeas Corpus is DENIED.

IT IS SO ORDERED this 15th day of May, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

DATE MAY 17 2000

YUNDRA HOOPER,)
)
 Plaintiff,)
)
 vs.) No. 99-CV-663-K
)
 APAC-OKLAHOMA, INC., et al.)
)
 Defendants.)

ADMINISTRATIVE CLOSING ORDER

F I L E D

MAY 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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 16 day of May, 2000.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

SM

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

FILED

MAY 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

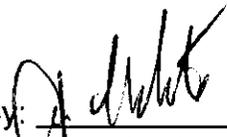
SUSAN ADAMS,)
)
Plaintiff,)
)
v.)
)
AMERICAN AIRLINES, INC.)
)
Defendants.)

Case No. 94-C-1046-H ✓

ENTERED ON DOCKET
DATE MAY 16 2000

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41(a)(1), Plaintiff Susan Adams, now Susan Severson, and Defendant American Airlines, Inc. by and through their attorneys of record, hereby jointly stipulate to the dismissal of the above-styled action, with prejudice, each party to bear their own costs and attorneys' fees incurred herein.

By: 

Joe L. White
Gary G. Grisso
1718 West Broadway
Collinsville, Oklahoma 74021
(918) 371-2531

Attorneys for Plaintiff,
SUSAN ADAMS, Now SUSAN SEVERSON

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CTS

DAVID R. CORDELL, OBA #11272
JOHN A. BUGG, OBA #13665

By: 

David R. Cordell
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3700 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4344
(918) 586-5711
(918) 586-8547 (facsimile)

Attorneys for Defendant,
AMERICAN AIRLINES, INC.

OF COUNSEL:

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

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Plaintiff,

v.

JAMES E. ETHINGTON, JR.;
SPOUSE, if any, OF JAMES E. ETHINGTON, JR.;
KAREN E. ETHINGTON aka Karen E. Freeland;
SPOUSE, if any, OF KAREN E. ETHINGTON
aka Karen E. Freeland;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET
DATE MAY 16 2000

CIVIL ACTION NO. 98-CV-0709-H (M) ✓

ORDER OF SALE

UNITED STATES OF AMERICA TO: U.S. Marshal for the
Northern District of Oklahoma

On April 24, 2000, the United States of America recovered judgment
in rem against the Defendants, James E. Ethington, Jr. and Karen E. Ethington aka
Karen E. Freeland, in the above-styled action to enforce a mortgage lien upon the
following described property:

Lot Twenty-two (22), Block Thirteen (13), LEISURE LANES, an
Addition in Tulsa County, State of Oklahoma, according to the
Recorded Plat thereof.

The amount of the judgment is the principal sum of \$71,529.09, plus
administrative charges in the amount of \$248.29, plus penalty charges in the amount of
\$257.40, plus accrued interest in the amount of \$3,875.33 as of June 1, 1997, plus
interest accruing thereafter at the rate of 5.5 percent per annum until judgment, plus

ENTERED ON DOCKET

DATE _____

15

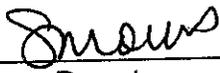
6

interest thereafter at the current legal rate of 6.197 percent per annum until paid, plus the costs of this action in the amount of \$10.00 (fee to record Notice of Lis Pendens), plus any other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If Defendants, James E. Ethington, Jr. and Karen E. Ethington aka Karen E. Freeland, should fail to satisfy the in rem judgment to the Plaintiff, the judgment provides 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 the property according to Plaintiff's election with or without appraisal and to apply the proceeds to the payment of the costs of the sale and the Plaintiff's judgment. Any residue is to be paid to the Court Clerk to await further order of this Court.

THEREFORE, this is to command you to proceed according to law, to advertise and sell, with appraisal, the above-described real property and apply the proceeds thereof as directed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 15 day of May, 2000.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By 
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS
LIABILITY LITIGATION (NO. VI):

ENTERED ON DOCKET
MAY 16 2000
DATE _____

THIS DOCUMENT RELATES TO: :
GEORGIA-PACIFIC CORPORATION CASES :
ON THE ATTACHED LIST NS-OK 4 :

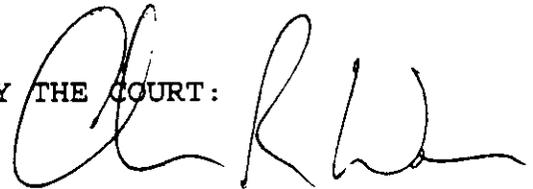
CIVIL ACTION NO. MDL 875

89-CV-569-B ✓

ORDER

IT IS ORDERED that plaintiffs' Complaint and all crossclaims in the cases on the attached list are hereby dismissed, with prejudice, against Georgia-Pacific Corporation only.

BY THE COURT:



Charles R. Weiner, J.

Date: May 8, 2000

District of Arizona

2-87-2200

2-87-2207

2-87-2208

2-89-100

District of Columbia

1-89-1816

Southern District of Florida

0-88-6708

0-92-6183

0-92-6184

0-92-6185

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0-92-6203

0-92-6204

0-92-6206

0-92-6207

1-90-1548

9-92-6184

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

FILED

MAY 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THURMAN L. ROWE,)
)
Plaintiff,)
)
vs.)
)
GRAND RIVER DAM AUTHORITY,)
)
Defendant.)

Case No. 99-CV-633-BU(J)

ENTERED ON DOCKET

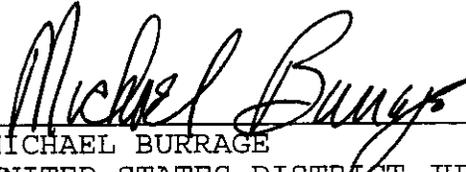
DATE MAY 16 2000

JUDGMENT

This matter came before the Court upon the Motion for Summary Judgment filed by Defendant, Grand River Dam Authority, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendant, Grand River Dam Authority, and against Plaintiff, Thurman L. Rowe.

DATED at Tulsa, Oklahoma, this 15th day of May, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THURMAN L. ROWE,)
)
 Plaintiff,)
)
 vs.)
)
 GRAND RIVER DAM AUTHORITY,)
)
 Defendant.)

Case No. 99-CV-633-BU(J)

ENTERED ON DOCKET

DATE MAY 16 2000

ORDER

This matter comes before the Court upon the Motion for Summary Judgment filed by Defendant, Grand River Dam Authority. Plaintiff, Thurman L. Rowe, has responded to the motion, Defendant has replied, Plaintiff has sur-replied and Defendant has responded thereto. In addition, as directed by the Court, the parties have filed supplemental briefs. Upon due consideration of all of the parties' submissions, the Court makes its determination.

Plaintiff, a black male, has been employed by Defendant since 1991 in the position of Auxiliary Equipment Operator. In September of 1993, Plaintiff suffered a heart attack. From September 15, 1993 until May 31, 1994, Plaintiff was absent from his job on sick leave, vacation leave and leave without pay. On August 7, 1995, Plaintiff filed an action against Defendant alleging claims of race and disability discrimination. The civil rights action was settled and the case was closed on November 21, 1996.

On November 14, 1997, John McClure, Rotating Equipment Superintendent, resigned and on September 30, 1998, Bob Nix, Flue

Gas Desulfurization Department Superintendent, resigned. To date, these positions remain unfilled. On July 31, 1999, Jim Martin, Results Department Superintendent, also resigned. Rebecca Oliver, Senior Results Technician, was promoted to the position.

From May 1, 1999 to October 9, 1999, Jack Gandy, Maintenance Supervisor, was assigned to the special duty of Maintenance Planner.

Effective January 5, 1998, Plaintiff and two (2) other Auxiliary Equipment Operators in the "scrubber" operation were assigned to a day crew in the Main Plant. Plaintiff was permanently transferred to the Main Plant in October of 1998.

Plaintiff has brought the instant action alleging a claim of race discrimination under the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. (Title VII), and 42 U.S.C. § 1981, a claim of retaliation under Title VII and a claim of disability under the American Disabilities Act, 42 U.S.C. § 12101, et seq. (ADA).¹

In this action, Plaintiff alleges that Defendant denied him promotions on account of his race. Plaintiff also alleges that Defendant retaliated against him for filing the 1995 lawsuit by assigning him to the day crew in the Main Plant. Plaintiff further

¹ In his Amended Complaint, Plaintiff also alleges a claim of age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. Plaintiff, in response to Defendant's motion, represents that he voluntarily dismisses the age discrimination claim. The Court construes the representation as a motion to dismiss pursuant to Rule 41, Fed. R. Civ. P., and grants the motion. Therefore, Plaintiff's age discrimination claim is dismissed without prejudice.

alleges that Defendant failed to provide reasonable accommodations for his heart condition.

Summary Judgment Standard

Summary judgment should 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." Fed. R. Civ. P. 56(c). 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 (1970). Once the moving party has met its burden, the opposing party must come forward and identify sufficient evidence to require submission of the case to a jury. The Court views the evidence in a light most favorable to the opposing party. Jones v. Unisys Corp., 54 F.3d 1357, 1361 (10th Cir. 1995).

McDonnell Douglas Burden Shifting Framework

A plaintiff who lacks direct evidence of racial discrimination may rely upon indirect evidence of discrimination by invoking the burden shifting framework in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). A plaintiff relying on the McDonnell Douglas framework must first establish a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802. If the plaintiff carries that burden, the burden then shifts to the defendant to articulate a facially non-discriminatory reason for

the challenged employment action. Id. at 802-03. If the defendant makes such a showing, the burden then reverts to the plaintiff to prove the proffered non-discriminatory reason is pretextual, from which a jury may infer discriminatory intent. Id. at 804. In Randle v. City of Aurora, 69 F.3d 441 (10th Cir. 1995), the Tenth Circuit ruled that a plaintiff may withstand summary judgment under the McDonnell Douglas framework, if the plaintiff presents evidence which establishes a prima facie case of discrimination and presents evidence which establishes that defendant's proffered non-discriminatory reason for its employment action against him is pretextual, i.e., unworthy of belief. Id. at 452-53.

Discrimination in Promotions

Plaintiff, in this action, alleges that Defendant failed to promote him to the positions of Rotating Equipment Superintendent, Flue Gas Desulfurization Department Superintendent, Preventive Maintenance Superintendent and Results Department Superintendent on the basis of race.

In order to establish a prima facie case of unlawful failure to promote because of race, the plaintiff must establish that (1) he belongs to a minority group; (2) he was qualified for the position; (3) he was not promoted; and (4) the position remained open or was filled with a non-minority. Reynolds v. School District No. 1, 69 F.3d 1523, 1533 (10th Cir. 1999). Defendant, in its motion, contends that Plaintiff cannot establish a prima facie case of discrimination for each of the above-stated positions. As to the Rotating Equipment Superintendent and Flue Gas

Desulfurization Department Superintendent positions, Defendant contends that these positions were not "open." Defendant also contends that there is no position of Preventive Maintenance Superintendent. In regard to the Results Department Superintendent position, Defendant contends that Plaintiff is not qualified for such position.

Even if Plaintiff could establish a prima facie case of discrimination in regard to the positions of Rotating Equipment Superintendent, Flue Gas Desulfurization Department Superintendent, and Results Department Superintendent, Defendant contends that Plaintiff cannot present sufficient evidence to establish that its proffered non-discriminatory reasons for not promoting Plaintiff to these positions are pretextual. Defendant contends that the evidence shows that Plaintiff was not promoted into the Flue Gas Desulfurization Department Superintendent and Rotating Equipment Superintendent positions because the positions were eliminated as a part of its cost cutting efforts. Defendant contends that the evidence shows that the duties of the Flue Gas Desulfurization Department Superintendent were divided among three other department superintendents and that the duties of the Rotating Equipment Superintendent were spread among existing personnel. In regard to the Results Department Superintendent, Defendant contends that the evidence shows that Rebecca Oliver, who was promoted to the position, had superior work experience and background to that of Plaintiff.

In response, Plaintiff contends that the evidence establishes

a prima facie case of discrimination as to the superintendent positions. Plaintiff contends that the evidence also establishes that Defendant's proffered non-discriminatory reasons for not promoting him are pretextual. In regard to the Flue Gas Desulfurization Department Superintendent and Rotating Equipment Superintendent positions, Plaintiff argues that Defendant realized no real cost saving benefits from the elimination of these positions because Defendant gave substantial raises to the personnel who assumed the duties of such positions. As to Results Department Superintendent position, Plaintiff contends that he was more qualified for the position than Rebecca Oliver.

Upon review of the record, the Court finds that Plaintiff has not established a prima facie case of discrimination as to the Flue Gas Desulfurization Department Superintendent, Rotating Equipment Superintendent and Preventive Maintenance Superintendent positions. Specifically, Plaintiff has not presented evidence to show that the Flue Gas Desulfurization Department Superintendent and Rotating Equipment Superintendent positions remained open when Plaintiff was not promoted into these positions. The undisputed evidence reveals that these positions were eliminated upon the retirement of the employees holding those positions and the duties for those positions were divided among other personnel. As to the Preventive Maintenance Superintendent, Plaintiff has not presented any evidence to show that such position existed.

Even assuming that Defendant could establish the positions of Flue Gas Desulfurization Department Superintendent and Rotating

Equipment Operator remained open, the Court concludes that Plaintiff has failed to present sufficient evidence to demonstrate that Defendant's proffered non-discriminatory reason for not promoting Plaintiff to those positions is unworthy of credence. Although Plaintiff has presented evidence that the personnel who assumed the duties of the of these positions received substantial raises, this evidence does not rebut the fact that Defendant received a cost savings from the elimination of these positions. Defendant's undisputed evidence clearly demonstrates that it saved money from the elimination of these positions. Plaintiff has also pointed to the fact that Defendant promoted Rebecca Oliver to the position of Results Department Superintendent instead of eliminating the position upon the retirement of Jim Martin. However, the undisputed evidence shows that unlike the duties of the Rotating Equipment Superintendent and the Flue Gas Desulfurization Department Superintendent positions, the duties of the Results Department Superintendent position could not be assigned to other personnel.

As to the Results Department Superintendent position, the Court assumes without deciding that Plaintiff has established a prima facie case of discrimination. Nevertheless, upon review of the record, the Court finds that Plaintiff has failed to demonstrate that Defendant's proffered non-discriminatory reason for not promoting Plaintiff to the position is unworthy of credence. Through its evidence, Defendant has shown that Rebecca Oliver rather than Plaintiff was selected for the position because

her work experience and background was superior to that of Plaintiff.

In rebuttal, Plaintiff claims that based upon his education and experience, he is as qualified, if not more qualified than Rebecca Oliver for the position of Results Department Superintendent. Plaintiff points to the fact that he has an engineering degree, that he has previous supervisory experience and that prior to his employment with Defendant, he helped to design some of the equipment used by Defendant.

Plaintiff's belief that he was more qualified than Rebecca Oliver for the position of Results Department Superintendent does not establish pretext. An employer does not violate Title VII by choosing among equally qualified candidates, so long as the decision is not based upon unlawful criteria. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981). Absent evidence that one candidate is overwhelmingly better qualified, pretext cannot be shown simply by comparing Plaintiff's qualifications with those of the successful applicant. Sanchez v. Phillip Morris, Inc., 992 F.2d 244, 247-248 (10th Cir. 1993); Fallis v. Kerr McGee Corp., 944 F.2d 743, 747 (10th Cir. 1991) (holding that mere disagreement with employer's evaluation of which geologists were best qualified, standing alone, could not support a finding of pretext); Branson v. Price River Coal Co., 853 F.3d 768, 772 (10th Cir. 1988) ("As courts are not free to second guess an employer's business judgment, this assertion [that plaintiff was equally or more qualified] is insufficient to support

a finding of pretext.") In the instant case, Plaintiff's evidence does not show that he was overwhelming better qualified for the Results Department Superintendent position than Rebecca Oliver. The Court therefore finds that Plaintiff has not established that Defendant's proffered non-discriminatory reason for its employment decision is pretextual. See, Burlington v. United Air Lines, Inc., 186 F.3d 1301, 1319 (10th Cir. 1999) (concluding no evidence of pretext where plaintiff failed to demonstrate that she was overwhelmingly better qualified than the other applicants). Summary judgment is therefore appropriate.²³

² In the pretrial order submitted by the parties, Defendant contends that any claims of Plaintiff relating to the position of Results Department Superintendent are barred because Plaintiff has not filed a Charge of Discrimination with the Equal Employment Opportunity Commission with respect to the position. The parties, at the direction of the Court, submitted additional briefs on this issue. Because the Court finds that summary judgment on the claim is appropriate as Plaintiff has failed to demonstrate that Defendant's non-discriminatory reason for not promoting Plaintiff to the position is pretextual, the Court need not address the issue of whether the claim is barred.

³ In his response brief, Plaintiff argues that the fact Defendant only has two black employees out of 450 total employees is evidence of discrimination. The Court finds that Plaintiff's statistical evidence is insufficient to allow a reasonable jury to infer that Defendant's proffered non-discriminatory reasons were a pretext for discrimination. The statistical evidence presented does not address Defendant's specific reasons for not promoting Plaintiff. The statistical evidence sheds little light on the central issue of the pretext analysis--the motive behind Defendant's decision not to promote Defendant. Considering the limited insight the evidence gives into Defendant's motive in not promoting Plaintiff and the lack of other probative evidence specifically rebutting Defendant's proffered reasons, the Court finds the statistical evidence is insufficient to demonstrate a genuine fact issue in this case. See, Bullington v. United Air Lines Inc., 186 F.3d 1301 (10th Cir. 1999) (statistics insufficient to allow a reasonable trier of fact to infer employer's proffered reasons were a pretext for discrimination).

Retaliation

Plaintiff alleges that Defendant retaliated against him in violation of Title VII by assigning him to the day crew in the Main Plant after the conclusion of his 1995 civil rights lawsuit.

In order to establish a prima facie case of unlawful retaliation under Title VII, Plaintiff must establish (1) protected opposition to discrimination or proceeding arising out of discrimination; (2) adverse action by the employer contemporaneously or subsequent to the employee's protected activity; and (3) causal connection between such activity and the employer's action. Williams v. Rice, 983 F.2d 177, 181 (10th Cir. 1993). The causal connection element may be shown by producing "evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." Burrus v. United Tel. Co. of Kansas, Inc., 683 F.2d 339, 343 (10th Cir.), cert. denied, 459 U.S. 1071 (1980).

The Court, upon review, questions whether Plaintiff has established the prima facie case of unlawful retaliation. As stated, the causal connection element may be established by evidence of protected conduct closely followed by adverse action. Burrus, 683 F.2d at 343. The evidence in the record does not reveal protected conduct closely followed by adverse action. The evidence reveals that the 1995 lawsuit was settled and then closed in November of 1996. It also reveals that the decision to transfer Plaintiff to the day crew occurred in December of 1997 and that Plaintiff was ultimately transferred to the day crew in January of

1998. The Court concludes that the approximate one year time lag between participation in a protected activity and the alleged discriminatory act itself is insufficient to justify an inference of causation. See, Conner v. Schnuck Markets, Inc., 121 F.3d 1390, 1395 (10th Cir. 1997) (four month time lag between protected activity and termination by itself is not sufficient to justify inference of causation).⁴

Nonetheless, even if Plaintiff can establish the prima facie case of retaliation, the Court finds that Plaintiff has failed to present sufficient evidence to show that Defendant's articulated reasons for Plaintiff's assignment to day crew are unworthy of credence. Through its evidence, Defendant has shown that Plaintiff was assigned to day crew for training and health purposes. The evidence shows that Plaintiff in fact received training after being assigned to the day crew. It also shows that the work performed by Plaintiff on the day crew assignment was less strenuous than the work performed by Plaintiff in the scrubber. Plaintiff contends

⁴ In his response brief, Plaintiff also contends that Defendant assigned him to the day crew in retaliation for complaints made to management for not being considered for the position of Rotating Equipment Superintendent. Plaintiff contends that he complained about the position to Robert Sullivan, the Affirmative Action Coordinator, in a letter dated November 28, 1997. The record, however, does not contain such letter. The record does contain a letter dated December 1, 1998 from Tommy M. Rickner to Plaintiff referring to a letter written by Plaintiff to Ron Coker on November 16, 1998 complaining about the Rotating Equipment Supervisor position. This letter does not establish a "causal connection" as the letter refers to a complaint made after Plaintiff's assignment to the day crew. Nevertheless, the Court, as stated herein, finds that Plaintiff has failed to establish that Defendant's non-discriminatory reason for Plaintiff's assignment to the day crew is pretextual.

that Defendant's articulated reasons are pretextual in that the two Auxiliary Equipment Operators, who were assigned with him to the day crew, were informed that they were assigned to the day crew as discipline for their abuse of sick leave; these two operators were not assigned to the Main Plant after training, and two other operators with more seniority than Plaintiff, Gene Head and Burl Raymer, were not selected for the training. The Court, however, finds that Plaintiff cannot rely upon the evidence that the two operators assigned with Plaintiff were informed that they were assigned to the day crew as disciplinary action. Such testimony constitutes inadmissible hearsay evidence and cannot be used to defeat summary judgment. Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1555 (10th Cir. 1995). As to the fact that these two operators were not moved to the Main Plant after training, the record shows that the next available position in the Main Plant was given to Plaintiff, who had more seniority, than the other two operators. As to Mr. Head and Mr. Raymer, the evidence shows that Plaintiff actually had more seniority than Mr. Raymer and that Mr. Head had already completed some of the training for the Main Plant.

Discrimination Based Upon Disability

In this action, Plaintiff contends that Defendant failed to provide reasonable accommodations to enable Plaintiff with his heart condition to perform the essential functions of his job. Upon review of the record, the Court finds that Plaintiff has not presented sufficient evidence to show that Defendant has failed to provide any reasonable accommodation for Plaintiff to perform the

essential functions of his job. The evidence in the record shows that in response to Plaintiff's doctor's direction that Plaintiff not exert himself to the point of having chest discomfort, Defendant has told Plaintiff to pace himself so as to insure that he does not have chest discomfort. Plaintiff, in his briefing, argues that Defendant reduced the number of Auxiliary Equipment Operators working on each shift in the scrubber and that such action increased Plaintiff's workload. However, the evidence shows that Plaintiff was still allowed the accommodation of pacing himself so as to not have chest pain. Furthermore, the evidence shows that during the time of the reduction of Auxiliary Equipment Operators, Plaintiff was transferred to the Main Plant for training and his work at the Main Plant was less strenuous than the work in the scrubber. The evidence shows that Plaintiff was transferred back to the scrubber in May of 1998 but that he only worked in the scrubber until October of 1998, when he was permanently transferred to the Main Plant.

It appears to the Court that Plaintiff wants Defendant to accommodate him by providing a promotion to a supervisory position. Defendant, however, is under no obligation to give a promotion. Smith v. Midland Brake, 180 F.3d 1154, 1176-77 (10th Cir. 1999).

In his briefing, Plaintiff states that he cannot obtain a supervisory position unless he goes through the normal promotional matrix and that the next step for him would be Plant Operator. Plaintiff, however, also states that he cannot perform the requirements of this position due to his heart condition. The

evidence in the record, though, does not support Plaintiff's statements. The record indicates that Defendant's promotional policy does not prohibit an Auxiliary Equipment Operator from applying for a position higher than Plant Operator.

Upon review, the Court finds that Plaintiff has failed to present sufficient evidence to establish his ADA claim. The Court therefore concludes that summary judgment is appropriate.

Conclusion

Based upon the foregoing, the Motion for Summary Judgment filed by Defendant, Grand River Dam Authority (Docket Entry #18), is **GRANTED**. Judgment shall issue forthwith.

ENTERED this 15th day of May, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

evidence in the record, though, does not support Plaintiff's statements. The record indicates that Defendant's promotional policy does not prohibit an Auxiliary Equipment Operator from applying for a position higher than Plant Operator.

Upon review, the Court finds that Plaintiff has failed to present sufficient evidence to establish his ADA claim. The Court therefore concludes that summary judgment is appropriate.

Conclusion

Based upon the foregoing, the Motion for Summary Judgment filed by Defendant, Grand River Dam Authority (Docket Entry #18), is **GRANTED**. Judgment shall issue forthwith.

ENTERED this 15th day of May, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

MAY 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARILYNN G. DAY,)
)
Plaintiff,)

v.)

Case No. 99-CV-435-EA ✓

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

ENTERED ON DOCKET
DATE MAY 16 2000

ORDER

On April 24, 2000, this Court remanded this case to the Commissioner for further administrative action. No appeal was taken from this Judgment and the same is now final.

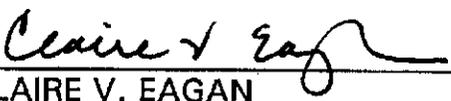
Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$4,087.00 for attorney fees and no costs, for a total award of \$4,087.00, for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$4,087.00 and no costs under EAJA. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, plaintiff's

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counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 15th day of May 2000.



CLAIRE V. EAGAN
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

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

BILLY MAULDIN,)
)
 Plaintiff,)
)
 vs.)
)
 WORLDCOM, INC.,)
)
 Defendant.)

ENTERED ON DOCKET
DATE **MAY 16 2000**
Case No. 98-CV-307-K ✓

FILED
MAY 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court are the cross-motions of the parties for summary judgment. Plaintiff brings this action seeking the immediate vesting of stock options issued by his former employer, MFS Intelenet Inc. ("MFS") which merged with defendant¹ on December 31, 1996. Specifically, plaintiff seeks summary judgment that (i) defendant breached the MFS stock options agreements by failing to vest his outstanding stock options at the time of his constructive involuntary termination from defendant's employ and (ii) plaintiff is entitled to immediate vesting of all his outstanding stock options.

Defendant contends it is entitled to summary judgment that (i) the outstanding stock options expired when plaintiff voluntarily resigned to take a better-paying position with another employer; (ii) the decision of the Compensation and Stock Option Committee ("Committee") through its designee Dennis Sickle ("Sickle") that

¹WorldCom, Inc. acquired MCI Communications Corporation in 1998, and has been renamed MCI WORLDCOM, Inc.

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plaintiff was not entitled to accelerated vesting of his stock options is entitled to deference by this Court as the decision was in good faith and not arbitrary or capricious; (iii) any changes to plaintiff's authority, duties or responsibilities were done "for cause" and cannot form the basis for his claim of constructive involuntary termination; and (iv) plaintiff is not entitled to accelerated vesting of his December 31, 1996 stock option grant as it was issued after the "change of control".

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." Rule 56(c) F.R.Cv.P. In applying this standard, the Court views the evidence and draws reasonable inferences therefrom in a light most favorable to the non-moving party. See Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir.1996).

Plaintiff was hired by MFS, a telecommunications corporation, in May of 1994 as the Operations Manager of its facility in Houston, Texas. After he had worked in Houston a short time, MFS transferred plaintiff to Los Angeles, California, where he also held the position of Operations Manager. In June 1996, plaintiff became the City or Operations Manager for the Dallas area. As such, plaintiff had total responsibility for operations in the city of Dallas, i.e., overseeing all customer line installations, network augments, building additions, electronic installations and

alarming of the system. As Operations Manager for the Dallas area, plaintiff had responsibility over three individuals: David Dillman ("Dillman"), Roger Underwood ("Underwood") and Scott Pfister ("Pfister") who designed and engineered the fiber optics and electronics network in Dallas.

While employed by MFS, plaintiff was offered participation in the MFS Communications Company 1993 Stock Plan ("Plan"). MFS and plaintiff executed four Stock Option Agreements dated September 30, 1994, December 30, 1994, December 29, 1995 and December 31, 1996 (collectively referred to as the "Stock Option Agreements"). Each of the Stock Option Agreements awarded plaintiff the right to purchase shares of MFS common stock (defined under the Agreements as "Option Shares") "on the terms and conditions contained in this Option Agreement", specifically 300, 1200, 1200 and 3000 Option shares respectively.

Each Stock Option Agreement recites the stock option was issued to "provide the Employee an opportunity to purchase the Common Stock. . . to carry out the purposes of the Company's 1993 Stock Plan." The Plan provides:

[t]he Committee [the Compensation Committee of the Board of Directors of MFS] may from time to time at its discretion, subject to the provisions of the Plan, determine when options shall be granted and at the time of each grant determine those eligible employees to whom options shall be granted. . . Each such option shall be evidenced by a written agreement containing terms and conditions established by the Committee consistent with the provisions of the Plan.

The Plan further provides:

[t]he Committee shall have plenary authority in its discretion, but subject to the express provisions of the Plan including, without limitation. . . . when an option can be exercised . . . and to interpret the Plan and to make all other determinations deemed advisable for the administration of the Plan. The Committee may designate Employees of the Company to assist the Committee in the administration of the Plan and may grant authority to such persons to execute option agreements or other documents on behalf of the Committee. . . . In the event of a disagreement as to the interpretation of the Plan. . . . or as to any right or obligation arising from or related to the Plan, the decision of the Committee shall be final and binding.

Each of the Stock Option Agreements between MFS and plaintiff provides the following:

In the event of a Change of Control (as hereinafter defined) and the Employee's subsequent Involuntary Termination (as hereinafter defined) within two years thereafter, the full number of the Option Shares shall immediately vest.

A "Change of Control" is defined under each of the Stock Option Agreements as follows:

Change of Control. Change of Control shall mean:

(I) The acquisition (other than from the Company) by any person, entity or "group", within the meaning of Section 13(d)(3) or 14(d)(2) of the Securities Exchange Act of 1934 (the "Exchange Act"), (exclusive, for this purpose, of the company or its affiliates, or any employee benefit plan of the Company or its affiliates, which acquires beneficial ownership of voting securities of the Company) of beneficial ownership (within the meaning of Rule 13d-3 promulgated under the Exchange Act) of more than fifty percent (50%) of the then outstanding shares of common stock of the combined voting power of the Company's then outstanding voting securities entitled to vote generally in the election of

directors; or

(II) Approval by the stockholders of the Company of a reorganization, merger, or consolidation, in each case, with respect to which persons (or persons who are beneficial owners through such person) who were the stockholders of the Company immediately prior to such reorganization, merger or consolidation do not, immediately thereafter, own more than 50% of the combined voting power entitled to vote generally in the election of directors of the reorganized, merged or consolidated company's then outstanding voting securities, or a liquidation or dissolution of the Company or the sale of all or substantially all of the assets of the Company provided, however that a distribution, by dividend or otherwise, by Kiewit Diversified Group Inc.

"Involuntary Termination" is defined under each of the Stock Option Agreements as follows:

Involuntary Termination. Involuntary Termination shall mean either:

(I) the actual involuntary termination without cause of the Employee's employment with the Company or one of its subsidiaries after a Change of Control, or

(II) the constructive involuntary termination of the Employee's employment with the Company and its subsidiaries after a Change of Control.

The term "constructive involuntary termination" shall include (x) a material reduction in the Employee's compensation (including applicable fringe benefits) or (y) the demotion or diminution in the Employee's position, authority, duties or responsibilities without cause.

The Stock Option Agreements also state "[i]f the employment of the Employee is terminated (other than for cause or in the case of an Involuntary Termination as described [herein], or resigns, then all unvested Options as of the date of termination or resignation shall

be forfeited. . . ."

In 1996, MFS and defendant announced the two companies would merge. To effect the merger, MFS and defendant entered into an Amended and Restated Agreement and Plan of Merger dated August 25, 1996. Shareholders of MFS and defendant were given a copy of a Joint Proxy Statement/Prospectus which contained the Plan of Merger for their consideration in determining whether to adopt the Amended and Restated Agreement and Plan of Merger. The Amended and Restated Plan of Merger provides:

Worldcom and MFS hereby acknowledge that the Merger and the consummation of the transactions contemplated under this Agreement will be treated as a "Change of Control" for purposes of each of the applicable MFS Benefit Plans and each applicable employment, severance or similar agreement applicable to any employee of MFS. . . and agree to abide by the provisions of any Benefit Plans and Change in Control Agreements which related to a Change in Control, including, but not limited to, the accelerated vesting and/or payment of equity-based awards.

At separate meetings on December 20, 1996, the shareholders of MFS and defendant adopted the Amended and Restated Plan of Merger and approved the merger. The merger transaction itself was completed on December 31, 1996. There is no dispute that the merger satisfies the "Change of Control" definition in plaintiff's Stock Option Agreements.

Plaintiff contends that after the merger, his role and responsibilities diminished. Among other things, plaintiff's staff of engineers were directed by WorldCom personnel to report to the director of a newly created group within WorldCom. Plaintiff no

longer had the responsibility, duty, or authority to direct personnel in the continued planning, engineering and constructing of the fiber optics and electronics network being constructed in Dallas, Texas. Plaintiff also asserts that he suffered a material reduction in his compensation, including applicable fringe benefits.

On various occasions, plaintiff requested that defendant address his decreased job responsibilities and decreased compensation and benefits. Plaintiff informed WorldCom representatives that if his job situation did not change, he could not continue working for WorldCom. Plaintiff further informed WorldCom that if no steps were taken to address his situation, he would consider that WorldCom had constructively discharged his employment.

Plaintiff contends defendant failed to make any changes to plaintiff's job, authority, duties and responsibilities and failed to address the decrease in plaintiff's compensation. Accordingly, plaintiff submitted his resignation on May 7, 1997 and claimed that "[w]ith recent diminution of my benefits, authority, duties and responsibilities, I have effectively been "Constructively Involuntarily Terminated. . . ." Defendant failed and refused to vest the full number of stock options held by plaintiff.

Defendant denies that plaintiff suffered either a material reduction in his compensation or a demotion or diminution of his position, authority duties or responsibilities without cause. Defendant asserts that after the Change of Control, plaintiff's

compensation was not reduced at all, and he retained at least the same overall job responsibilities and duties. Furthermore, defendant contends that after the Change of Control, defendant was in the process of increasing plaintiff's compensation package and giving him a promotion. Finally, defendant asserts that plaintiff voluntarily resigned his employment in order to accept a position with a competitor for a significant increase in base salary and benefits.

As this recitation suggest, factual disputes abound in this case. Nevertheless, summary judgment may still be granted if there is no genuine dispute as to any material fact under the applicable law. First, defendant contends that the definition of constructive discharge should be that used in general employment law. That is, only if the defendant deliberately created intolerable working conditions such that the employee is forced to resign is a finding of constructive discharge applicable. Plaintiff responds that the appropriate definition is that used in the Stock Option Agreements themselves. Plaintiff contends the fact that the Agreements specifically define an Involuntary Termination as including a material reduction in compensation or diminution in authority, etc., indicate an intent that the common-law definition not be used.

There is a sufficient factual dispute as to whether a material reduction in compensation took place such that summary judgment will not be granted on that ground. Defendant also argues that any changes in plaintiff's job were done "with cause", i.e., to enhance

the efficiency of defendant's business. Plaintiff argues to the contrary, that because the Agreements do not define "without cause" the phrase means what it normally does in the employment context. That is, it modifies the "at-will" rule by requiring an employer to identify a legitimate reason related to the employee's job performance or conduct. Defendant has not articulated such a reason. The Court finds the Agreements ambiguous in this regard; therefore summary judgment will again not be granted in defendant's favor on this ground.

As an alternative argument, defendant asserts that this Court should show deference to the Committee's decision. The Committee appointed and delegated authority to Dennis Sickle ("Sickle") and Bruce Borghardt ("Borghardt"), or either of them, to review, approve or deny, or take other actions with respect to requests for acceleration of vesting of stock options pursuant to the MFS stock plans. Upon receipt of plaintiff's claim for accelerated stock options, Rosanne Dickerson (vice-president of Human Resources for WorldCom), conducted an investigation. At the conclusion of that investigation, on May 20, 1997 she submitted her findings and recommendation that plaintiff's claim be rejected to Sickle. Sickle adopted the recommendation and denied plaintiff's claim on May 30, 1997. On September 10, 1997, the Committee ratified the decision.

Defendant cites Weir v. Anaconda Co., 773 F.2d 1073 (10th Cir.1985) for the proposition that a stock option plan committee's denial of an employee's request for benefits must be upheld if it

was properly within the committee's discretion and not arbitrary, in bad faith or fraudulent. Id. at 1078. Plaintiff cites no contrary authority, but simply notes that the Weir decision was interpreting Kansas law, which is not applicable to this case. This Court notes that in McIntyre v. Philadelphia Suburban Corp., 2000 WL 254306 (E.D.Pa.), the district court cited Weir in support of the general proposition that the authority of committees should be afforded "significant deference" when administering stock option plans.

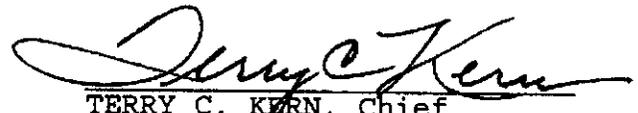
This principle seems appropriate under these facts. The Plan states that the Committee has "plenary authority" to make decisions regarding Plan interpretation, determination and procedures and that such decision is "final and binding". Plaintiff attacks the decision in two ways: (1) improper Committee membership and (2) improper delegation. Plaintiff points to the requirement that Committee members be "outside directors". Defendant has submitted evidence that the members of the Committee at the time were Stiles A. Kellett, Jr. and Lawrence C. Tucker and that both were "outside directors". Kellett was Chairman of Kellett Investment Corp. and Tucker was a general partner of Brown Brothers Harriman & Co. Neither was an employee of WorldCom. (Affidavit of Stephanie Scott, Defendant's Attachment U).

Plaintiff protests that it defeats the purpose of the "outside director" provision if the Committee can delegate the decision to one such as Sickle, who was a WorldCom employee. This is a legitimate complaint about the Plan as written, but plaintiff has

pointed to nothing in the Plan which prohibits such delegation. Further, Article XII of the Plan provides that acts approved in writing by the Committee "are valid acts of the Committee". Thus, the subsequent ratification by the Committee appears appropriate, plaintiff's contrary arguments notwithstanding. Certainly, the Court does not find that the decision was arbitrary and capricious, or in bad faith, even viewing the record in the light most favorable to plaintiff. Therefore, only on this ground, does the Court find summary judgment should be granted in defendant's favor.

It is the Order of the Court that the motion of the plaintiff for summary judgment (#42) is hereby DENIED and the motion of the defendant for summary judgment (#43) is hereby GRANTED.

IT IS SO ORDERED THIS 16th DAY OF MAY, 2000.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

JERRY ALEXANDER, CIPRIANO)
ALVARADO, LAVONNE ANDERSON,)
JOHN BENNETT, MARTY CHARLES,)
HOWARD CHILDERS, COY COOK,)
SCOTT COOK, MICHAEL COX,)
SHIRLEY DAVIS, EDWIN DEAN, LOIS)
DENTIS, SHERI DILLMAN, PRESTON)
DUGAN, JAMES EMERSON, JIMMY)
FORD, KENNETH GADDY, TERESA)
GLADD, RICHARD HIGGINS, JUDY)
HILKER, DANNY JACKSON, JAMES)
KEELING, DANNY KELLY, DIANE)
KELLY, DOROTHEA KIDNEY,)
WILLIAM KNIGHT, BARBARA LARUE,)
LARRY LEE, MICHAEL MARQUEZ,)
DALE MCDANIEL, JANIE MILLER,)
GILBERT NAIL, DARRIN PROCK,)
HOMER PURCELL, DONNA RAMBO,)
JAMES READY, LARRY SCARBROUGH,)
ALFRED SEIP, RAY SHIVERS, HAROLD)
SKAGGS, BOBBY SMITH, DAVID)
SMITH, TIMOTHY SNIDER, JOELLE)
STRUBLE, VICTOR TAYLOR,)
VICTORIA VAUGHN, STEVE WEGNER,)
DEAN WISE, CLARENCE WOODS,)
MICHAEL SILER, and CLEOTIS)
RAINES,)

Plaintiffs,)

v.)

SMITH & NEPHEW, P.L.C., and)
SMITH & NEPHEW RICHARDS, INC.,)

Defendants.)

FILED

MAY 15 2000 *SP*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAY 16 2000

Case No. 96-CV-1004-K (E) ✓

ORDER

Before the Court are Defendant Smith & Nephew Richards, Inc.'s ("Defendant's") motions for summary judgment and to exclude or limit the testimony of Jerry D. McKenzie, M.D., as to Plaintiff Harold Kevin Skaggs ("Plaintiff").

I. History of Case

This is a products liability case concerning the Rogozinski Spinal Rod System manufactured by Defendant, presently on remand from *In re Orthopedic Bone Screw Products Liability Litigation*, multidistrict litigation number 1014, in the United States District Court for the Eastern District of Pennsylvania. Plaintiff is suing Defendant for injuries allegedly sustained due to the Rogozinski system implanted into his back in 1994. Plaintiff's theories for liability include manufacturers' products liability, negligence, negligence per se, failure to warn, breach of express and implied warranties, and fraud.

Plaintiff twice injured his back in October 1993, while moving heavy objects at work and performing other duties. In February 1994, Dr. Don L. Hawkins found Mr. Skaggs to be suffering from degenerative changes with annular disruption and central herniation at L5-S1. Conservative treatment failed to remedy Mr. Skaggs' condition. Although Dr. Hawkins recommended that Mr. Skaggs consider living with the discomfort, Mr. Skaggs decided to have surgery. Dr. Hawkins discussed the alternatives, risks, benefits, and possible complications of this surgery with Mr. Skaggs. On March 30, 1994, Dr. Hawkins performed a decompressive lumbar laminectomy with discectomy at L5-S1; mesial facetectomies and foraminotomies at the L5-S1 nerve root, left; segmental fixation of the L5-S1 level, using the

Rogozinski Spinal Rod System; bilateral lateral mass fusion, L5-S1, using corticocancellous iliac bone graft; excision of the spinous process of L5 and superior spinous process of S1, using local bone for augmentation and fusion mass. Although x-rays and examinations showed excellent alignment of the system and a solidifying fusion mass, in April 1995, Skaggs still complained of some pain in his back and other areas and expressed a fear of his implants. Although Dr. Hawkins advised him that his symptoms were not related to the device and that its removal might not help, Mr. Skaggs chose to have the Rogozinski device removed. During the explantation surgery, Dr. Hawkins noted solid, if immature, fusion. In August 1995, a few months following surgery, Plaintiff suffered a fall on some steps, sufficient to cause a bruise on his buttocks. In April 1996, Brent Hisey, M.D., examined Plaintiff and concluded that Plaintiff was suffering from failed back syndrome and probable continued lumbar discogenic pain syndrome with pseudoarthrosis at L5-S1 on the right. Before performing any surgery, however, Dr. Hisey required Plaintiff either to attend aggressive rehabilitation or undergo further diagnostic testing to better identify his pain-generating mechanism. In July 1996, Dr. Hisey noted that an MRI showed post-surgical changes at L5-S1 and recommended Plaintiff seek a second opinion from James Odor, M.D., regarding possible 360° fusion at the L5-S1 level. In August 1996, Dr. Odor found that an MRI scan and x-rays showed what appeared to be solid fusion with no motion on flexion extension and made no surgery recommendation at that time. James C. Mayoza, M.D., subsequently found that the fusion was solid, and, in July 1997, expressed concern that a

lateral disc protrusion at the L3-L4 level might account for Mr. Skaggs' residual pain. Plaintiff argues that the Rogozinski system was not mechanically strong enough to support his spine during the fusion process, did not promote fusion or provide any medical benefit, and that it aggravated, if not caused, Plaintiff's medical problems, primarily continued back and leg pain, as well as anxiety and depression.

II. Exclusion of Expert Testimony

Defendant seeks to exclude the testimony of Jerry D. McKenzie, M.D., Plaintiff's medical causation expert, for failure to satisfy Fed. R. Evid. 702. Defendant argues that Dr. McKenzie is not qualified to testify as to his expressed opinions, his opinions are not sufficiently reliable to satisfy Rule 702, and his opinions are irrelevant to the case.

A. Standard

Fed. R. Evid. 702 authorizes a "witness qualified as an expert by knowledge, skill, experience, training, or education" to testify as to "scientific, technical, or other specialized knowledge." Testimony is admissible under Rule 702, if it "rests on a reliable foundation and is relevant." *See Kumho Tire Co. v. Carmichael*, 526 U.S.137, 141 (1999). In making its initial determination of reliability, the Court has broad latitude to consider whatever factors the Court finds useful, and the particular factors will depend on the unique circumstances of the expert testimony involved. *See id.* at 152. Factors mentioned in *Daubert* and *Kumho* include the following: (1) whether the reasoning or methodology underlying the expert's opinion has been or could be tested; (2) whether the reasoning or

methodology has been subject to peer review and publication; (3) the known or potential rate of error; and (4) the level of acceptance of the reasoning or methodology by the relevant professional community. *See id.* at 149-52; *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 592-95 (1993). These factors are not necessarily applied in every case and are not exclusive of other factors. *See Kumho*, 526 U.S. at 150. An expert may rely on facts and data not in evidence to the extent reasonably relied upon by experts in his field. *See Fed. R. Evid.* 703. Rule 702 was intended to liberalize the introduction of relevant expert evidence and such testimony is subject to being tested by "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Daubert*, 509 U.S. at 596. The Court also must recognize that expert witnesses have the potential to "be both powerful and quite misleading." *Id.* at 595.

B. Dr. McKenzie's Qualifications

Dr. McKenzie does not qualify as an expert to testify as to the causation of Plaintiff's ailments. Dr. McKenzie's report indicates that he proposes to testify that (1) the Rogozinski device did not provide any medical advantage or benefit to Mr. Skaggs; (2) he developed a localized chronic inflammatory response to the device that caused fibrous reactive scar tissue, foraminal stenosis, bony overgrowth, and failure of the fusion, resulting in nerve root adhesions and chronic severe lumbar pain; (3) this reaction caused loss of sensation in the lower extremities, difficulty walking, and other limitations on daily life; (4) the device also resulted in a consequential injury to his psychological system manifested by anxiety and

depression, resulting in significant limitations on daily activities and social interaction; and (5) an examination of the Rogozinski device explanted from Plaintiff indicates movement of the component parts while implanted in his spine.¹

The simple possession of a medical degree is insufficient to qualify a physician to testify as to the advantages of an spinal fixation device, the medical causation of spine-related ailments, or the mechanical functioning of an orthopedic implantation device. Plaintiff cites to *Wheeler v. John Deere Co.*, which states that "an expert witness is not strictly confined to his area of practice, but may testify concerning related applications; a lack of specialization does not affect the admissibility of the opinion, but only its weight." 935 F.2d 1090, 1100 (10th Cir. 1991). This opinion and the other federal cases cited by Plaintiff, however, are pre-*Daubert*.² A blanket qualification for all physicians to testify as to anything medically-related would contravene the Court's gate-keeping responsibilities.³

Dr. McKenzie's qualifications even fail to satisfy the Fifth Circuit's quite liberal qualification test. That Circuit finds that, while a completely unqualified expert should not

¹Dr. McKenzie has subsequently testified that he never examined Mr. Skaggs' explanted device and that this finding was in error.

²In fact, the only post-*Daubert* Tenth Circuit opinion to cite *Wheeler* is *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1519 (10th Cir. 1996). *Compton*, however, was based on the erroneous holding that *Daubert* was inapplicable to opinions not based on a particular methodology or technique. *See id.*, abrogated by *Kumho*, 119 S. Ct. at 1170.

³Other courts have reached a similar conclusion regarding the testimony of medical doctors. *See, e.g., Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 24 (D. Mass. 1995) ("Just as a lawyer is not by general education and experience qualified to give an expert opinion on every subject of the law, so too a scientist or medical doctor is not presumed to have expert knowledge about every conceivable scientific principle or disease.").

testify, *Daubert* focuses instead on relevancy and reliability. *See Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 507 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 1171 (2000). Therefore, "[a]s long as some reasonable indication of qualifications is adduced, the court may admit the evidence without abdicating its gate-keeping function." *Id.* As more fully set out below, Dr. McKenzie's qualifications fail to satisfy even this minimal test.

Dr. McKenzie's experience as an emergency room physician and in legal medicine for workers' compensation injuries does not qualify him to give the opinions to which he proposes to testify. Dr. McKenzie has been licensed as a doctor in Oklahoma since 1967, with over two decades of experience in emergency medicine. Dr. McKenzie is not board certified in any medical specialty and has no experience or training in orthopedics, spinal surgery, spinal fusion with instrumentation, neurology, or other areas remotely related to the subject of his opinions. Plaintiff makes no attempt to demonstrate Dr. McKenzie's qualifications in these specialized areas but rather relies on his assertion that Dr. McKenzie's medical degree is qualification enough. Plaintiff simply has not demonstrated that Dr. McKenzie is "qualified as an expert by knowledge, skill, experience, training, or education" to testify as to the effects of the Rogozinski device or the causes of Mr. Skaggs' ailments.⁴ *See Fed. R. Civ. Evid. 702.*

⁴Dr. McKenzie's qualifications to render opinions regarding the mechanical behavior of the Rogozinski device that he never examined are even more lacking. Dr. McKenzie has demonstrated absolutely no training, education, or experience in biomechanics or any related field.

C. Reliable Foundation

Even if Dr. McKenzie possessed the appropriate qualifications, his proffer lacks a reliable foundation. Plaintiff must show that Dr. McKenzie's method is scientifically sound and his opinion is based on sufficiently reliable facts. *See Mitchell v. Gencorp Inc.*, 165 F.3d 778, 781 (10th Cir. 1999). At a minimum, Dr. McKenzie should describe the method he used in reaching, and the data supporting, his determination. The Court cannot rely on an expert's mere assurance that the methodology and data are reliable. *See id.* The Court does not focus on an expert's conclusions but on whether his principles and methodology are sound. *See Daubert*, 509 U.S. at 595. If any step renders Dr. McKenzie's opinion unreliable – either in the choice of methodology or its application – his opinion is inadmissible. *See Mitchell*, 165 F.3d at 782.

Dr. McKenzie's methodology for determining the medical causation of Plaintiff's ailments is wholly lacking in reliability.⁵ Dr. McKenzie notes that he interviewed Mr. Skaggs, reviewed certain medical records and x-rays, inspected Mr. Skaggs' explanted device, and performed a physical examination of Mr. Skaggs. On this basis and his expertise as a licensed physician, Dr. McKenzie opines that the Rogozinski device caused the numerous problems listed above. Dr. McKenzie has later testified that he actually did not

⁵This discussion will focus on Dr. McKenzie's evaluation of whether Defendant's device *actually* caused Plaintiff's injuries, specific causation, rather than whether it is *capable* of causing such injuries, general causation. The parties do not appear to dispute the issue of general causation for the purposes of the motion to exclude.

examine Mr. Skaggs' implant, because Mr. Skaggs did not receive it following his explantation surgery. Although Dr. McKenzie has subsequently corrected himself, the inclusion of an entirely false paragraph in his report, containing a physical description of a device he did not examine, raises severe questions regarding the reliability of Dr. McKenzie's methodology. Dr. McKenzie also fails to explain why he eliminated, assuming he even considered, other possible causes for Plaintiff's injuries. Dr. McKenzie does not explain the effect of, nor does he even mention, Mr. Skaggs' post-explantation fall. He also fails properly to explain why he is ignoring other orthopedic physicians' findings that Mr. Skaggs achieved solid fusion. Finally, he makes no attempt to explain how the Rogozinski device, as opposed to fusion surgery in general, is responsible for the injuries he has identified. Dr. McKenzie's opinion is devoid of any indice of reliable methodology or any indication of any methodology whatsoever, other than examining the patient and attributing all of his physical problems to the Rogozinski device.⁶

The standard used to determine the sufficiency of causation evidence does not affect

⁶Other courts have found that some sort of differential diagnosis or attempted elimination of other causes is an important, if not necessary, factor in determining the reliability of a medical causation opinion. See, e.g., *Rutigliano v. Valley Bus. Forms*, 929 F. Supp. 779, 786 (D.N.J. 1996) (requiring differential diagnosis before an expert may give opinion testimony regarding specific causation), *aff'd*, 118 F.3d 1577 (3d Cir. 1997); *Wooley v. Smith & Nephew Richards, Inc.*, 67 F. Supp. 2d 703, 703 (S.D. Tex. 1999) (rejecting expert opinion as unreliable that, among other things, lacked any analysis indicating how other possible causes of the patient's pain were ruled out); *McCollin v. Synthes Inc.*, 50 F. Supp. 2d 1119, 1127 (D. Utah 1999) (rejecting expert's opinion that, among other things, failed to explain how other potential causes were ruled out); *Calli v. Danek Med., Inc.*, 24 F. Supp. 2d 941, 951 (W.D. Wis. 1998) (finding that expert's assertion that implanted device caused patient's symptoms based on his general expertise and without ruling out other possible causes lacked sufficient reliability and was unsupported speculation); *Tucker v. Nike, Inc.*, 919 F. Supp. 1192, 1196-97 (N.D. Ind. 1995) (finding that expert's failure to exclude other possible factors and to inquire as to patient's prior injuries rendered opinion unreliable).

this analysis. Plaintiff's reliance on the lesser causation standard of *McKellips v. Saint Francis Hospital, Inc.*, in order to cure the defects in his expert's methodology, is misplaced. 741 P.2d 467 (Okla. 1987). In *McKellips*, the Oklahoma Supreme Court adopted the loss of chance of survival doctrine that lessens the causation burden in medical malpractice cases where the duty breached was one imposed to prevent the type of harm the patient ultimately sustained. *See id.* at 474. This doctrine, even if it were otherwise applicable, has *not* been extended to ordinary negligence actions brought against persons other than a medical practitioner or hospital. *See Hardy v. Southwestern Bell Tel. Co.*, 910 P.2d 1024, 1025-26 (Okla. 1996). Thus, even if a lesser causation standard would be sufficient to lessen the reliability standards imposed by *Daubert*, the doctrine is inapplicable to this case. Furthermore, requiring Dr. McKenzie to employ differential diagnosis does not require Plaintiff to prove causation beyond a reasonable doubt. Contrary to Plaintiff's analysis, *In re Paoli Railroad Yard PCB Litigation* reemphasizes the need for a medical causation expert to engage in diagnostic techniques that rule out other causes and offer a good explanation as to why his conclusion remains reliable when he does not. 35 F.3d 717, 761 (3d Cir. 1994). Dr. McKenzie has failed to do so and does not meet the reliability requirements imposed by Rule 702.⁷

⁷Having found Dr. McKenzie unqualified and his methodology unreliable, the Court does not rule on the relevance of his proffered opinion.

III. Summary Judgment

A. Standard

Summary judgment is appropriate if “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence that would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must go beyond the pleadings and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494. Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *See Thomas v. International Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995).

B. Plaintiff's Claims

Plaintiff's claims against Defendant are as follows: (1) manufacturers' products liability; (2) negligence, including negligence per se; (3) failure to warn; (4) breach of express and implied warranties; and (5) fraud.⁸ Defendant argues that, because Plaintiff has

⁸This formulation differs somewhat from that found in Plaintiff's complaint. However, given the complex history of the case, the Court will rely on Plaintiff's representations in his summary judgment response as to the extent of his claims.

failed to prove causation, his entire case should be dismissed. Defendant also argues that Plaintiff's Food and Drug Administration ("FDA") regulatory theories are legally unsound and that Plaintiff cannot establish any defect in the Rogozinski device.

C. Manufacturers' Products Liability

Because Plaintiff has put forward no evidence of medical causation, Plaintiff's manufacturers' products liability claim must fail. The three elements of a manufacturers' products liability action are as follows: (1) the product caused Plaintiff's injury; (2) the defect existed in the product at the time it left Defendant's possession and control; and (3) the defect rendered the product unreasonably dangerous. *See Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1363 (Okla. 1974). To establish causation, Plaintiff must prove that his injury was caused, not necessarily by the negligence of Defendant, but by reason of a defect built in and existing at the time of his injury. *See id.* at 1364. Unreasonably dangerous means that the device was dangerous to an extent beyond that which would be contemplated by the ordinary customer who purchases it, with the ordinary knowledge common to the community as to its characteristics. *See id.* at 1362-63.

Absent the now-excluded testimony of Dr. McKenzie, Plaintiff has no evidence of medical causation. The Oklahoma Supreme Court has frequently found expert testimony necessary to establish medical causation "[w]here injuries are of a character requiring skilled and professional men to determine the cause and extent thereof." *Williams v. Safeway Stores, Inc.*, 515 P.2d 223, 227 (Okla. 1973). Plaintiff has no expert qualified to render an opinion

as to the cause of his injuries. As noted above, Dr. McKenzie's testimony cannot be admitted, because he lacks the necessary qualifications and his methodology is unreliable. Plaintiff also attempts to rely on the testimony of Harold Alexander, Ph.D., to satisfy this burden. However, Dr. Alexander's testimony is limited to orthopedic bioengineering by Pretrial Order No. 725.⁹ *In re Orthopedic Bone Screw Prods. Liab. Litig.*, No. MDL 1014, 1997 WL 39583 *6 (E.D. Pa. Jan. 23, 1997). This means Dr. Alexander may testify as to "how pedicle screws function in the human body and how the human body functionally, but not medically, responds to pedicle screws." *Id.* at *3. He is not, however, "particularly qualified to make . . . statements in the additional disciplines of law, medicine, orthopedics, FDA regulatory practice, conflicts of interest, market surveys, and clinical studies." *Id.* at *4. While Dr. Alexander's affidavit covers many of these disallowed areas, his orthopedic bioengineering testimony is insufficient to create an issue of causation.¹⁰

⁹Bioengineering includes the following: (1) biomechanics, the study of how a medical device will mechanically interact with surrounding tissue; (2) biomaterials, the study of the materials in a medical device and the body tissue's response to this device; (3) biomedical engineering, the study of how a device should be designed and constructed; and (4) design and analysis of device research, the study of the proper design and implementation of studies to determine potential risks and benefits associated with device designs and the extent to which those risks and benefits are realized in clinical practice. *See* 1997 WL 39583, at *1, 6.

¹⁰Plaintiff argues that Dr. Alexander's testimony is sufficient to establish that the device provided no medical benefit to Plaintiff and generated metal particles and corrosion products that produced an inevitable inflammatory response in adjacent tissues. As noted above, no expert has examined Mr. Skaggs' device, because it was not provided to him following its explantation. Therefore, Plaintiff's assertion that, "the physical evidence of component interface motion, surface abrasion, and corrosion exhibited by the explanted components" proves actual medical causation cannot be correct in this case. (Pl.'s Resp. Def.'s Mot. Summ. J. at 37.)

D. Negligence and Negligence Per Se

1. Negligence

Plaintiff's negligence claim similarly fails on his inability to show causation. The elements of a negligence claim in Oklahoma are as follows: (1) the existence of a duty owed by Defendant to Plaintiff to use ordinary care; (2) the breach of that duty; and (3) an injury proximately caused by the breach. *See Comer v. Preferred Risk Mut. Ins. Co.*, 991 P.2d 1006, 1010 (Okla. 1999). Therefore, in order for Plaintiff to recover on a negligence action, there must be a causal connection between Defendant's actions and the injury. *See Key v. Liquid Energy Corp.*, 906 F.2d 500, 505 (10th Cir. 1990). As noted above, Plaintiff has failed to put forth any evidence of causation, rendering judgment for Defendant appropriate as to this claim, as well. *See Hardy v. Southwestern Bell Tel. Co.*, 910 P.2d 1024, 1027 (Okla. 1996) ("While absolute certainty is not required, mere possibility of causation is insufficient.").

2. Negligence Per Se

Plaintiff's negligence per se claim fails, because this theory is inapplicable to labeling and marketing violations under the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 *et seq.*, and Plaintiff has put forward no evidence of causation. When a statute or regulation governs conduct, the Court may adopt it as the standard required of a reasonably prudent person if the Court believes it appropriate for civil liability. *See Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 622 (10th Cir. 1998). The violation of a statute is

negligence per se if (1) the claimed injury is caused by the law's violation; (2) the injury is of the type intended to be prevented by the statute; and (3) the injured person is a member of the class the statute intends to protect. *See Lockhart v. Loosen*, 943 P.2d 1074, 1078 (Okla. 1997). Plaintiff's negligence per se claim appears to be based on Defendant's alleged violations of FDA regulations. The Court has rejected this theory in *Johnson v. Smith & Nephew Richards, Inc.*, No. 97-CV-363-K, 1999 WL 1117105 *2 (N.D. Okla. Sept. 30, 1999).

In this case, Plaintiff has failed to put forth evidence that Defendant's alleged violation of the FDA regulations caused his injury. On the contrary, Defendant has submitted Dr. Hawkins' uncontroverted testimony that he knew that the Rogozinski device had not been approved by the FDA to be marketed for the insertion of bone screws in the vertebral pedicles and that he relied on his knowledge of the medical standard of care and the facts of Mr. Skaggs' case in recommending the surgery.

Furthermore, the regulations alleged to have been violated are administrative and do not impose a standard of care, as could form the basis of a negligence per se claim. Plaintiff argues that Defendant unlawfully marketed the Rogozinski device for use with pedicular attachment. Under the Medical Device Amendments of 1976, 21 U.S.C. §§ 360c *et seq.*, devices are divided into three categories, Classes I, II, and III. The classes range from least to most dangerous. Class I devices are subject only to general controls. *See* 21 U.S.C. § 360c(a)(1)(A). Class II devices are subject to further special controls, and Class III devices

require premarket approval ("PMA"). *See id.* § 360c(a)(1)(B)-(C). At the time of Plaintiff's surgery, the Rogozinski device with pedicular attachment fell under Class III. However, because it was substantially equivalent to devices marketed in interstate commerce prior to May 28, 1976, it could be introduced into the market without PMA. *See id.* §§ 360(k), 360c(f). This equivalency classification applied only to devices labeled and intended to be fixed to the spine by laminar hooks and sacral/ilic attachment. The FDA prohibited Defendant from labeling or promoting the device for pedicular attachment to the vertebral column. Moreover, the FDA required that all labeling prominently note that the screws were intended for sacral/ilic attachment only and include the following statement: "WARNING – THIS DEVICE IS NOT INTENDED FOR PEDICULAR APPLICATION." While the FDA regulates the manner in which Defendant markets the Rogozinski device, it does not regulate a physician's decision to use the device for another, "off-label" use. *See* Citizen Petition Regarding the Food and Drug Administration's Policy on Promotion of Unapproved Uses of Approved Drugs and Devices; Request for Comments, 59 Fed. Reg. 59,820, 59,821 (1994). Furthermore, the parties acknowledge that the FDCA does not provide a private right of action. *See* 21 U.S.C. § 337(a). Nevertheless, Plaintiff seeks to enforce the FDCA by arguing that the FDA's labeling requirements constitute a minimum standard of care. As noted in *Johnson*, these requirements are merely administrative in nature and lack any independent substantive content. *See* 1999 WL 1117105, at *2. Under these circumstances, the Court finds that the alleged violations of FDA regulations do not create a cause of action

for negligence per se in Oklahoma. *Cf. Talley v. Danek Med., Inc.*, 179 F.3d 154, 161 (4th Cir. 1999) (finding no negligence per se claim under Virginia law, because the regulations lack substantive content); *Baker v. Danek Med.*, 35 F. Supp. 2d 875, 878 (N.D. Fla. 1998) (finding no negligence per se claim under Florida law where FDCA does not provide private right of action and FDA status was immaterial to implanting surgeon); *but cf. Valente v. Sofamor*, 48 F. Supp. 2d 862, 876 (E.D. Wis. 1999) (disagreeing with *Cali v. Danek Med., Inc.*, 24 F. Supp. 2d 941, 954 (W.D. Wis. 1998), and finding Wisconsin law allows negligence per se claim based on violation of FDCA).

E. Failure to Warn

Plaintiff's failure to warn claim cannot withstand the application of the learned intermediary doctrine. In Oklahoma, the learned intermediary doctrine is an exception to the duty to warn, under which the manufacturer can warn the physician rather than the ultimate consumer.¹¹ *See Tansy v. Dacomed Corp.*, 890 P.2d 881, 886 (Okla. 1994). The reasoning behind this doctrine is instructive. As a physician, Dr. Hawkins has the duty to inform himself of the qualities and characteristics of the Rogozinski system and to exercise independent judgment, taking into account his knowledge of the patient, as well as the product. *See Edwards v. Basel Pharms.*, 933 P.2d 298, 300 (Okla. 1997). The patient is expected to rely primarily on this judgment. *See id.* Therefore, if the Defendant properly

¹¹There are two exceptions to the learned intermediary doctrine in Oklahoma – mass immunizations and situations where the FDA has mandated that warning be given directly to the consumer – neither of which is applicable here. *See Edwards v. Basel Pharms.*, 933 P.2d 298, 301 (Okla. 1997).

informed Dr. Hawkins, it is entitled to assume that he exercised his informed judgment. *See id.* at 300-01. In this case, Dr. Hawkins has testified that he was fully informed as to the FDA status of the Rogozinski System, knew of its risks, did not rely on Defendant's promotional materials, and exercised his independent medical judgment based on the standards of care and Mr. Skaggs' situation in recommending the surgery. Plaintiff has presented no evidence to the contrary. Given these facts, Plaintiff can show no injury resulting from any failure to warn Dr. Hawkins.

F. Breach of Express and Implied Warranties

Plaintiff's claim for breach of express warranty fails, because Plaintiff has submitted no evidence that Dr. Hawkins relied on any of Defendant's representations. *See Speed Fasteners, Inc. v. Newsom*, 382 F.2d 395, 397 (10th Cir. 1967). Dr. Hawkins states in his affidavit that Defendant did not make any warranty about, or promise of performance concerning, the Rogozinski System and that he was knowledgeable of the device's regulatory status and risks. He also states that he has used different spinal fixation devices and based his decision to use the Rogozinski device on his experience with the system. Plaintiff's only response is that the Court can infer that Dr. Hawkins relied on these representations despite his affidavit to the contrary. Plaintiff puts forward no material facts in support of Dr. Hawkins' reliance, warranting summary judgment to Defendant on this claim.

Plaintiff's warranty claims also lack any evidence of causation. In addition to breach of express warranty, Plaintiff alleges breach of implied warranty of fitness for intended use.

In a products liability action, breach of implied warranty is no longer an appropriate remedy except as provided in the Uniform Commercial Code. *See Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1365 (Okla. 1974). In order to recover for breach of warranty, Plaintiff must show the following: (1) the existence of the warranty; (2) that the warranty was broken; and (3) that the breach was the proximate cause of the loss sustained. *See American Fertilizer Specialists, Inc. v. Wood*, 635 P.2d 592, 595 (Okla. 1981); *see also* U.C.C. § 2-314 cmt. 13. As noted above, Plaintiff has no evidence that the device caused his injuries.

G. Fraud

A fraud claim requires Plaintiff to prove (1) Defendant made a material representation; (2) that was false; (3) and made knowingly or recklessly, without regard for its truth; (4) with the intent that it be acted upon; and (5) Plaintiff was injured as a result. *See McCain v. Combined Communications Corp. of Okla., Inc.*, 975 P.2d 865, 867 (Okla. 1998). In order to succeed on this claim, Plaintiff must show that Defendant's submissions to the FDA caused Dr. Hawkins to use the Rogozinski Spinal System and that the device caused his injury. As detailed above, Plaintiff has no evidence supporting either assertion.

IV. Conclusion

Because Dr. McKenzie is not qualified to render his proffered expert opinion and because his methodology is unreliable, his testimony is excluded. Absent this testimony, Plaintiff lacks any evidence that the Rogozinski Spinal Rod System caused his injuries. Plaintiff also has submitted no evidence to contradict Defendant's evidence that his surgeon,

Dr. Hawkins, was aware of the FDA status of the device, did not rely on any representations made by Defendant, was aware of its risks, and chose to implant the Rogozinski system in Mr. Skaggs based on his independent medical knowledge. Under these circumstances, Plaintiff's claims for manufacturers' products liability, negligence, negligence per se, failure to warn, breach of express and implied warranties, and fraud must fail.

IT IS THEREFORE ORDERED that Defendant's Motion to Exclude, or in the Alternative, Limit the Testimony of Jerry D. McKenzie, M.D. as to Plaintiff Harold Kevin Skaggs (# 9) is GRANTED and Defendant's Motion for Summary Judgment as to Plaintiff, Harold Skaggs (# 27) is GRANTED.

ORDERED this 12 day of May, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN MUMEY, M. D.,)
)
Plaintiff,)
)
vs.)
)
NORTHWESTERN PACIFIC)
INDEMNITY COMPANY, a foreign)
insurance company,)
)
Defendant.)

Case No. 00-C-238-B(E) ✓

ENTERED ON DOCKET
DATE MAY 16 2000

ORDER

Before the Court is Motion to Remand filed by Plaintiff pursuant to 28 U.S.C. § 1447(c) (Docket #3) and the Court finds the Motion shall be granted.

This case was originally filed in The District Court of Tulsa County, Oklahoma on January 30, 1998. On July 29, 1998 Plaintiff voluntarily dismissed without prejudice. Plaintiff refiled the case in Tulsa County District Court on July 9, 1999 claiming damages in excess of \$10,000 on his breach of contract claim. The prayer for relief was amended on January 4, 2000 to allege \$49,000 in damages. On January 26, 2000 Defendant served Plaintiff with discovery and Plaintiff responded on March 3, 2000.

Defendant filed Notice of Removal on March 21, 2000 in which Defendant asserts an exhibit attached to Plaintiff's Answers to Interrogatories and Responses to Request for Production of Documents establishes that Plaintiff claims damages in excess of \$104,000, thereby establishing subject matter jurisdiction in this Court. However, the exhibit was not part of the Tulsa County District Court pleadings attached to the Notice of Removal.

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On March 29, 2000 the Plaintiff filed a Motion to Remand. In the response brief filed by Defendant on April 13, 2000 Defendant attaches what appears to be the exhibit originally missing from the removed pleadings, which is a handwritten list of items with a monetary value assigned to each. Defendant also cites to Plaintiff's March 27, 2000 deposition, in which Plaintiff indicated his damages are less than \$75,000 for personal property and between \$30,000 and \$50,000 for structural damage. The Court notes that neither of these evidentiary submissions was part of the record at the time the Notice of Removal was filed and in fact, the referenced deposition was not taken until six days after removal.

The Court has reviewed the chronology of events in this case along with the Notice of Removal pursuant to the directive of this circuit in *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995), and concludes that neither the Notice of Removal nor the attached exhibits establish the requisite jurisdictional amount for purposes of diversity jurisdiction. Defendant's allegations are legally insufficient to establish the amount in controversy by a preponderance of the evidence. *Barber v. Albertsons, Inc.*, 935 F. Supp. 1188 (N.D.Okla 1996), citing *Gafford v. General Elec. Co.*, 997 F.2d 150, 157-60 (6th Cir. 1993). Discovery documents are allowed to produce facts concerning the jurisdictional amount. *Barber v. Albertsons, Inc.*, 935 F. Supp. 1188, 1191 (N.D. Okla 1996). However, the Defendant in this case did not properly and/or timely attach the crucial, determinative documents to its notice. "Both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice." *Laughlin*, 50 F.3d at 873.

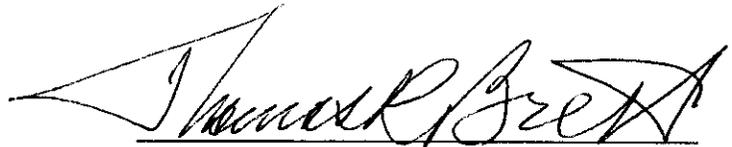
Removal statutes are narrowly construed and uncertainties resolved in favor of remand. The presumption is against removal jurisdiction. If it appears from the notice and any exhibits thereto that removal should not be permitted, "the Court shall make an order for summary

remand." 28 U.S.C. § 1446(c)(4).

In this instance, the Notice of Removal and its exhibits do not establish jurisdictional amount. The Court concludes it is without subject matter jurisdiction to proceed in this matter. Accordingly, the case should be remanded to the District Court of Tulsa County, Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Motion to Remand filed by Plaintiff (Docket #3) is granted. The above styled case is hereby remanded to the District Court of Tulsa County, Oklahoma. The Clerk of Court is directed to take the necessary action to remand the case without delay.

DONE THIS th15 DAY OF MAY, 2000.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE MAY 15 2000

UNITED STATES OF AMERICA,)
ex rel. General Services Agency,)
Plaintiff,)
v.)
Wyandotte Indian Tribe of Oklahoma,)
Defendant.)

CIVIL CASE
NO. 00 CV 0177 H ✓

FILED

MAY 12 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER ADMINISTRATIVELY CLOSING CASE PENDING
SETTLEMENT OR MOTION TO REOPEN

The Court having reviewed the Motion to Administratively Close Case
Pending Settlement or Motion to Reopen and good cause having been shown:

IT IS THEREFORE ORDERED that the Clerk shall administratively close this
civil case pending either a motion to dismiss or motion to reopen by the United
States. The Plaintiff is directed to notify the court of the status of this case by
August 21, 2000 or this action shall be deemed dismissed without prejudice.

IT IS SO ORDERED on May 12TH, 2000.


UNITED STATES DISTRICT JUDGE

Order prepared and submitted by:
PHIL PINNELL, OBN 07169
Assistant United States Attorney
918-581-7463 (Telephone)
Attorneys for the Plaintiff

4

UK
5-9-00

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

ENTERED ON DOCKET

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JUAN C. RODRIGUEZ,)
)
Defendant.)

DATE MAY 15 2000

CASE NO. 00CV0180H(M)

FILED

MAY 12 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AGREED JUDGMENT AND ORDER OF PAYMENT

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

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.
2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.
3. The defendant hereby agrees to the entry of Judgment in the principal sum of \$5,451.12, plus accrued interest of \$2,862.31 , plus administrative costs in the amount of \$18.80, plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate 6.197 until paid, plus costs of this action, until paid in full.
4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and

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the further representation of the defendant that Juan C. Rodriguez will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 15th day of June, 2000, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$100.00, and a like sum on or before the 15th day of each following month until January 15, 2001 at which time the defendant's payments shall increase to \$250.00 per month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

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

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

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

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

(f) In addition to the regular monthly payment, the defendant hereby agrees to the submission of this debt to the Department of Treasury for inclusion in the Treasury Offset Program. Under this program, any federal payment the defendant would normally receive may be offset and applied to this debt.

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

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

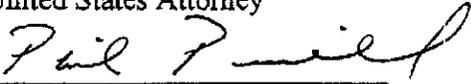
7. The defendant has the right of prepayment of this debt without penalty.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Juan C. Rodriguez, in the principal amount of \$5,451.12, plus accrued interest in the amount of \$2,862.31, plus interest at the rate of 8% until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 6.197 percent per annum until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney


PHIL PINNELL, OBA #7169
Assistant United States Attorney


JUAN C. RODRIGUEZ

sm
5/8/00

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 12 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

APACHE COYLE,)
)
 Plaintiff,)
)
 v.)
)
 GREEN COUNTRY INTERIORS)
)
 Defendant,)

Case No. 99 CV 0690 H (E) ✓

ENTERED ON DOCKET
DATE MAY 15 2000

ORDER

Now on this 14th day of April, 2000 this matter comes on before me, the undersigned Judge of the United States District Court on the Motion of Defendant Green Country Interiors ("Employer") for summary judgment against Plaintiff Apache Coyle. After hearing the arguments of the parties the court finds as follows:

Plaintiff's claim for discrimination under the Pregnancy Discrimination Act and Title VII:

Plaintiff has, for purposes of summary judgment, established a *prima facie* case under the Pregnancy Discrimination Act. Defendant has, for summary judgment purposes, established a legitimate, non-discriminatory reason for its employment action. However, based on the Affidavit of Mr. Sammy Allen Porter (Exhibit "D" to Plaintiff's Response to Motion for Summary Judgment) there is an issue of fact as to Defendant's proffered reason for Defendant's employment action. Thus, Defendant's Motion is denied as it relates to Plaintiff's claim for discrimination under the Pregnancy Discrimination Act and Title VII.

Plaintiff's pendent claim under the Oklahoma Anti-Discrimination Act:

Defendant's Motion is granted as it relates Plaintiff's pendent claim under the Oklahoma Anti-Discrimination Act.

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Plaintiff's claim for recovery under Oklahoma's public policy tort:

An employment contract of infinite duration may be terminated "for good cause, for no cause, or even for cause morally wrong" with no liability for breach of contract. *Collier v. Insignia Financial Group*, 981 P.2d 321, 323 (Okla. 1999). The narrowly defined public policy tort under the *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989) exception to the common law employment-at-will doctrine lies when an employer (1) violates, by wrongful discharge, a public policy goal clearly articulated by constitution, statute or jurisprudence and (2) there is no adequate statutorily-expressed remedy. *Id.*

In the instant case plaintiff claims discrimination because she was pregnant. *Collier v. Insignia Financial Group*, 981 P.2d 321, 326 (Okla. 1999), appears to permit a victim of *quid pro quo* sexual harassment, who has been discharged, to maintain a public policy tort claim for wrongful discharge. *Collier* does not address the adequacy of Title VII remedies nor the fact that Oklahoma law does not prohibit discrimination based on pregnancy. The court recognizes that Ms. Coyle has an adequate remedy under Title VII. The court finds that Oklahoma law is silent on the issue of pregnancy discrimination and, unlike the federal law, does not expressly prohibit it.

Further, this court recognizes that in *List v. Anchor Paint Mfg. Co.*, 910 P.2d 1011 (Okla. 1996) the Oklahoma Supreme Court held that a discharge based on a plaintiff's status (in the instant case as a pregnant woman) does not state a claim for public policy tort. "Only a discharge arising from the employee's acts rather than his status, will support a common law retaliatory discharge cause of action. *List*, 910 P.2d at 1014. In *List*, the plaintiff claimed his discharge was based on his employer's discrimination against him because of his age. The Oklahoma Supreme Court stated "Mr. List has adequate statutory remedies, and his claim is not based on retaliation for anything that he

did. Instead, Mr. List's claim is based solely upon his status, his age. Because Mr. List's statutory remedies are adequate and his common law claim is based solely on his status, his statutory remedies are exclusive." *Id.*

However, this Court believes it is confined by its interpretation of *Collier* that any employment action potentially violative of Title VII -- regardless of the availability of an adequate remedy under Title VII -- entitles a plaintiff to go forward on a claim for violation of Oklahoma's public policy tort. Further, this Court believes that pregnancy discrimination constitutes discrimination on the basis of sex in violation of Oklahoma's Anti-Discrimination Act. Thus, Defendant's Motion for Summary Judgment is denied on this issue.

Plaintiff's claim that Defendant interfered with her effort to obtain unemployment benefits:

Plaintiff's Complaint alleges that she has been damaged by Defendant's alleged interference with her efforts to obtain unemployment. Plaintiff claims she is allowed to pursue a public policy tort as a result of this alleged interference.

However, Plaintiff has subsequently admitted that Defendant did nothing to interfere with her unemployment benefits. Deposition of Apache Coyle at 146 (Exhibit "A" to Defendant's Motion for Summary Judgment and Brief in Support). Ms. Coyle explained that she was denied unemployment benefits because she had not been employed anywhere for the minimum length of time necessary to qualify for benefits. *Id.* Considering the facts in a light most favorable to Plaintiff, this court is compelled to grant Defendant's Motion for Summary Judgment on this claim.

Plaintiff's claim for recovery under the *prima facie* tort doctrine:

The *prima facie* tort doctrine permits the recovery of damages for conduct that does not fall within a traditional category of tort liability. *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426,

433 (10th Cir. 1990). The plaintiff must establish that the defendant's "conduct is generally culpable and not justified under the circumstances." *Id.* (quoting *Restatement of Torts (Second)* at § 870). The Tenth Circuit Court of Appeals has held that Oklahoma recognizes a *prima facie* tort claim only in cases involving an alleged malicious injury to a business or property interest. *Id.*

In Oklahoma, an at-will employee of a private employer has no "property" interest in her continued employment. *Brewer v. Bama Pie, Inc.*, 390 P.2d 500, 502 (Okla. 1964). This court is unaware of any Oklahoma case that has ever recognized a *prima facie* tort claim in the employment context. *Merrick*, 911 F.2d at 433.

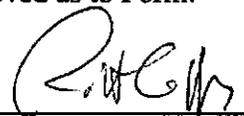
Plaintiff claims to have been discharged from her employment because of her status as a pregnant woman. This is not a property interest protected under the *prima facie* tort doctrine. Thus, Defendant's Motion for Summary Judgment on this claim is granted.

IT IS SO ORDERED.



JUDGE OF THE DISTRICT COURT

Approved as to Form:



Robert Coffey, OBA #10528
ATTORNEYS FOR PLAINTIFF,
APACHE COYLE



Maddlene A.B. Witterholt, OBA #10528
Crowe & Dunlevy
ATTORNEY FOR DEFENDANT,
GREEN COUNTRY INTERIORS

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

CLARA A. MEEKS,)
)
 Plaintiff,)
)
 vs.)
)
 LIBERTY MUTUAL INSURANCE COMPANY)
 a foreign corporation,)
)
 Defendant.)

Case No. 00-MC-07-BU

ENTERED ON DOCKET
DATE MAY 15 2000

FILED

MAY 12 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court upon Defendant, Liberty Mutual Insurance Company's Motion to Withdraw Motion for Contempt Citation. Upon due consideration, the Court finds that Defendant's motion should be granted.

Accordingly, Defendant, Liberty Mutual Insurance Company's Motion to Withdraw Motion for Contempt Citation is GRANTED. The Motion for Contempt Citation is WITHDRAWN. The hearing on the Motion for Contempt Citation currently scheduled for Monday, May 15, 2000 at 10:30 a.m. is STRICKEN.

With the withdrawal of the Motion for Contempt Citation, the Court DIRECTS the Court Clerk to terminate this matter in his records.

ENTERED this 12th day of May, 2000.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 11 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL E. HENTGES & ASSOCIATES,
L.L.C., and MICHAEL E. HENTGES,

Plaintiffs,

v.

TOM PETRACEK

Defendant.

Case No. 00CV396KCM ✓

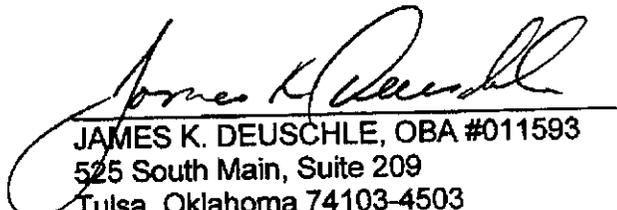
ENTERED ON DOCKET

DATE MAY 15 2000

DISMISSAL WITHOUT PREJUDICE ✓

COMES NOW James K. Deuschle, attorney for the Plaintiffs and hereby dismisses the above captioned matter without prejudice pursuant to Rule 41 (a) of the Federal Rules of Civil Procedure.

The Plaintiffs
By their attorney


JAMES K. DEUSCHLE, OBA #011593
525 South Main, Suite 209
Tulsa, Oklahoma 74103-4503
Telephone (918) 592-2280
Facsimile (918) 592-2281

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FILED

MAY 12 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

In re:)

DURABILITY INC.,)

Debtor.)

No. 98-CV-232-B ✓

SCOTT P. KIRTLEY,)

Appellant,)

v.)

SOVEREIGN LIFE INSURANCE)
COMPANY OF CALIFORNIA,)

Appellee.)

ENTERED ON DOCKET
DATE MAY 15 2000

ORDER

This matter is remanded to the United States Bankruptcy Court for the Northern District of Oklahoma for further proceedings consistent with the opinion of the United States Court of Appeals for the Tenth Circuit filed May 8, 2000.

DATED this 12th day of May, 2000.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAY 11 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN COLLINS, et al.)
)
 Plaintiffs,)
)
 v.)
)
 DEPUY INC., et al.,)
)
 Defendants.)

CASE NO. 4:00-CV-000124 B(J) ✓

ENTERED ON DOCKET
DATE MAY 12 2000

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO PLAINTIFF LONG**

Plaintiff Mary Long, by counsel, and defendants DePuy Inc., DePuy Motech, Inc., and Johnson & Johnson, by counsel, stipulate as follows:

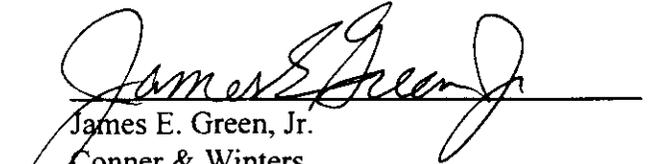
1. All claims and controversies between plaintiff Mary Long and all defendants have been compromised and settled.
2. The claims of plaintiff Mary Long are dismissed with prejudice as to all defendants.
3. The claims of other plaintiffs are not affected by this stipulation.

4. No costs are awarded.



Gary A. Eaton
Eaton & Sparks
1717 East 15th Street
Tulsa, OK 74104

Attorney for Plaintiff
Mary Long



James E. Green, Jr.
Conner & Winters
3700 First Mace Tower
15 East Fifth Street
Tulsa, OK 46601

Michael R. Fruehwald
Barnes & Thornburg
11 South Meridian Street
Indianapolis, IN 46204

Attorneys for Defendants DePuy Inc.,
DePuy Motech, Inc., and Johnson & Johnson

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAY 11 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES RUSHING, o/b/o)
DANIELL RUSHING, a minor,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner, Social)
Security Administration,)
)
Defendant.)

Case No. 99-CV-613-J ✓

ENTERED ON DOCKET
DATE MAY 12 2000

ORDER

On April 3, 2000, this Court remanded this case to the Commissioner for further administrative action. No appeal was taken from this Judgment and the same is now final.

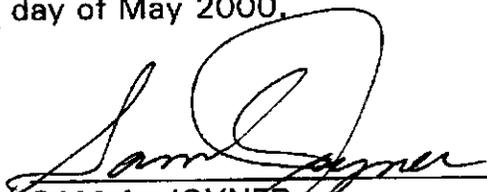
Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$2,286.15 for attorney fees and \$9.16 for costs, for a total award of \$2,295.31, for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$2,286.15 and costs of \$9.16 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to

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Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

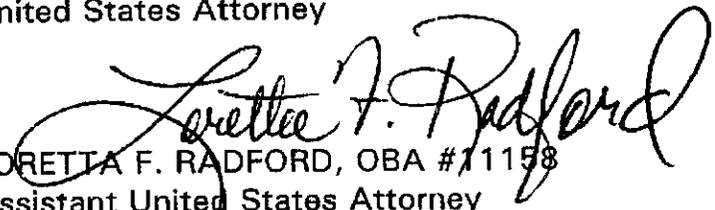
It is so ORDERED THIS 11 day of May 2000.



SAM A. JOYNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

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

ELLIOTT JASON DUNCAN, JR,)
)
 Plaintiff,)
)
 vs)
)
 STANLEY GLANZ, Sheriff of Tulsa County)
 et al.,)
)
 Defendants.)

ENTERED ON DOCKET
DATE MAY 12 2000
Case No. 99-CV-171-H (E)
FILED
MAY 12 2000
Phil Lombarci, Clerk
U.S. DISTRICT COURT

JOURNAL ENTRY ON CONFESSION OF JUDGMENT

This cause comes on for hearing on this 12TH day of MAY, 2000. The Plaintiff, Elliott Jason Duncan, Jr., appearing by Counsel, David C. Phillips, III, Defendants, Board of County Commissioners of Tulsa County, Oklahoma and Stanley Glanz, Sheriff of Tulsa County, appearing by Gordon W. Edwards, Assistant District Attorney. The Court finds that these parties have entered the following stipulations:

1. The Board of County Commissioners of Tulsa County, Oklahoma approved the recommendation of the District Attorney of Tulsa County, Oklahoma, to confess judgment in the case herein in the amount of Twenty Thousand Dollars (\$20,000.00) under the following conditions:
 - a. The Defendants, Board of County Commissioners and Sheriff Stanley Glanz, are in no way admitting any liability or fault on the part of the Board of County Commissioners, Sheriff Stanley Glanz, or any other unnamed employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma;
 - b. That the settlement of this case will result in a full release of any and all, past, present, or future claims against Defendants Board of County Commissioners of the County of Tulsa, Sheriff Stanley Glanz, and any other unnamed employees and/or agents of the Board of County Commissioners, Sheriff Stanly Glanz or Tulsa County, Oklahoma, which Plaintiff Elliott Jason Duncan, Jr. has or may have as a result of the incidents alleged to have occurred herein;
 - c. That the settlement of this case will result in a full release of any and all, past, present,

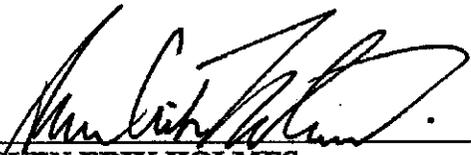
RB

or future claims for attorney's fees under 42 U.S.C. § 1988, and costs associated therewith against Defendant Board of County Commissioners of the County of Tulsa, Sheriff Stanly Glanz, as well as against any unnamed employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma, which Plaintiff Elliott Jason Duncan, Jr. or his attorney, David C. Phillips, III may have as a result of this judgment.

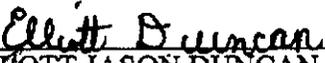
2. Plaintiff Elliott Jason Duncan, Jr. is fully aware of the conditions upon which this confession of judgment is made and hereby fully accepts said conditions.

The Court accepts these stipulations and based upon said stipulations finds that the Plaintiff is entitled to recover the sum of Twenty Thousand Dollars (\$20,000.00) against the Board of County Commissioners of the County of Tulsa, Oklahoma.

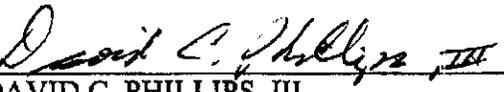
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff recover judgment against the Board of County Commissioners of Tulsa County, Oklahoma, in the sum of Twenty Thousand Dollars (\$20,000.00), with interest from the date hereof at the federal rate for judgments.


SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

JUDGMENT IN CASE NO. 99-CV-171-H APPROVED AS TO FORM AND CONTENT:



ELLIOTT JASON DUNCAN, JR.
Plaintiff



DAVID C. PHILLIPS, III
Attorney for Plaintiff

BOARD OF COUNTY COMMISSIONERS
OF TULSA COUNTY, OKLAHOMA

and

STANLEY GLANZ, SHERIFF
OF TULSA COUNTY, OKLAHOMA

By: 

GORDON W. EDWARDS
ASSISTANT DISTRICT ATTORNEY
Attorney for Defendants

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

ELEOTT JASON DUNCAN, JR,)
)
 Plaintiff,)
)
 vs) Case No. 99-CV-171-H (E)
)
 STANLEY GLANZ, Sheriff of Tulsa County)
 et al.,)
)
 Defendants.)

WARRANT OF ATTORNEY

I, Wilbert Collins, Chairman of the Board of County Commissioners for Tulsa County, State of Oklahoma, as the duly authorized representative of the Board of County Commissioners, Tulsa County, State of Oklahoma, hereby appoint the District Attorney, Tulsa County, State of Oklahoma, or his Assistant District Attorney, Gordon W. Edwards to be the Board's attorney to appear in United States District Court for the Northern District of Oklahoma, and there to confess judgment in favor of Plaintiff Eleott Jason Duncan, Jr., in the amount of Twenty Thousand Dollars (\$20,000.00); hereby giving the District Attorney full power and authority to perform every act necessary, including the power to waive and release all errors incident to the exercise of this power and the entry and enforcement of the judgment, and all right of review predicated thereon; hereby ratifying and confirming all that the District Attorney may do or cause to be done by virtue hereof.

Dated this 8th day of May, 2000.

**BOARD OF COUNTY COMMISSIONERS OF
TULSA COUNTY, OKLAHOMA**

Wilbert Collins Sr.
WILBERT COLLINS, CHAIRMAN

ATTEST:

by Connie Reason, Dep.
County Clerk

BACKGROUND

At the time Petitioner filed the instant petition for writ of habeas corpus, he was incarcerated pursuant to convictions entered in Tulsa County District Court, Case No. CF-93-5647, Attempting to Obtain Merchandise by False Pretense, After Former Conviction of a Felony; and Case No. CF-94-148, Grand Larceny, After Former Conviction of a Felony. Petitioner was sentenced to ten (10) years imprisonment on each conviction, to be served concurrently. Petitioner does not challenge the validity of his convictions in this action. Instead, Petitioner challenges the administration of his sentence by the Oklahoma Department of Corrections ("ODOC").

The records provided by Respondent indicate that on December 7, 1998, the ODOC removed 580 days of earned credits from Petitioner's service record pursuant to a calculation audit. The audit revealed that Petitioner was ineligible to receive the earned credits due to a February 16, 1990 finding of misconduct. In the instant petition, Petitioner challenges the revocation of his earned credits and seeks restoration of the revoked 580 earned credits, his return to Earned Credit Classification Level 4, and his release from the custody of ODOC.

However, during the pendency of this action, Petitioner fully discharged his sentence and was released from custody. As a result, Respondent urges that the petition has been rendered moot and should be dismissed on that basis.

ANALYSIS

In Spencer v. Kemna, 523 U.S. 1 (1998), the United States Supreme Court held that the presumption of collateral consequences applicable to criminal convictions even after a habeas petitioner is released from prison does not extend to revocations of parole. Although a habeas petitioner's release from prison does not cause the petition to become moot on the theory that it no longer satisfied the "in custody" requirement of 28 U.S.C. § 2254, where the petitioner challenges

some aspect of his restraint other than the validity of his underlying conviction, the injury-in-fact requirement of Article III cannot be presumed if the petitioner has been released from custody during the pendency of the habeas petition. Id. at 983-86. In Spencer, the petitioner failed to demonstrate concrete injuries-in-fact attributable to his parole revocation. Id. at 986-88. For example, the Court rejected as too speculative the possibility that the petitioner's parole revocation could affect future parole determinations should he be rearrested. Even though the petitioner had already in fact been rearrested on a new offense at the time the Court ruled, future parole determinations still remained "a possibility rather than a certainty or even a probability," and hence too speculative to overcome mootness. Id. at 986. The Court also found too speculative the possibility that parole revocation could be used to increase the length of a future sentence or as evidence in subsequent proceedings. Id. at 986-87. According to the Court, the risk of injury to a party's interest must not be excessively remote if such a contingency is to keep the controversy alive. Id. at 986. Finding that Article III's case-or-controversy requirement is no longer satisfied in such a case, the Court concluded the petition must be dismissed as moot. Id.; see also Aragon v. Shanks, 144 F.3d 690, 691 (10th Cir. 1998); Johnson v. Riveland, 855 F.2d 1477, 1480 (10th Cir. 1988).

The facts of the instant case are analogous to those in Spencer. Petitioner here challenges the ODOC's revocation of earned credits. Significantly, he does not challenge the underlying convictions. Because he has completed the entire term of imprisonment, including the term attributable to the revoked earned credits, Petitioner is no longer subject to any direct restraint as a result of the revocation challenged in the instant petition. Furthermore, Petitioner has not alleged or made any showing of continuing collateral consequences resulting from the revocation of his earned credits. As a result, this Court concludes his petition challenging the revocation of earned credits should be dismissed as moot.

CONCLUSION

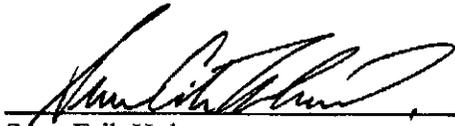
Because Petitioner has discharged the sentence at issue in this case and has failed to demonstrate the existence of continuing collateral consequences resulting from the revocation of his earned credits, the petition for writ of habeas corpus should be dismissed as moot.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss as moot (#10) is **granted**.
2. The petition for writ of habeas corpus (#1) is **dismissed with prejudice as moot**.
3. Petitioner's "motion to place case upon accelerated docket calender" (#9) is **denied as moot**.

IT IS SO ORDERED.

This 11TH day of MAY, 2000.


Sven Erik Holmes
United States District Judge

SM

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

FILED

MAY 11 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN AMBRUS, an Individual.)
)
Plaintiff)
vs.)
)
CLAY D. THOMPSON and CALISE)
R. THOMPSON, husband and wife.)
)
Defendants.)

Case No. 99 CV 0537 K (J) ✓

Judge Kern

ENTERED ON DOCKET

DATE MAY 12 2000

JOINT STIPULATION OF DISMISSAL

The Plaintiff, John T. Ambrus, by and through his attorney, Kenneth E. Wagner and The Defendants, Clay D. and Calise R. Thompson, by and through their attorney, Robert E. Jamison, Jr. hereby stipulate to the dismissal of all causes of action with prejudice to refile by virtue of a mutual settlement agreement reached by the parties.

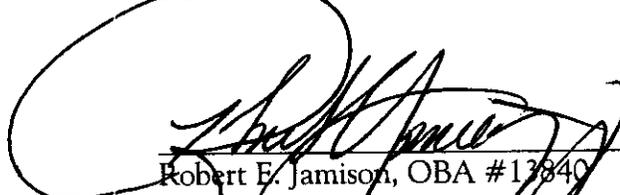
Respectfully submitted,

LATHAM, STALL, WAGNER & STEELE, P.C.



Kenneth E. Wagner, OBA #16049
1437 S. Boulder, Suite 820
Tulsa, OK 74119
918-382-7523 telephone
918-382-7541 fax
Attorney for Plaintiff

SCHROEDER & ASSOCIATES



Robert E. Jamison, OBA #13840
5100 E. Skelly Drive, Suite 950
Tulsa, OK 74135
918-665-0185 telephone
918-665-3483 fax
Attorney for Defendants

C/S

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CERTIFICATE OF MAILING

I hereby certify that on the 11th day of May, 2000, a true and correct copy of the foregoing instrument with the correct and proper postage thereon fully prepaid was mailed to the following:

Robert E. Jamison, Jr.
Schroeder & Associates
5100 E. Skelly Drive
Suite 950
Tulsa, OK 74135

Attorney for Defendants

LATHAM, STALL, WAGNER & STEELE, P.C.
Kenneth E. Wagner
1437 S. Boulder, Suite 820
Tulsa, OK 74119

Attorney for Plaintiff

Schroeder & Associates

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

FILED

MAY 11 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROY T. VAN METER,)

Plaintiff,)

vs.)

LOWES HOME IMPROVEMENT)

WAREHOUSE, INC., a/k/a LOWES)

HOME CENTERS, INC.,)

Defendant.)

Case No. 99-CIV-00093(M)

ENTERED ON DOCKET

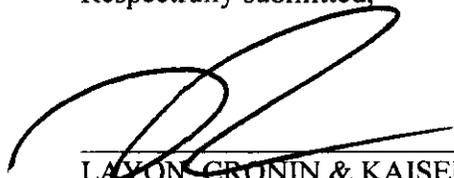
MAY 12 2000

DATE _____

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41 (a)(1), Plaintiff submits the Parties Stipulation of Dismissal with Prejudice and hereby dismisses the above-styled action with prejudice to a refiling.

Respectfully submitted,



LAYON, CRONIN & KAISER
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Facsimile: (405) 236-3934
Attorney for Defendant

C15

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

F I L E D
MAY 11 2000

BEN-TREI, LTD., an Oklahoma Corporation,)
)
)
Plaintiff,)
)
vs.)
)
INDAGRO SA,)
a Societe Anonyme,)
And)
INDAGRO CONTRACTORS LTD.,)
an Irish Company Corporation,)
)
Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99 CV 0479E (E) ✓

ENTERED ON DOCKET
MAY 11 2000
DATE _____

JUDGMENT

On the 16th day of February, 2000 this Court entered its Order on the Joint Motion to Dismiss (Docket #2) of the Defendants INDAGRO SA (ISA) and INDAGRO CONTRACTORS, LTD., (ICL) (collectively, INDAGRO), the Joint Motion to Dismiss Or In The Alternative To Stay Action and Compel Arbitration (Docket #10) of the Defendants, INDAGRO SA and INDAGRO CONTRACTORS, LTD., the Motion to Stay Arbitration (Docket #23), the Motion to Withdraw of Tony Haynie, Jacalyn W. Peter, and the law firm of Conner & Winters, and the Motion for Expedited Ruling (Docket #27) of the Plaintiff, BEN-TREI, LTD. All pending motions were determined at that time. Additionally, Defendants were directed to cause new counsel to enter an appearance in this matter within twenty (20) days of February 16, 2000. Defendants were advised that failure to do so may result in the imposition of appropriate sanctions. No entry of appearance was made as directed by the Order.

On March 29, 2000, pursuant to notice to all parties, the Court conducted a scheduling conference pursuant to FED. R. CIV. P. 16. As of March 29, 2000, Defendants had failed to cause

substitute counsel to enter an appearance. At that time, Defendants were further ordered to cause substitute resident counsel to enter its appearance by 4:30 p.m., April 18, 2000 or default judgment against the Defendants on the issue of liability as to all claims would be entered. Defendants have failed to comply with this Order. Consequently, entry of judgment as to liability on all claims is appropriate pursuant to FED. R. CIV. P. 16 (f) and 32 (b)(2).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby granted by default in favor of BEN-TREI, Ltd. against INDAGRO SA and INDAGRO CONTRACTORS, LTD. on all claims in this action.

Additionally, the Court has reviewed the evidentiary submissions filed in this case, including but not limited to the Affidavits of Fredrick A. Bendana and William S. Leach filed April 19, 2000 and finds that substantial evidence in the record supports entry of judgment in favor of Plaintiff for breach of contract under its first claim for relief and that the evidence in the record, by a preponderance, supports entry of judgment in favor of Plaintiff for breach of contract and attorney fees and expenses reasonably and necessarily incurred in this litigation.

FURTHER, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that BEN-TREI, Ltd. recover judgment of and from INDAGRO SA and INDAGRO CONTRACTORS, LTD. in the sum of \$102,500.00 together with attorneys' fees and expenses in the amount of \$40,209.21, interest from the date hereof until paid at the rate of 8.73% and costs of this action.

Dated this 10th ^{MAY} of ~~April~~, 2000.


JAMES O. ELLISON, U.S. DISTRICT JUDGE

2

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

FILED

MAY 11 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARVIN SUMMERFIELD, et al.,

Plaintiffs,

v.

MARK MCCOLLOUGH, et al.,

Defendants.

Case No. 98-CV-0328-B(EA) ✓

ENTERED ON DOCKET

DATE MAY 11 2000

**ORDER DISMISSING CERTAIN
SETTLING DEFENDANTS WITH PREJUDICE**

UPON the Plaintiffs, Marvin Summerfield and David Cornsilk's Application for Order Dismissing
Certain Defendants With Prejudice, it is hereby

ORDERED that Settling Defendants Joe Byrd, Jennie Battles and Rex Earl Starr are hereby
dismissed, with prejudice, from the above-referenced action.

DATED this 11th day of May, 2000.

For: Thomas R. Brett
THOMAS R. BRETT, SENIOR JUDGE
JUDGE OF THE DISTRICT COURT

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 11 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STEVEN RAY ROMACK,)
)
 Plaintiff(s),)
)
 vs.)
)
 GARY GIBSON, Warden,)
)
 Defendant(s).)

Case No. 99-CV-41-B(J) ✓

ENTERED ON DOCKET
DATE MAY 11 2000

REPORT AND RECOMMENDATION

Petitioner filed a Petition for a Writ of Habeas Corpus on January 15, 1999. The action was referred, by minute order, to the undersigned United States Magistrate Judge for further proceedings consistent with his jurisdiction. Petitioner is currently incarcerated at the Diamondback Correctional Facility and appears *pro se*. Petitioner challenges two state court convictions for which Petitioner is currently serving consecutive 30 year sentences.

The United States Magistrate Judge has reviewed the briefs and pleadings filed by the parties, the submitted transcripts, and the cited case law. For the reasons discussed below, the Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED** by the District Court.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner married Grace Caswell in 1993. Ms. Caswell had two young daughters from a prior marriage. Petitioner stayed at home with Ms. Caswell's children and Petitioner's son (from a prior marriage) while Ms. Caswell worked.

Petitioner additionally testified that at certain times during the marriage he did not live with Ms. Caswell or the children. Petitioner and Ms. Caswell subsequently divorced.

In July of 1995, the children were removed from the house by the Department of Human Services. Petitioner claims that the children were removed based upon a complaint that he made with regard to the actions of Ms. Caswell. The children were subsequently placed in foster care with Henry and Linda Wollman. While in foster care the Caswell girls began exhibiting atypical behavior. The Caswell girls also disclosed, to a court-appointed psychologist, that they had been abused by Petitioner. In addition, Mr. Wollman, the foster parent, plead guilty to molesting the two girls.

At trial, Petitioner claimed that Ms. Caswell, in an effort to seek revenge against Petitioner, encouraged the two girls to fabricate a story that Petitioner sexually abused the girls. Petitioner's father and mother testified that Ms. Caswell had told each of them, on separate occasions, that Ms. Caswell would "get" Petitioner, and would see him either in the morgue or the penitentiary. Petitioner testified that he did not abuse the Caswell girls. Petitioner's fiancée testified, at trial, that the older Caswell girl told her that her mother was forcing her to make up the sexual abuse story.

Ms. Caswell testified and denied Petitioner's and Petitioner's parents' allegations. The two Caswell girls each testified that Petitioner had sexually abused them. The girls' counselor and medical doctor testified that the two Caswell girls exhibited behavior consistent with individuals who report sexual abuse.

The Jury returned with a guilty verdict on two separate counts of sexual abuse of a child and recommended two life sentences. Petitioner was originally sentenced

to two consecutive life sentences and a fine of \$10,000. Petitioner appealed the sentence and conviction to the Oklahoma Court of Criminal Appeals ("OCCA"). On appeal, the OCCA determined that the attorney who was appointed to represent the minor victims in the criminal proceeding had assumed an improper prosecutorial role in the proceeding. The OCCA concluded that Petitioner's sentence should be reduced to two consecutive 30 year sentences.

In his habeas application, Petitioner asserts that:

- (1) Petitioner was denied a fair hearing in violation of his right to due process of law under the Sixth and Fourteenth Amendments because the trial court permitted an attorney appointed to represent the minor children to act as a "special prosecutor;"
- (2) Petitioner was denied a fair hearing in violation of his due process rights because the trial court permitted repetitive and cumulative testimony from three witnesses, with each witness repeating the victims' statements from the same interviews;
- (3) The admission of evidence regarding the juvenile court proceedings adjudicating the children as deprived violated the presumption of innocence and Petitioner's right to a fair jury trial and due process of law;
- (4) Petitioner was denied a fair trial due to the prosecutorial misconduct;
- (5) Petitioner was denied effective assistance of counsel due to counsel's failure to object to cumulative, inadmissible and prejudicial testimony, and due to counsel's failure to present jury witnesses regarding Petitioner's good character;

Respondent filed a motion to dismiss asserting that Petitioner had not raised all of the arguments with regard to ineffective assistance of trial counsel in the state courts that he had raised in his present habeas application. Petitioner filed an amended

petition for habeas relief and asserted that he did not intend to raise any issues which had not been previously raised before the state courts. The Court concluded that the motion to dismiss was moot.

Respondent filed a Response to Petitioner's Petition for a Writ of Habeas Corpus on July 8, 1999. The Court entered an Order on August 13, 1999, noting that Petitioner had not filed a reply, and directing that Petitioner file a reply on or before August 25, 1999. Petitioner did not file a reply.

II. DISCUSSION

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

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

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

28 U.S.C. § 2254(d).

On April 18, 2000, the Supreme Court decided Williams v. Taylor, 120 S. Ct. 1495 (2000). In Williams, the Court definitively interpreted the revised standards of review set out in § 2254(d), holding that Section

2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. . . . Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 1520.

DUE PROCESS – COURT-APPOINTED ATTORNEY AS SPECIAL PROSECUTOR

Petitioner initially asserts that he was denied due process because the trial court permitted an attorney appointed to represent the minor children to act as a "special prosecutor." Petitioner filed no reply to Respondent's brief, but the record does contain a copy of the brief which Petitioner filed at the OCCA, in addition to Petitioner's Petition for a Writ of Habeas Corpus.

Petitioner's brief at the OCCA level stressed that permitting a child advocate to act as a "special prosecutor" violated Oklahoma law. As noted, this argument was presented to the OCCA, and the OCCA modified Petitioner's sentence from two life sentences to two 30 year terms. Petitioner also generally asserts that this violates due process because it improperly bolsters the State's prosecution and gives paramount importance to the victim's interests while compromising the accused's interest in a fair trial.

Respondent initially asserts that this involves an issue of state law and therefore is inappropriate for the purposes of requesting federal habeas relief. Respondent additionally asserts that any error was harmless.

Petitioner does not articulate a specific violation of a federal constitutional right. In habeas petitions, the federal courts act in a limited capacity and can review state court proceedings only for the possible violation of federal constitutional law. Petitioner has not sufficiently identified a federal constitutional right.

In addition, the Court has review the record and concludes that even if Petitioner was able to establish the violation of a federal constitutional right, any alleged violation was harmless. The present standard in determining whether trial error is harmless in federal habeas corpus cases was articulated in Brecht v. Abrahamson, 113 U.S. 619, 113 S. Ct. 1710 (1992), and further clarified in O'Neal v. McAninch, 513 U.S. 432, 437, 115 S. Ct. 992, 995 (1995). See also Calderon v. Coleman 525 U.S. 141, 119 S.Ct. 500 (1998). Before the Court's decision in Brecht, the same "harmless error" standard applied in both direct appeals and federal habeas corpus cases. That standard was established by the Court in Chapman v. California, 386 U.S. 18 (1967), and required that for a conviction tainted by a constitutional trial error to be upheld, the prosecution must demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 24. In Brecht, the Court held that the Chapman standard, although remaining applicable to errors reviewed on direct appeals, no longer applied in federal habeas corpus cases. The

Court, instead, adopted the standard previously established in Kotteakos v. United States, 328 U.S. 750 (1946).

The imbalance of the costs and benefits of applying the Chapman harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error. The Kotteakos standard, we believe, fills the bill. The test under Kotteakos is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice."

Brecht, 113 S. Ct. at 1721 (citations omitted). In determining whether error is harmless, Kotteakos emphasized that the issue is not whether the jury was correct in its ultimate judgment as to guilt or innocence.

[The issue is] what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened.

Kotteakos, 328 U.S. 750, 763 (citations omitted). The standard was further clarified by the Supreme Court in O'Neal v. McAnninch, 513 U.S. 432, 435, 115 S. Ct. 992, 994 (1995).

When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win. . . . Grave doubt mean[s] that in the judge's mind, the matter is so evenly balanced that he feels

himself in virtual equipoise as to the harmlessness of the error.

The Court has reviewed the entire record and concludes that any asserted error with regard to the remarks made by the children's advocate were harmless.

DENIAL OF DUE PROCESS – CUMULATIVE TESTIMONY OF WITNESSES

Petitioner asserts that he was denied a fair hearing in violation of his due process rights because the trial court permitted repetitive and cumulative testimony from three witnesses, with each witness repeating the victims' statements and testimony.

At trial, each of the female victims testified. In addition, Ms. Teresa Pratt testified as a social worker and counselor to the girls. Dr. Fisher testified as a psychologist. Both Ms. Pratt and Dr. Fisher did present some cumulative evidence. In addition, each testified as to their opinion regarding whether the two girls had been sexually abused and whether their stories were consistent with the stories of individuals who have been abused. Petitioner further complains about the admission of the testimony of Officer Mike Miller.

Respondent again notes that Petitioner has failed to identify a federal constitutional right. The Court agrees. Petitioner does not specify a federal right beyond the general and vague references to "due process." In addition, assuming a federal constitutional right was violated by the admission of such testimony, the Court, having reviewed the record, concludes that any admission was harmless.

ADMISSION OF EVIDENCE OF PRIOR CIVIL PROCEEDING

Petitioner asserts that the admission by the trial court of evidence related to the juvenile court proceedings which found that the children were deprived violated Petitioner's right to a fair jury trial and due process of law. Respondent asserts that although this may have constituted a state trial error, Petitioner's argument is insufficient to comprise a federal habeas claim.

In Smallwood v. Gibson, 191 F.3d 1257 (10th Cir. 1999), the Tenth Circuit noted:

On habeas review, we will not disturb evidentiary findings regarding the admission of prior offenses, crimes, or bad acts evidence unless the prejudice flowing from such evidence is so great as to constitute a denial of federal constitutional rights by rendering the trial fundamentally unfair. See Duvall, 139 F.3d at 787. "Mistakenly admitted evidence of prior crimes or convictions can, in some instances, 'imping[e] upon the fundamental fairness of the trial itself.'" Id. at 788 (*quoting United States v. Parker*, 604 F.2d 1327, 1329 (10th Cir.1979), *overruled on other grounds by United States v. Pennon*, 816 F.2d 527, 528 (10th Cir.1987)). A proper instruction by the court may cure the error. See id. In this case, the trial court failed to instruct the jury to disregard the evidence. We must therefore consider the record as a whole to determine whether the admission of the prior unadjudicated bad acts evidence resulted in fundamental unfairness.

This Court has reviewed the record and concludes that the admission did not result in fundamental unfairness.

PROSECUTORIAL MISCONDUCT

Petitioner asserts that he was denied a fair trial due to the misconduct of the prosecution. Petitioner objects to the prosecutors comments, during closing, that the defense was a "smokescreen" and that Petitioner had failed to raise reasonable doubt as improper. Petitioner relies on state law.

In analyzing whether a petitioner is entitled to federal habeas relief for prosecutorial misconduct, a federal habeas corpus court must determine whether there was a violation of the criminal defendant's federal constitutional rights which so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Coleman v. Saffle, 869 F.2d 1377, 1395 (10th Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990). See also Hopkinson v. Shillinger, 866 F.2d 1185, 1210 (10th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990).

The Magistrate Judge has reviewed the trial transcript and the comments in the prosecuting attorney's closing argument. The Magistrate Judge concludes that the comments about which Petitioner complains do not rise to the level required to affect Petitioner's federal constitutional rights.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner asserts that he was denied effective assistance of counsel due to counsel's failure to object to cumulative, inadmissible and prejudicial testimony, and

due to counsel's failure to present jury witnesses regarding the Petitioner's good character.

To establish ineffective assistance of counsel, Petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). Petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88.^{1/} To establish the second prong, Petitioner must show that this deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 842-44 (1993) (counsel's unprofessional errors must cause a trial to be "fundamentally unfair or unreliable").

The Court has reviewed Petitioner's arguments and the court transcripts. Petitioner has failed to establish that his counsel was ineffective pursuant to Strickland.

^{1/} "The proper standard for measuring attorney performance is reasonably effective assistance." Gillette v. Tansy, 17 F.3d 308, 310-311 (10th Cir. 1994) (quoting Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989)). In doing so, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, at 690. There is a "strong presumption [however,] that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 695. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

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 11 day of May 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 11 Day of May, 2000, 10:00 a.m.

CP
5/5/00
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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RaEARL HALL SMITH,)
)
Plaintiff,)
)
vs)
)
THE BOARD OF COUNTY)
COMMISSIONERS For Tulsa County, ex rel)
THE TULSA COUNTY SHERIFF'S DEPT.,)
STANLEY GLANZ, in his official capacity as)
Sheriff of Tulsa County, Oklahoma; and)
UNKNOWN DOES in their official capacity as)
jailers and custodians of the inmates o f Tulsa)
City/County Jail,)
)
Defendants.)

ENTERED ON DOCKET
MAY 11 2000
DATE

Case No. 99-CV-416-H (J)

FILED
MAY 10 2000
FBI Lombardi, Clerk
U.S. DISTRICT COURT

JOURNAL ENTRY ON CONFESSION OF JUDGMENT

This cause comes on for hearing on this 9TH day of MAY, 2000. The Plaintiff, RaEarl Hall Smith, appearing by Counsel, Joseph F. Clark, Jr. and Grant D. Glynn, Defendants, Board of County Commissioners of Tulsa County, Oklahoma and Stanley Glanz, Sheriff of Tulsa County, appearing by Gordon W. Edwards, Assistant District Attorney. The Court finds that these parties have entered the following stipulations:

1. The Board of County Commissioners of Tulsa County, Oklahoma approved the recommendation of the District Attorney of Tulsa County, Oklahoma, to confess judgment in the case herein in the amount of Twenty Thousand Dollars (\$20,000.00) under the following conditions:
 - a. The Defendants, Board of County Commissioners and Sheriff Stanley Glanz, are in no way admitting any liability or fault on the part of the Board of County Commissioners, Sheriff Stanley Glanz, or any other unnamed employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma;
 - b. That the settlement of this case will result in a full release of any and all, past, present, or future claims against Defendants Board of County Commissioners of the County of Tulsa, Sheriff Stanley Glanz, and any other unnamed employees and/or agents of the Board of County Commissioners, Sheriff Stanly Glanz or Tulsa County, Oklahoma, which Plaintiff RaEarl Hall Smith has or may have as a result of the

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incidents alleged to have occurred herein;

- c. That the settlement of this case will result in a full release of any and all, past, present, or future claims for attorney's fees under 42 U.S.C. § 1988, and costs associated therewith against Defendant Board of County Commissioners of the County of Tulsa, Sheriff Stanly Glanz, as well as against any unnamed employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma, which Plaintiff RaEarl Hall Smith or his attorneys, Joseph F. Clark, Jr. and Grant D. Glynn, may have as a result of this judgment.

2. Plaintiff RaEarl Hall Smith is fully aware of the conditions upon which this confession of judgment is made and hereby fully accepts said conditions.

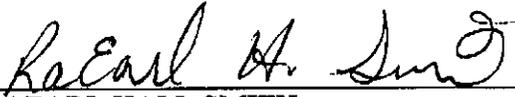
The Court accepts these stipulations and based upon said stipulations finds that the Plaintiff is entitled to recover the sum of Twenty Thousand Dollars (\$20,000.00) against the Board of County Commissioners of the County of Tulsa, Oklahoma.

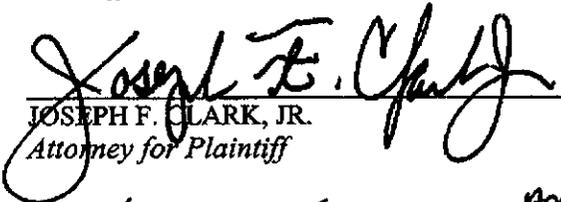
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff recover judgment against the Board of County Commissioners of Tulsa County, Oklahoma, in the sum of Twenty Thousand Dollars (\$20,000.00), with interest from the date hereof not to exceed ten (10%) per annum.



SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

JUDGMENT IN CASE NO.99-CV-416-H APPROVED AS TO FORM AND CONTENT:


RAEARL HALL SMITH
Plaintiff


JOSEPH F. CLARK, JR.
Attorney for Plaintiff


GRANT D. GLYNN
Attorney for Plaintiff *089#77035* *Approved \$20,000.00*

BOARD OF COUNTY COMMISSIONERS
OF TULSA COUNTY, OKLAHOMA

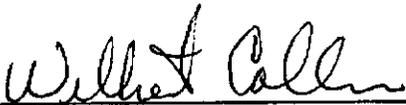
and

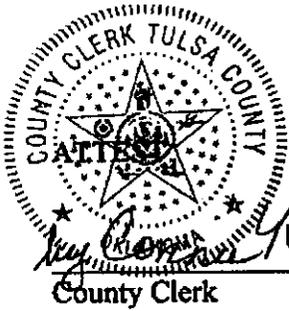
STANLEY GLANZ, SHERIFF
OF TULSA COUNTY, OKLAHOMA

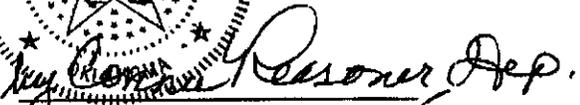
By: 
GORDON W. EDWARDS
ASSISTANT DISTRICT ATTORNEY
Attorney for Defendants

Dated this 17th day of April, 2000.

**BOARD OF COUNTY COMMISSIONERS OF
TULSA COUNTY, OKLAHOMA**


WILBERT COLLINS, CHAIRMAN




County Clerk

SM
5/5/00
80

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

ROGER AYRES and RAE ANN AYRES,)
Individually and as Guardians and Next)
Friend of REAGAN AYRES, a minor,)

Plaintiffs,)

-vs-

OLD NAVY CLOTHING CO. INC.,)
a Division or Subsidiary of THE GAP, INC.)

Defendant.)

ENTERED ON DOCKET

DATE MAY 11 2000

No.: 99-CV-1071-H /

FILED

MAY 10 2000

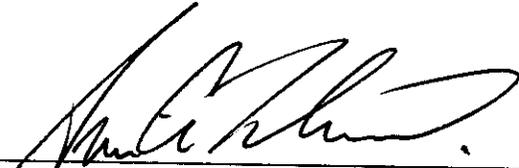
FILED
Clerk
U.S. DISTRICT COURT

ORDER OF REMAND

On this 28th day of April 2000, this case comes before the court for continued hearing on Plaintiffs' motion to remand. Plaintiffs appear by and through their counsel of record, Mr. Ken Ray Underwood. Defendant appears by and through its counsel of record, R. Jack Freeman of Feldman, Franden, Woodard & Farris. Having reviewed the case file, having heard from counsel for each of the parties and otherwise having been fully advised in the premises, and in consideration thereof, the court finds and orders that:

In behalf of the Plaintiffs, Plaintiffs' counsel stipulates that: a) the Plaintiffs are presently knowledgeable of every fact and circumstance upon which they might base or value their claim; b) the Plaintiffs have evaluated all of those facts and circumstances for the purpose of determining whether the amount of their claim exceeds \$75,000; and, c) having so evaluated their claim, that the amount of the Plaintiffs' claim, exclusive of interest and fees, does not exceed \$75,000. Accordingly,

IT IS ORDERED that this case will be remanded to state courts of Oklahoma, where Plaintiffs' claim, exclusive of interest and fees, will not exceed the amount of \$75,000.



THE HONORABLE SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED:



Ken Ray Underwood, OBA No. 9156
680 Park Centre
525 South Main
Tulsa, OK 74103
Telephone: (918) 582-7447
Facsimile: (918) 582-0166
Attorney for Plaintiffs



R. Jack Freeman, OBA No. 3128
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Attorneys for Defendant