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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN 30 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 /

ENTERED ON DOCKET  
DATE JUN 30 2000

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

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

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

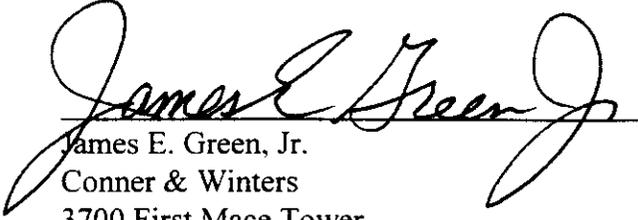
4. No costs are awarded.



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Attorney for Plaintiff  
Edwina Adams



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

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

JUN 30 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LESTER U. LYONS,  
SSN: 444-54-4945

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,

Defendant.

No. 99-CV-488-J ✓

ENTERED ON DOCKET  
DATE JUN 30 2000

ORDER<sup>1/</sup>

Plaintiff, Lester U. Lyons, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.<sup>2/</sup> Plaintiff asserts that the Commissioner erred because the ALJ's finding that Plaintiff was not disabled for any continuous twelve month period after June 15, 1993, is not supported by substantial evidence. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

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

<sup>2/</sup> Administrative Law Judge James D. Jordan (hereafter "ALJ") concluded that Plaintiff was not disabled on March 25, 1998. Plaintiff appealed to the Appeals Council. The Appeals Council declined Plaintiff's request for review on May 15, 1999. [R. at 5].

## I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was born September 25, 1952. [R. at 41]. Plaintiff was 45 years old at the time of the hearing before the ALJ. [R. at 262]. Plaintiff testified that he completed the ninth grade, but did not obtain his GED. [R. at 262].

In his disability report signed January 24, 1996, Plaintiff indicated that he had difficulty bending over for long periods of time, difficulty standing or lifting, and difficulty breathing. [R. at 55]. Plaintiff noted that he was able to fish and drive short distances, but that he had been unable to hunt. [R. at 55].

Plaintiff completed a physical on April 11, 1995. [R. at 84]. Plaintiff was described as giving a history of low back pain radiating to his left leg for the six months prior to the examination. [R. at 84]. An MRI revealed a disc herniation at L5-S1. Although Plaintiff had an epidural procedure, it did not relieve his pain. [R. at 81, 158]. Plaintiff was therefore scheduled for back surgery in April of 1995. Plaintiff was admitted for surgery April 11, 1995, and was discharged April 13, 1995. [R. at 81]. Plaintiff's post operation recovery progressed rapidly, and Plaintiff was "ambulatory without difficulty" by the time of his discharge. [R. at 81].

On April 27, 1995, two weeks after surgery, Plaintiff was reported as "doing well." Plaintiff was encouraged to continue walking. [R. at 155].

On May 23, 1995, six weeks after Plaintiff's surgery, Plaintiff reported that the pain in his left leg was gone, but that he had some numbness in his foot. [R. at 151]. The doctor noted that "he wants to go back to work, but he is a heavy laborer and has not really have [sic] any work hardening type of rehabilitation. I do feel that this would

be important for him because of the nature of his work. We will look into scheduling him for a work hardening regimen. He will return as necessary for follow up." [R. at 151].

Plaintiff was evaluated for a Workers' Compensation examination by John W. Hallford, D.O., on April 24, 1995. [R. at 123]. He noted that Plaintiff worked until June 1, 1993, but stopped working due to severe back pain. He observed that a November 23, 1994, radiograph epidural did not relieve Plaintiff's pain, and that Plaintiff was advised to pursue surgery. The doctor noted that Plaintiff obviously had problems with radiation of pain, that Plaintiff complained of severe low back pain, and that Plaintiff complained of mild degenerative discomfort in his left leg. The doctor described Plaintiff as moving slowly, and as being in obvious distress.

Richard Hastings, D.O., wrote a letter regarding Plaintiff's condition on February 4, 1996. He noted that he first evaluated Plaintiff on May 4, 1995. He observed that Plaintiff complained of shortness of breath. He concluded that Plaintiff was involved in cumulative and repetitive exposure to toxins, and that Plaintiff's last date of exposure was June 1, 1993. [R. at 126]. He concluded that Plaintiff had suffered a 20% impairment to the whole person, with 5% of the impairment attributed to Plaintiff's previous smoking. [R. at 126].

Dr. Hastings wrote a letter on June 7, 1995. [R. at 129]. He noted that Plaintiff complained of shortness of breath on exertion and significant pain in his knees. [R. at 129]. He concluded that, in his opinion, Plaintiff was 100% disabled, and would be for an indefinite period of time. [R. at 130]. On May 8, 1995, Dr.

Hastings noted that Plaintiff complained of shortness of breath after walking three blocks or one to two flights of stairs. [R. at 132].

A Residual Functional Capacity Assessment prepared by Thurma Fiegel on February 28, 1996 indicated that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk six out of eight hours, and sit six out of eight hours. [R. at 136]. The assessment was "affirmed as written," on August 14, 1996. [R. at 136].

On February 6, 1997, Jack Simmers, M.D., wrote that Plaintiff had back surgery and had experienced continuing pain since the surgery, "not being able to return to work without significant pain." [R. at 144]. He noted that he last saw Plaintiff in September 1996, and at that time referred him to a rheumatologist to determine if they could control Plaintiff's pain. [R. at 144].

Plaintiff testified that he had no difficulty driving. Plaintiff flew to Chicago to visit a niece in 1996. [R. at 268]. According to Plaintiff, he is able to go to the store, Wal-Mart, his church, visit friends, and recently attended his son's basketball game. [R. at 270].

Plaintiff testified that he prepared meals, cleaned the house some (vacuumed on occasion and mopped) and watched television. [R. at 271]. According to Plaintiff, although he is able to perform these tasks, he must rest after each task. Plaintiff stated that he lays down approximately three times each day for one to two hours at a time. [R. at 285]. Plaintiff also mows the yard with a push mower. [R. at 271].

Plaintiff stated that he had back surgery in 1995, but that by Thanksgiving

1995 he still experienced back pain. [R. at 272]. Plaintiff stated that lifting and sharp turns made his back hurt. [R. at 275]. According to Plaintiff, his hands and knees hurt all the time, and his knees have hurt since June 1993, with the pain simply getting worse each year. [R. at 278]. Plaintiff stated that he used a cane for about one year, and then stopped in May 1995. Plaintiff testified that his pain and inability to work has increased since June 1993. [R. at 282]. Plaintiff believes that he can currently walk only about two blocks. [R. at 281].

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

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

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

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

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

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

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<sup>3/</sup> Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that

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).

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

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

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

### III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ did find that Plaintiff had severe limitations which prevented Plaintiff from performing his past relevant work. He concluded that Plaintiff was able to perform light work. Based on the testimony of a vocational expert, the ALJ found

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

that Plaintiff was able to perform a significant number of jobs in the national economy and was therefore not disabled.

#### IV. REVIEW

Plaintiff asserts only one alleged error on review. Plaintiff argues that substantial evidence does not support the ALJ's conclusion that there was no continuous period of at least 12 months from 1993 until 1998 during which Plaintiff could not work. Plaintiff suggests that the ALJ should have analyzed Plaintiff's impairments in "parts." Plaintiff states that the RFC which the ALJ concluded Plaintiff had in 1998 could not possibly be the same as the RFC which Plaintiff had when Plaintiff had back surgery in 1995. Plaintiff specifically mentions the 1994 and 1995 time period. Plaintiff suggests that the medical evidence does not support a finding that Plaintiff could have performed light work during 1994 and 1995. Plaintiff states that nothing in the record suggests when Plaintiff had healed after his 1995 surgery, and that the record suggests that Plaintiff had difficulty. Plaintiff asserts that the case must be remanded for reevaluation of the 1994 to 1995 time period and the effect that Plaintiff's pain had on his ability to work.

Plaintiff raises several good points. However, under the facts in this case, and after a careful review of the record and the ALJ's opinion, the Court concludes that substantial evidence supports the decision of the ALJ that Plaintiff can perform substantial gainful activity and is not disabled.

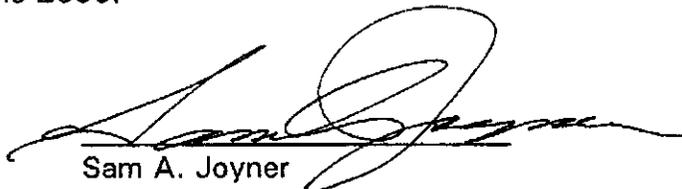
Plaintiff initially focuses on the 1994 to 1995 time frame. Plaintiff asserts disability beginning in June of 1993. The record contains very few records in 1993 and 1994. On December 28, 1994, an examination note indicates Plaintiff was evaluated for low back pain and left leg pain. The note indicates Plaintiff claimed the pain had been present for about three months, and there was no history of an injury. [R. at 166]. The examiner reported a full range of motion of the lumbar spine, with some mild tenderness to palpitation. [R. at 166]. An MRI revealed a central bulge of the L5-S1 disk. [R. at 166]. In early 1995, Plaintiff had an epidural injection in an effort to relieve pain in his back. The record does not contain numerous office visits prior to the epidural injection, or any details of Plaintiff's pain. In February 1995, the record notes that Plaintiff did not attain relief from his back pain after the injection, but indicates that Plaintiff suffered a spinal headache attributed to the injection, and that Plaintiff elected to have back surgery. Plaintiff had back surgery on April 11, 1995. Plaintiff's April 1994 examination indicated that Plaintiff had experienced back pain for the previous six months. [R. at 84]. Plaintiff was discharged and was fully ambulatory on April 13, 1995. [R. at 81]. On April 27, 1995, Plaintiff was encouraged to continue walking. [R. at 155]. By May 23, 1995, Plaintiff's doctor noted Plaintiff reported that his pain in his left leg was gone, but that Plaintiff experienced some numbness in his foot. Plaintiff reported that he wanted to return to work, and the doctor recommended scheduling Plaintiff for a work hardening program because Plaintiff's type of work was heavy labor. [R. at 151]. Plaintiff had a few doctor visits in 1995 and 1996 where he complained of back pain or knee pain.

[R. at 245, 248]. At his hearing in January 1998, Plaintiff testified that his pain and ability to work had become worse since 1993.

The record simply does not contain any records to support Plaintiff's complaints in 1993 and early 1994. Plaintiff visited a doctor in December 1994, and indicated that he had experienced back pain for the previous three months. An epidural injection did nothing to relieve the pain, and Plaintiff had back surgery in April 1995. Within days, Plaintiff was ambulatory, and at six weeks Plaintiff reported relief from his pain, and a desire to return to work. Plaintiff's doctor recommended work hardening. The ALJ reviewed all of Plaintiff's medical records. The ALJ noted the lack of medications and prescriptions after the Plaintiff's surgery, the lack of doctor's visits, and the failure by Plaintiff to seek further medical attention. [R. at 17]. The ALJ concluded that Plaintiff was not disabled for any 12 month period from June 1993 through the date of the ALJ's decision. [R. at 18]. The Court concludes that the ALJ's decision is supported by substantial evidence.

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

Dated this 30<sup>th</sup> day of June 2000.

A handwritten signature in black ink, appearing to read "Sam A. Joyner", written over a horizontal line.

Sam A. Joyner  
United States Magistrate Judge

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

FILED

JUN 23 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARY RAE PRUITT, WINDELL )  
MICHELLE GOOSBY, and )  
YOLANDA YBARRA )

Plaintiffs, )

vs. )

BORG-WARNER SECURITY CORPORATION, )  
ORVEL LEE THOMPSON, and )  
FREEDOM HOUSE INCORPORATED )

Defendants. )

No. 98-CV-186-(C)  
98-CV-187-(C)  
98-CV-188-(C)

ENTERED ON DOCKET  
JUN 29 2000  
DATE \_\_\_\_\_

**ORDER**

September 29, 1999, this Court stayed all proceedings in this case until such time as the Supreme Court rendered a decision regarding the constitutionality of the Violence Against Women Act, 42 U.S.C. § 13981. May 15, 2000, the Supreme Court addressed this question in United States v. Morrison, No. 99-5, 2000 WL 574361 (May 15, 2000). The Supreme Court held Congress lacked authority under the Commerce Clause to provide a federal civil remedy for the victims of gender-motivated violence.

The Court's September 29, 1998 stay is lifted. Based upon the decision in United States v. Morrison, plaintiffs' claims under 42 U.S.C. § 13981 are hereby dismissed.

IT IS SO ORDERED this 28<sup>th</sup> day of June 2000.

  
H. Dale Cook  
Senior United States District Judge

as 1/4/11

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6/26/00

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

FILED  
JUN 28 2000

MALCOLM LUSTER, JR., )  
)  
Plaintiff, )  
)  
v. )  
)  
GREDE-PRYOR, INC., )  
)  
Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 99 CV 526 C (E) ✓

ENTERED ON DOCKET

DATE JUN 29 2000

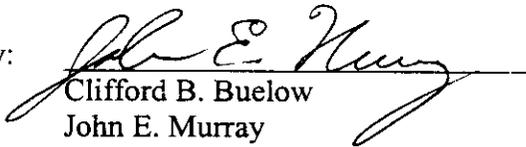
STIPULATION AND ORDER OF DISMISSAL  
WITH PREJUDICE

Stipulation

IT IS HEREBY STIPULATED AND AGREED by the parties, through their respective counsel, that all claims asserted by the plaintiff in this matter shall be dismissed with prejudice and without costs or attorney fees to any party and that either plaintiff or defendant may have judgment of dismissal entered without notice to any party.

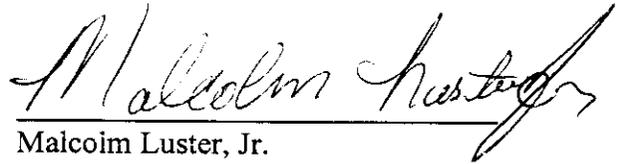
Dated: June 21, 2000.

By:



Clifford B. Buelow  
John E. Murray  
Attorneys for  
Grede-Pryor, Inc.  
111 East Kilbourn Avenue,  
Suite 1400  
Milwaukee, WI 53202  
(414) 276-0200

By:



Malcolm Luster, Jr.  
12712 Parker Heights Blvd.  
Spencer, OK 73084

**F I L E D**

JUN 23 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Pursuant to the foregoing Stipulation between the parties, it is hereby ordered that this matter is dismissed with prejudice and without cost or attorney fees to any party and that either party may have judgment of dismissal entered without notice to any other party.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: 6-28, 2000



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

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

**F I L E D**

JUN 28 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FRANK LEE EDENS, JR., )

Plaintiff, )

vs. )

Case No. 99-CV-1024-C (E)

WASHINGTON COUNTY JAIL; )

ROBERT BLACKWOOD, Detention )

Officer; and CHARLES CARROLL, )

Detention Officer, )

Defendants. )

**ENTERED ON DOCKET**

**DATE JUN 29 2000**

**ORDER**

On November 30, 1999, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983 and a motion for leave to proceed *in forma pauperis*. By order filed December 13, 1999, the Court directed Plaintiff to cure certain deficiencies in his motion for leave to proceed *in forma pauperis*. Specifically, Plaintiff was advised that this action could not proceed unless he submitted an amended motion for leave to proceed *in forma pauperis* supported by the required certified copy of his trust fund account statement (or institutional equivalent) for the 6-month period immediately preceding the filing of the complaint obtained from the appropriate official of each prison at which he is or was confined or show cause in writing for his failure to do so. In addition, the Clerk of Court was directed to mail to Plaintiff the forms and information necessary for preparing the document ordered by the Court. Plaintiff was also advised that these deficiencies were to be cured by January 14, 2000, and that "[f]ailure to comply with this Order may result in dismissal of this action without prejudice." To date, Plaintiff has neither submitted the amended motion nor shown cause for his failure to do so. In addition, no correspondence from the Court to Plaintiff been returned.

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Because Plaintiff has failed to submit the amended motion to proceed *in forma pauperis* in compliance with the Court's Order of December 13, 1999, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Plaintiff's civil rights *Complaint* is **dismissed without prejudice** for lack of prosecution.

SO ORDERED this 28 day of June, 2000.

  
\_\_\_\_\_  
H. DALE COOK, Senior Judge  
UNITED STATES DISTRICT COURT

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

**FILED**

JUN 28 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JERRY MYERS, Individually and as Administrator  
of the estate of DEBRA LEANN MYERS, deceased,

Plaintiff,

v.

TROPIC TEX INTERNATIONAL, INC., a New Jersey  
Corporation, and WAL-MART STORES, INC., An  
Arkansas Corporation

Defendants.

Case No. 99 CV 1128E (J)

ENTERED ON DOCKET  
DATE JUN 29 2000

**NOTICE OF DISMISSAL WITHOUT PREJUDICE**

COMES NOW the Plaintiff, Jerry Myers, individually and as Administrator of the estate of Debra LeAnn Myers, deceased, and pursuant to Federal Rules Civil Procedure 41(a)(1) dismisses without prejudice the cause of action alleged against the defendant Tropic Tex International, Inc., a New Jersey corporation. The plaintiff would show the Court that prior to the filing of this Notice of Dismissal without prejudice, the defendant Tropic Tex International, Inc. had not been served with summons nor answered the complaint filed in this cause.

Respectfully submitted,



Scott Allen, OBA #13588  
Attorney for Plaintiff

STIPE LAW FIRM

16

43

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(918) 749-0749  
(918) 747-0751 (fax)

Randall Jackson  
Co-Counsel  
105 S. St. Mary's Street, Suite 850  
Alamo National Bank Building  
San Antonio, TX 78205

**CERTIFICATE OF MAILING**

I hereby certify that on the 28<sup>th</sup> day of June, 2000, a true and correct copy of the above and foregoing instrument was mailed with sufficient postage prepaid thereon to:

Douglas E. Stall, Esq.  
Mark T. Steele, Esq.  
LATHAM, STALL, WAGNER, STEELE & LEHMAN  
Boulder Towers, Suite 820  
1437 South Boulder  
Tulsa, Oklahoma 74119



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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

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

Plaintiff, )

v. )

BRUCE W. ABBOTT, JR. aka B. W. Abbott )  
aka Bruce W. Abbott aka Bruce Wilburn Abbott; )

ETHA A. ABBOTT )

aka E. A. Abbott aka Etha Annette Abbott; )

PREFERRED CREDIT CORPORATION; )

COUNTY TREASURER, Tulsa County, )

Oklahoma; )

BOARD OF COUNTY COMMISSIONERS, )

Tulsa County, Oklahoma, )

Defendants. )

JUN 27 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
JUN 28, 2000  
DATE \_\_\_\_\_

CIVIL ACTION NO. 99-CV-0964-BU (J)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27<sup>th</sup> day of June,

2000. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; that the Defendants, Bruce W. Abbott, Jr. aka B. W. Abbott aka Bruce W. Abbott aka Bruce Wilburn Abbott, Etha A. Abbott aka E. A. Abbott aka Etha Annette Abbott, and Preferred Credit Corporation, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, Bruce W. Abbott, Jr. aka B. W. Abbott aka Bruce W. Abbott aka Bruce Wilburn Abbott, Etha A. Abbott aka E. A. Abbott aka Etha Annette Abbott, and Preferred Credit Corporation, were served by publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning April 14, 2000, and continuing through May 19, 2000, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, Bruce W. Abbott, Jr. aka B. W. Abbott aka Bruce W. Abbott aka Bruce Wilburn Abbott, Etha A. Abbott aka E. A. Abbott aka Etha Annette Abbott, and Preferred Credit Corporation, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, Bruce W. Abbott, Jr. aka B. W. Abbott aka Bruce W. Abbott aka Bruce Wilburn Abbott, Etha A. Abbott aka E. A. Abbott aka Etha Annette Abbott, and Preferred Credit Corporation. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter

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

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed its Answer on December 8, 1999; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on December 8, 1999; that the Defendants, Bruce W. Abbott, Jr. aka B. W. Abbott aka Bruce W. Abbott aka Bruce Wilburn Abbott, Etha A. Abbott aka E. A. Abbott aka Etha Annette Abbott, and Preferred Credit Corporation, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on May 7, 1998, Bruce Wilburn Abbott and Etha Annette Abbott filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 98-01797-M. The real property subject to this foreclosure action and described above was made a part of the bankruptcy estate as is evidenced by Schedule A - Real Property of the bankruptcy schedules. On August 14, 1998, a Discharge of Debtor was entered discharging debtors from all dischargeable debts. Subsequently, on January 13, 1999, Case No. 98-01797-M, United States Bankruptcy Court for the Northern District of Oklahoma was closed.

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

A tract of land in the East Half of the Northeast Quarter (E $\frac{1}{2}$  NE $\frac{1}{4}$ ) of Section One (1), Township Twenty-one (21) North, Range Thirteen (13) East of the Indian Base and Meridian, Tulsa County, State of Oklahoma, according to the U.S. Government Survey thereof, said E $\frac{1}{2}$  of the NE $\frac{1}{4}$  being comprised of Lot 1 and the SE $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Section 1, and said tract of land being described as all of the South 250 feet of the North 2400 feet of said E $\frac{1}{2}$  of the NE $\frac{1}{4}$ , less and except the East 880 feet thereof, reserving to the public an easement and right of way over the East 25 feet thereof for roadway purposes and an easement and right of way over the North 5 feet and the South 5 feet and the West 10 feet thereof for installation and maintenance of utility lines with right of ingress and egress thereto.

The Court further finds that on May 20, 1987, Bruce W. Abbott, Jr. and Etha A. Abbott executed and delivered to Mortgage Clearing Corporation their mortgage note in the amount of \$72,346.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Bruce W. Abbott, Jr. and Etha A. Abbott, husband and wife, executed and delivered to Mortgage Clearing Corporation a real estate mortgage dated May 20, 1987, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on May 26, 1987, in Book 5025, Page 1095, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 8, 1988, Mortgage Clearing Corporation assigned the above-described note and mortgage to the Administrator of Veterans Affairs, now known as the Secretary of Veterans Affairs. This Assignment of Mortgage was recorded on November 30, 1988, in Book 5142, Page 1739, in the records of Tulsa County, Oklahoma. The Secretary of Veterans Affairs reamortized this loan and the interest rate was changed to 7 percent per annum.

The Court further finds that Defendants, Bruce W. Abbott, Jr. aka B. W. Abbott aka Bruce W. Abbott aka Bruce Wilburn Abbott and Etha A. Abbott aka E. A. Abbott aka Etha Annette Abbott, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$63,437.68, plus administrative charges in the amount of \$667.70, plus penalty charges in the amount of \$25.36, plus accrued interest in the amount of \$6,084.51 as of April 1, 1999, plus interest accruing thereafter at the rate of 7 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$632.93 (\$192.13 fees for service of Summons and Complaint, \$430.80 publication fees, \$10.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has liens on the property which is the subject matter of this action by virtue of 1999 ad valorem taxes in the amount of \$847.00, plus penalties and interest

and by virtue of 1999 taxes for the Collinsville Fire District in the amount of \$56.00, plus penalties and interest. Said liens are superior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, Bruce W. Abbott, Jr. aka B. W. Abbott aka Bruce W. Abbott aka Bruce Wilburn Abbott, Etha A. Abbott aka E. A. Abbott aka Etha Annette Abbott, and Preferred Credit Corporation, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against Defendants, Bruce W. Abbott, Jr. aka B. W. Abbott aka Bruce W. Abbott aka Bruce Wilburn Abbott and Etha A. Abbott aka E. A. Abbott aka Etha Annette Abbott, in the principal sum of \$63,437.68, plus administrative charges in the amount of \$667.70, plus penalty charges in the amount of \$25.36, plus accrued interest in the amount of \$6,084.51 as of April 1, 1999, plus interest accruing thereafter at the rate of 7 percent per annum until judgment, plus interest thereafter at the current legal rate of 6.375 percent per annum until fully paid, plus the costs of this action in the amount of \$632.93 (\$192.13 fees for service of Summons and Complaint, \$430.80 publication fees, \$10.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended

during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the total amount of \$903.00 plus penalties and interest by virtue of 1999 ad valorem taxes in the amount of \$847.00 and by virtue of 1999 taxes for the Collinsville Fire District in the amount of \$56.00.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Bruce W. Abbott, Jr. aka B. W. Abbott aka Bruce W. Abbott aka Bruce Wilburn Abbott, Etha A. Abbott aka E. A. Abbott aka Etha Annette Abbott, Preferred Credit Corporation, and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

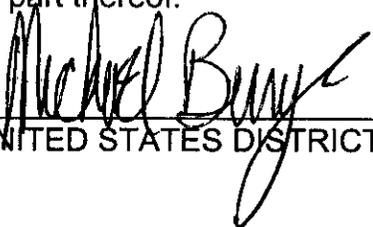
In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma;

Third:

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

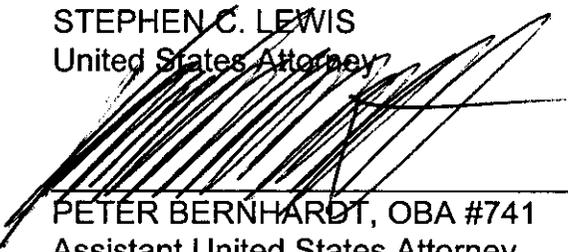
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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

  
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

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

  
DICK A. BLAKELEY, OBA #0852  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4835  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Case No. 99-CV-0964-BU (J) (Abbott)

PB:css

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

**FILED**

JUN 27 2000

PHILLIP CHRISTOPHER GREELEY, )

Petitioner, )

vs. )

RAY LITTLE, Warden; and )

THE ATTORNEY GENERAL )

OF THE STATE OF OKLAHOMA, )

Respondents. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 99-CV-237-BU (M)

ENTERED ON DOCKET

DATE JUN 28 2000

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge entered on June 6, 2000 (Docket #14), in this habeas corpus action brought pursuant to 28 U.S.C. § 2254. The Magistrate Judge recommends that Petitioner's petition for a writ of habeas corpus be dismissed as procedurally barred. None of the parties has filed an objection to the Report and the time for filing an objection has passed.

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

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

1. The Report and Recommendation of the Magistrate Judge (#14) is **adopted and affirmed**.
2. The petition for a writ of habeas corpus is **dismissed** as procedurally barred.

SO ORDERED THIS 27<sup>th</sup> day of JUNE, 2000.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

JUN 27 2000

PHILLIP CHRISTOPHER GREELEY, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 RAY LITTLE, Warden; and )  
 THE ATTORNEY GENERAL )  
 OF THE STATE OF OKLAHOMA, )  
 )  
 Respondents. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 99-CV-237-BU (M)

ENTERED ON DOCKET  
DATE JUN 28 2000

**JUDGMENT**

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 27<sup>th</sup> day of JUNE, 2000.

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

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

**F I L E**

**JUN 27 2000**

COBRA MANUFACTURING COMPANY, INC. )

Plaintiff, )

vs. )

TRU-FIRE CORPORATION )

Defendant. )

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

Case No.00-CV-182BU

Judge Michael Burrage

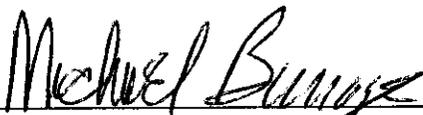
**ENTERED ON DOCKET**

**DATE JUN 28 2000**

ORDER

On this 27<sup>th</sup> day of JUNE, 2000, there comes on for hearing the Plaintiff's Notice of Dismissal Without Prejudice, and the Court having examined the pleadings filed herein and being otherwise fully advised in the premises, finds:

IT IS HEREBY ORDERED, ADJUDGED, and DECREED, that this action is hereby dismissed without prejudice.

  
UNITED STATES DISTRICT JUDGE

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

MARGARET VANDEVER, an individual; )  
WILLIAM VANDEVER, an individual; )  
FFA MORTGAGE CORP. an Oklahoma )  
corporation; MARGARET VANDEVER )  
COMPANY, INCORPORATED, an Oklahoma )  
corporation; WILLIAM VANDEVER )  
CORPORATION, an Oklahoma corporation; )  
WILLIAM G. VANDEVER AND COMPANY, )  
an Oklahoma corporation; FIRST FINANCIAL )  
ADVISERS, an Oklahoma corporation; and )  
TULSA ASSOCIATED SERVICES )  
CORPORATION, an Oklahoma corporation )

Plaintiffs, )

vs. )

HARTFORD INSURANCE COMPANY OF )  
THE MIDWEST dba ITT HARTFORD, a )  
foreign insurance company, )

Defendants. )

**FILED**

**JUN 27 2000**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUN 28 2000

Case Number 99-CV-0670 BU(M)

**ORDER OF DISMISSAL**

The Court, having reviewed the application for a dismissal with prejudice submitted on behalf of the Plaintiffs, hereby finds that said application should be and is hereby granted. The above styled action and all claims for relief of the Plaintiffs against the Defendant are dismissed with prejudice to the refileing of same.

  
\_\_\_\_\_  
U.S. DISTRICT COURT JUDGE

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

KEVIN D. BATE, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 UNITED AIR LINES, )  
 )  
 Defendant. )

ENTERED ON DOCKET  
DATE JUN 27 2000  
No. 99-CV-105-K  
**FILED**  
JUN 27 2000 *SL*  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

On June 12, 2000, the Court entered an order granting plaintiff ten days in which to effect service. Plaintiff has failed to comply.

It is the Order of the Court that this action is DISMISSED without prejudice.

ORDERED this 26 day of June, 2000.

  
TERRY Q. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JUN 27 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RICHARD D. BLACKBURN,

Plaintiff,

vs.

WILLIAM J. HENDERSON,

Defendant.

No. 98-CV-776-K

ENTERED ON DOCKET  
JUN 27 2000  
DATE

JUDGMENT

This action came on for jury trial, the Honorable Terry C. Kern, Chief District Judge, presiding. The jury returned a verdict in favor of the defendant.

IT IS THEREFORE ORDERED that judgment is hereby entered in favor of defendant and that plaintiff take nothing by this action.

ORDERED this 27 day of June, 2000.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JUN 27 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GERALD FRANKLIN BELL, )

Petitioner, )

vs. )

RON WARD, )

Respondent. )

Case No. 97-CV-584-K

ENTERED ON DOCKET

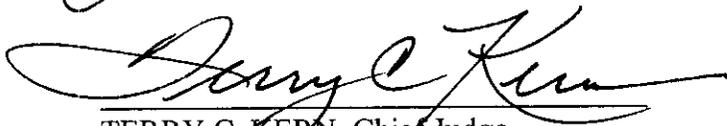
DATE JUN 27 2000

**JUDGMENT**

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 26 day of June, 2000.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

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

JACK ADAM BENJAMIN, JR., )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
TWYLA SNIDER, )  
 )  
Respondent. )

ENTERED ON DOCKET

DATE ~~JUN 26 2000~~

Case No. 98-CV-957-H (J)

**FILED**

JUN 26 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT**

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

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

IT IS SO ORDERED.

This 23<sup>RD</sup> day of June, 2000.



Sven Erik Holmes  
United States District Judge

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

JACK ADAM BENJAMIN, JR., )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 TWYLA SNIDER, )  
 )  
 Respondent. )

Case No. 98-CV-957-H (J)

ENTERED ON DOCKET

DATE JUN 26 2000

FILED

JUN 26 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Before the Court for consideration is the petition for a writ of habeas corpus (Docket #1), filed by Petitioner, a state inmate appearing *pro se*. Respondent has filed a response pursuant to Rule 5, *Rules Governing Section 2254 Cases* (Docket #6). Petitioner has filed a reply to Respondent's response (#7). For the reasons discussed below, the Court finds the petition for writ of habeas corpus should be denied.

**BACKGROUND**

On February 5, 1971, Petitioner entered a plea of guilty to the offense of Robbery with Firearms in the District Court for Tulsa County, Case No. CRF-70-1648. He was sentenced to life imprisonment. Petitioner did not pursue a direct appeal of his conviction.

According to the Affidavit submitted by Jim Rabon, Coordinator for the Sentence Administration and Offender Records for the Oklahoma Department of Corrections (#6, attachment), Petitioner was paroled on December 22, 1983, with a parole discharge date of Life. However, while on parole supervision, Petitioner violated the terms of his parole. As a result, on September 30, 1997, the Governor revoked, pursuant to Okla. Stat. tit. 57, § 350, Petitioner's parole

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in part, five years, and did not grant him street time toward service of the revocation. Petitioner remains incarcerated serving the sentence imposed following the revocation of parole on his life sentence.

Petitioner filed the instant petition for a writ of habeas corpus on December 18, 1998, alleging that the application of Oklahoma Department of Corrections (“ODOC”) Policy OP-060211, prohibiting inmates serving a life sentence from receiving earned credits on a revoked portion of parole, formulated under color of 57 O.S. Supp 1976 § 138, or any later versions, to his five (5) years of revoked parole, is a violation of the *ex post facto* clause and is unconstitutional as applied to him. See #2 at 2-3. Petitioner asserts that pursuant to the version of Okla. Stat. tit. 57, § 138 in effect at the time of his conviction, he would have been entitled to an award of good time credits and that those credits must be deducted from the time he is presently serving as a result of his parole revocation.

In response to the petition, Respondent argues that there is no merit to Petitioner’s claim, and that his request for federal habeas relief must be denied.

### *ANALYSIS*

Although it is not clear from the record before the Court whether Petitioner has a state judicial remedy available for his claim asserted in this action, the Court nonetheless finds that this petition should be denied regardless of the exhaustion status of Petitioner’s claim. See 28 U.S.C. § 2254(b)(2) (providing that a habeas petition may be denied notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State). The Court also finds that Petitioner is not entitled to an evidentiary hearing on his claim. See 28 U.S.C. § 2254(e)(2).

Petitioner argues that ODOC's application of both the good time credit statute, as amended in 1976, and its own policy, violates the *ex post facto* clause of the federal constitution. "To fall within the *ex post facto* prohibition, a law must be retrospective and 'disadvantage the offender affected by it' by, *inter alia*, increasing the punishment for the crime." Lynce v. Mathis, 117 S.Ct. 891, 892 (1997) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)). Petitioner contends that although he was convicted in 1971, the ODOC applies its policy, OP-060211, "under color of 57 O.S. Supp. 1976, § 138, or any latter amendments," to allow the withholding of earned credits from his sentence following the revocation of his parole. (#2 at 4). Petitioner argues that the retrospective application of the 1976 version of § 138, "has clearly made petitioner's sentence more onerous by lengthening the time he must serve on the five (5) years of revoked parole time he is serving." (Id.). Thus, Petitioner claims ODOC's refusal to credit his sentence with earned credits is prohibited by the *ex post facto clause* and constitutes a violation of the principles announced in Weaver v. Graham, 450 U.S. 24 (1981). See #7 at 6.

Section 138, as amended in 1976, provided, for the first time explicitly, that "[n]o deductions shall be credited to any inmate serving a sentence of life imprisonment." Okla. Stat. tit. 57, § 138 (1976). The quoted language does not appear in the version of the statute in effect during 1970-71, the version Petitioner believes should be applied in his case. The 1968 and 1970 versions of the statute provided, in pertinent part, as follows:

Every convict who shall have no infractions of the rules and regulations of the prison or laws of the State recorded against him shall be allowed for his term a deduction of two (2) months in each of the first two (2) years; four (4) months in each of the next two (2) years; five (5) months in each of the remaining years of said term, and prorated for any part of the year where the sentence is for more or less than a year. . . .

Okla. Stat. tit. 57, § 138 (1968, 1970) (emphasis added). Pursuant to this version of the statute,

credits were to be allowed for an inmate's "term." The word "term" refers to a term of years and not to a sentence of life imprisonment.<sup>1</sup> Therefore, the pre-1976 version of the statute implied that inmates serving life sentences would not be entitled to credit deductions. Furthermore, in an unpublished opinion, the Tenth Circuit Court of Appeals analyzed whether the denial of earned credits to prisoners sentenced to life prior to 1976 constituted an *ex post facto* violation and held that the 1973 statute implies what was made explicit by the 1976 amendment to the statute, i.e., good time credits shall not be deducted from the sentence of an inmate serving a sentence of life imprisonment. See Collins v. State, No. 95-6099, 1995 WL 405112 (10th Cir. July 10, 1995). Accordingly, Petitioner is ineligible for good time credits under all versions of Section 138. Therefore, the 1976 and subsequent versions of the statute are not more onerous than the earlier versions, i.e., the 1968, 1970, and 1973 versions, with respect to Petitioner and application of the later versions do not disadvantage Petitioner as long as he is serving a life sentence.

Petitioner attempts to distinguish his circumstances from those at issue in Collins by stating that he "recognizes that it is impossible to subtract earned credits from a life sentence; it is not, however, impossible to subtract earned credits from five (5) years of revoked parole, thereby shortening the time he must remain incarcerated before returning to parole status." (#7 at 5). However, contrary to Petitioner's belief that his present 5 year sentence is distinct from his life sentence, the Court finds that he continues to serve his life sentence although he is presently incarcerated on a partial revocation of parole on that life sentence. Because Petitioner is serving time for revocation of parole on a life sentence, he is not entitled to earned credits. The Court

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<sup>1</sup>"Term" is defined as a fixed and definite period of time; implying a period of time with some definite termination. Black's Law Dictionary 1470 (6th ed. 1990) (citing First-Citizens Bank & Trust Co. V. Conway Nat'l Bank, 317 S.E.2d 776, 778 (S.C. Ct. App. 1984)).

concludes that no *ex post facto* violation has occurred and that the petition for a writ of habeas corpus should be denied.

**CONCLUSION**

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

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

IT IS SO ORDERED.

This 27<sup>RD</sup> day of JUNE, 2000.



Sven Erik Holmes  
United States District Judge

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

FILED  
JUN 26 2000

COBRA MANUFACTURING COMPANY, INC. )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 TRU-FIRE CORPORATION )  
 )  
 Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No.00-CV-182BU ✓

Judge Michael Burrage  
ENTERED ON DOCKET

DATE JUN 26 2000

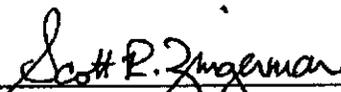
**PLAINTIFF'S NOTICE OF DISMISSAL WITHOUT PREJUDICE**

COMES NOW, Plaintiff, Cobra Manufacturing Company, Inc. ("Cobra"), through its undersigned counsel, and hereby dismisses without prejudice, pursuant to Fed.R.Civ.P. 41(a)(1), all claims in the above-styled lawsuit.

In support of this instant Notice of Dismissal, Plaintiff would have the Court know that dismissal without approval of the Court is appropriate because Defendant has not yet filed an answer in this case. Dismissal without prejudice is appropriate because Plaintiff has not previously dismissed an action — in any court of the United States or in any state court — based on or including any claim in the instant lawsuit.

WHEREFORE, Plaintiff respectfully requests that this Court issue an order dismissing without prejudice the above-styled action.

Respectfully submitted,

  
\_\_\_\_\_  
Scott R. Zingerman, OBA # 14342  
FELLERS, SNIDER, BLANKENSHIP,  
BAILEY & TIPPENS, P.C.  
The Kennedy Building  
321 South Boston, Suite 800  
Tulsa, OK 74103-3318  
Telephone: (918) 599-0621  
Facsimile: (918) 583-9659

*Attorney for Plaintiff*

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN 26 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

ENTERED ON DOCKET  
DATE JUN 26 2000

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

Plaintiff William D. Spencer, by counsel, and defendants DePuy Inc., DePuy Motech, Inc., and Johnson & Johnson, by counsel, stipulate as follows:

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

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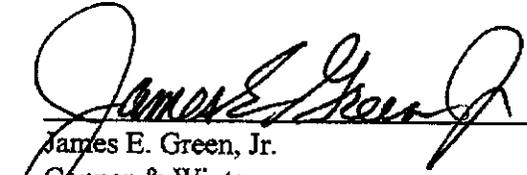
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4. No costs are awarded.



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

Attorney for Plaintiff  
William D. Spencer



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

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

**FILED**  
JUN 26 2000  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JEFF HARPER and CAROL HARPER, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 TRANSAMERICA ASSURANCE COMPANY, )  
 a Colorado corporation, )  
 )  
 Defendant. )

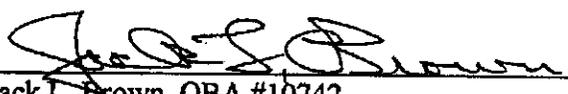
Case No. 00CV0341E (J) ✓

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

The captioned parties hereby jointly stipulate for the dismissal of all claims and counterclaims in the above captioned action with prejudice to their refiling, with each party to bear its own costs, expenses and attorney fees.

  
\_\_\_\_\_  
R. Scott Savage, OBA #7926  
James E. Maupin, OBA #14966  
Moyers, Martin, Santee, Imel & Tetrick, LLP  
320 South Boston, Suite 920  
Tulsa, Oklahoma 74103  
(918) 582-5281

Attorneys for Plaintiffs

  
\_\_\_\_\_  
Jack L. Brown, OBA #10742  
Jones, Givens, Gotcher & Bogan  
15 E. 5<sup>th</sup>, Suite 3800  
Tulsa, OK 74103-4309  
(918) 581-8200

Attorneys for Defendant

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN 26 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 ✓

ENTERED ON DOCKET

DATE JUN 26 2000

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

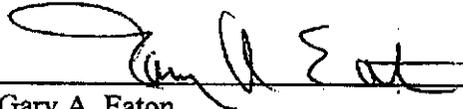
Plaintiff Jamie Shelley, by counsel, and defendants DePuy Inc., DePuy Motech, Inc., and Johnson & Johnson, by counsel, stipulate as follows:

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

elo

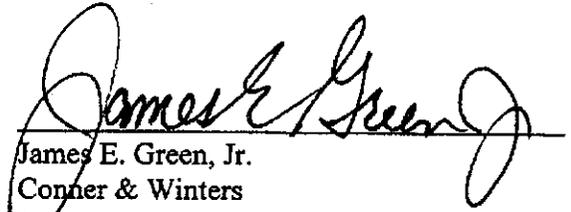
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4. No costs are awarded.



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

Attorney for Plaintiff  
Jamie Shelley



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

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

**F I L E D**

JUN 26 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CHRISTOPHER LANGSTON, )  
)  
Plaintiff, )  
)  
vs. )  
)  
ALICIA LITTLEFIELD; )  
CHRISTIANNA L. WRIGHT, )  
)  
Defendants. )

No. 00-CV-300 B (E) /

ENTERED ON DOCKET

DATE JUN 26 2000

**ORDER**

Plaintiff, appearing *pro se* and *in forma pauperis*, filed this action pursuant to 42 U.S.C. § 1983 against the Honorable Alicia Littlefield, Delaware County District Court Judge, and Christianna L. Wright, an attorney in the Delaware County Public Defender's Office. For the reasons discussed below, the Court finds Plaintiff's complaint should be dismissed with prejudice.

***BACKGROUND***

In his complaint, Plaintiff identifies three claims as follows:

- Count I: Judicial conflict of interest.  
Former Ottawa (sic) Co. Asst. D.A. Ms. Littlefield had prior knowledge of my case before presideing (sic) over case as Delaware Co. District Judge.
- Count II: Denied effective council (sic) representation (I did not apply for a public defender)  
Records will show my formal attempts to dismiss Ms. Wright were denied by Ms. Littlefield who also appointed Ms. Wright without my request as a P.D.
- Count III: Denied the right to produce evidence to support my case.  
Evidence that would have surely cleared my name was continually denied to enter by not only Ms. Littlefield, but also my Public Defender Ms. Wright. Ms Littlefield appointed Ms. Wright without a application of request for a Public Defender. I was denied to hire a lawyer or have Ms. Wright replaced.

(#1). Plaintiff seeks monetary compensation and punitive damages.

## ANALYSIS

### A. Standards

Plaintiff is a prisoner as that term is defined in § 1915A(c) (i.e., a person incarcerated for violations of the criminal law). The Defendants in this case are employees of a governmental entity. The Court is, therefore, required to conduct an initial review of Plaintiff's complaint. See 28 U.S.C. § 1915A(a). During this review, the Court is required to "identify cognizable claims or dismiss the complaint, or any part of the complaint, if the complaint (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b).

Plaintiff is also proceeding *in forma pauperis*. In cases where the plaintiff is proceeding *in forma pauperis*, § 1915(e) provides as follows:

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court **shall** dismiss the [*in forma pauperis*] case at any time if the court determines that . . . the action . . . is frivolous . . . fails to state a claim on which relief may be granted; or seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915(e)(2)(B)(emphasis added). Courts may dismiss *in forma pauperis* complaints as "frivolous" if they rely on "inarguable legal conclusion[s]" or "fanciful factual allegation[s]." Neitzke v. Williams, 490 U.S. 319, 325 (1989).

### B. Plaintiff's claims are frivolous

The Court finds that Plaintiff's claims against Defendant Wright rely on an inarguable legal conclusion and are, therefore, frivolous. Section 1983 provides as follows:

Every person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia*, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (emphasis supplied). It is well established that the public defender is not subject to § 1983 liability because her actions as a defense attorney are not “under color of state law.” See Polk county v. Dodson, 454 U.S. 312, 325 (1981). Therefore, Plaintiff’s claims against Defendant Wright rely on inarguable legal conclusions and should be dismissed as frivolous.

Similarly, a state court judge has absolute immunity for her actions, unless they were nonjudicial, or taken in the complete absence of all jurisdiction. Mireles v. Waco, 502 U.S. 9, 11012 (1991). The actions taken by Defendant Littlefield forming the basis of Plaintiff’s complaint were judicial and within her jurisdiction as Delaware County District Court Judge. Therefore, the Court concludes Defendant Littlefield is absolutely immune from damages in this civil rights action. Plaintiff’s claims against Defendant Littlefield rely on inarguable legal conclusions and should be dismissed as frivolous.

### ***CONCLUSION***

Plaintiff’s claims against Defendants Littlefield and Wright are frivolous and this action must be dismissed pursuant to 28 U.S.C. § 1915A(b)(1). This dismissal should count as Plaintiff’s first “prior occasion” under 28 U.S.C. § 1915(g).<sup>1</sup>

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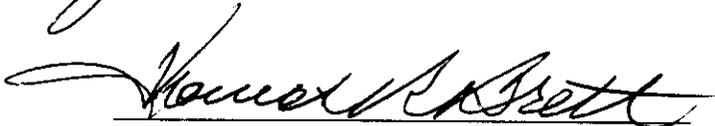
<sup>1/</sup> 28 U.S.C. § 1915(g) provides as follows:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

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

1. Plaintiff's 42 U.S.C. § 1983 complaint is **dismissed with prejudice**, pursuant to 28 U.S.C. § 1915A(b)(1), as frivolous.
2. The Clerk is directed to **flag** this as a dismissal pursuant to 28 U.S.C. § 1915A. As a result, this dismissal counts as Plaintiff's first "prior occasion" for purposes of 28 U.S.C. § 1915(g).

SO ORDERED THIS 26<sup>th</sup> day of June, 2000.

  
THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

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

**FILED**

JUN 26 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARY ELIZABETH VARNER, )  
)  
Plaintiff, )  
)  
vs. )  
)  
JOPLIN-JOHNSTON INDUSTRIAL )  
SUPPLY, d/b/a JOPLIN INDUSTRIAL )  
SUPPLY, and AMERICAN AIRLINES )  
)  
Defendants. )

Case No.: 99CV0965E (E)

ENTERED ON DOCKET  
DATE JUN 26 2000

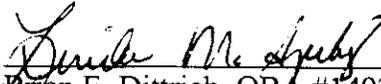
STIPULATION FOR DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Mary Elizabeth Varner ("Varner"), and the defendant, Joplin-Johnston Industrial Supply ("Johnston"), and hereby stipulate and agree that the above captioned cause may be dismissed with prejudice to further litigation pertaining to all matters involved herein. Defendant American Airlines was previously dismissed from this litigation and a compromise settlement covering all claims involved in the above captioned cause has been made between Varner and Johnston. Therefore, the said parties hereby request the Court dismiss said action with prejudice, pursuant to this stipulation.

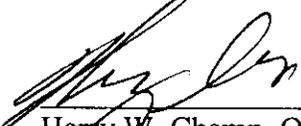
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C/S  
CAB

Respectfully Submitted,

  
\_\_\_\_\_  
Brian E. Dittrich, OBA #14934  
Linda M. Szuhly, OBA #17905  
Whitten, McGuire, Wood, Terry,  
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ATTORNEYS FOR JOPLIN-JOHNSTON  
INDUSTRIAL SUPPLY

  
\_\_\_\_\_  
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(918) 585-3232/ 585-2007

ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

JUN 26 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

COLLISION CENTERS INTERNATIONAL, )  
INC., a Utah corporation, DAN BAILEY, )  
WILLIAM G. BAILEY, FREDDIE K. )  
BARNETT, J.R. BRAZEAL, MICHAEL J. )  
CHAMPAGNE, ROBERT TERRY COLBERT, )  
MARK R. EVELAND, WILLIAM H. )  
EVELAND, JR., MICKEY O. GARRISON, )  
F. MACK GREEVER, STEPHEN JAMES )  
HATCH, TED HITE, DON HUGGINS, )  
ROBERT H. JONES, JR., JOHN M. KING, )  
LAWRENCE G. LILlich, TAYLOR L. )  
MARKLE, MIKAL McCUBBIN, NEAL and )  
LYNDA McDONALD, ROBERT J. MERKLE, )  
SARAH E. MERKLE, LAURA LUCINDA )  
MORRISON, KENNETH and KAREN RIGGS, )  
JEROME L. ROBERTSON, DANNY and )  
LINDA SOMMERHAUSER, WAYNE R. )  
STEVENS, WILLIAM E. and ESTHER M. )  
WELTE, MICHAEL A. and D. KAY )  
WICKLUND, WILLIAM E. WICKLUND, and )  
C. REX WOMBLE, individuals, )

Plaintiffs, )

vs. )

COLLISION KING, INC., formerly known as )  
Prodigy A.R.T. Corp., a Nevada corporation, )

Defendant. )

ENTERED ON DOCKET  
DATE JUN 26 2000

No. 98-CV-0040-BU-(J) ✓

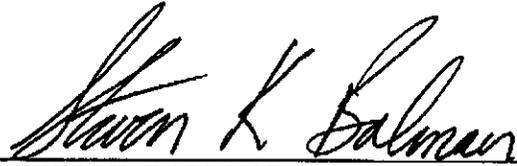
**STIPULATION OF DISMISSAL  
WITH PREJUDICE**

Plaintiffs, and each of them, hereby dismiss their claims against Defendant Collision King, Inc. with prejudice, each party to pay its own costs and expenses in accordance with the terms of the settlement agreement between the parties.

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cl

Dated this 23rd day of June, 2000.



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Attorneys for Plaintiffs



---

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

**FILED**

VOICEXPRESS INFORMATION SYSTEMS, )  
INCORPORATED, an Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
EFFICIENT NETWORKS, INCORPORATED, )  
a Delaware corporation, )  
 )  
Defendant. )

JUN 22 2000  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 00-CV-0176H (J)

**ENTERED ON DOCKET**  
DATE JUN 23 2000

**STIPULATION OF DISMISSAL WITH PREJUDICE**

COME NOW the Plaintiff, VoiceXpress Information Systems, Incorporated ("VEXIS") and the Defendant, Efficient Networks, Incorporated, and jointly stipulate to the dismissal of all claims herein with prejudice to the refile thereof.

WHEREFORE, the parties respectfully request an appropriate order be entered to memorialize their joint stipulation of dismissal.

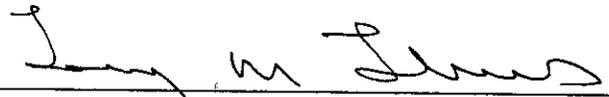
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Respectfully submitted,



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**ATTORNEYS FOR PLAINTIFF,  
VOICEXPRESS INFORMATION  
SYSTEMS, INCORPORATED**



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Tulsa, Oklahoma 74103-3313

AND

Steven A. Harr  
MUNSCH, HARDT, KOPF & HARR, P.C.  
1445 Ross Avenue  
4000 Fountain Place  
Dallas, Texas 75202-2790

**ATTORNEYS FOR THE DEFENDANT,  
EFFICIENT NETWORKS, INCORPORATED**

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

ST. PAUL RE-INSURANCE, LTD.,

Plaintiff,

vs.

GLEND A ANN McCORMICK,  
CHRISTINA V. WILEY and STATE  
INSURANCE FUND,

Defendants.

Case No. 99-CV-484-K (M)

ENTERED ON DOCKET  
DATE JUN 23 2000

FILED

JUN 22 2000 SAE

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

Plaintiff's Motion For Judgment As To State Insurance Fund and Attorney Fees As To Glenda Ann McCormick and Christina V. Wiley [Dkt. 11] has been referred to the undersigned United States Magistrate Judge for report and recommendation. Plaintiff requests: declaratory judgment that it owes no duty to defend its insured, McCormick, in a state court action brought by Wiley; declaratory judgment that it owes no duty to pay any judgment in the state court action; and judgment on attorneys fees and costs against defendants Wiley and McCormick in the total amount of \$13,391.41.

Background

According to the allegations in the complaint, Plaintiff St. Paul Re-Insurance, Ltd. ("St. Paul") issued a homeowner's insurance policy to Defendant Glenda Ann McCormick covering the period from April 26, 1997, to April 26, 1998. Defendant Christina V. Wiley brought an action against Defendant McCormick in Oklahoma State Court seeking damages for personal injuries sustained in an incident which occurred

on or about July 30, 1997. St. Paul provided Ms. McCormick a defense in the State Court action under a reservation of its rights under the policy as the terms of the insurance policy exclude coverage for intentional acts by an insured. St. Paul claims the acts giving rise to the state court action were intentional acts by its insured, McCormick. St. Paul's Complaint for Declaratory Relief filed in this court seeks "a Declaratory Judgment that no defense or indemnity is owed their insured McCormick for the claims made by Wiley in her State District Court action against defendant McCormick, and to grant St. Paul reimbursement for its costs and attorney fees in the defense of McCormick and any other relief the Court deems just and proper." [Dkt. 1, p.3].

Defendants McCormick and Wiley failed to answer, enter appearances, or otherwise respond to the complaint. By motion filed July 28, 1999, Plaintiff advised the court of Defendants' default and requested that a hearing be set to determine the amount of costs and attorneys fees to be included in the judgment. [Dkt. 6]. On August 18, 1999, the court entered an order finding that Defendants McCormick and Christina V. Wiley are in default and that judgment should be entered for Plaintiff, the amount to be determined on pleadings submitted by the parties. [Dkt. 9].

By motion dated September 30, 1999, Plaintiff requests that judgment be entered against the State Insurance Fund<sup>1</sup> and Defendants McCormick and Wiley. [Dkt. 11]. Specifically, Plaintiff asks that the court: (1) enter a Declaratory Judgment that

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<sup>1</sup> The State Insurance Fund filed an Amended Answer admitting the allegations in Plaintiff's First Amended Complaint for Declaratory Relief. [Dkt. 10].

the plaintiff owes no indemnity to the State Insurance Fund for any subrogated interest it may have in Wiley's State District Court suit against McCormick; (2) enter a Declaratory Judgment that plaintiff owes no duty to defend defendant McCormick in the State District Court action brought by defendant Wiley against McCormick or to pay any Judgment to defendant Wiley in the State District Court Action; and (3) that the court enter judgment on attorneys fees and costs against defendants Wiley and McCormick in the total amount of \$13,391.41, \$9,366.87 of which was incurred in the defense of McCormick in the State action. Counsel for Defendant Wiley entered his appearance and objected to Plaintiff's prayer for attorneys fees and costs against Defendant Wiley. [Dkt. 12]. The matter was referred to the undersigned United States Magistrate Judge. A hearing was held on June 1, 2000.

#### Analysis

Fed.R.Civ.P. 55 governs the entry of default judgments in federal court. Rule 55 mandates a two-step process for a party who seeks a default judgment in his favor. First, the party wishing to obtain a default judgment must apprise the court that the opposing party has failed to plead or otherwise defend by requesting "by affidavit or otherwise" that the clerk enter default on the docket. Fed.R.Civ.P. 55(a). Second, following an entry of default, "the party entitled to a judgment by default shall apply to the court therefor." Fed.R.Civ.P. 55(b)(2); *See also Meehan v. Snow*, 652 F.2d 274, 276 (2nd Cir. 1981).

The court's August 18 Order states: "IT IS THEREFORE ORDERED that Plaintiff be reimbursed for its costs and attorneys fees in the defense of Glenda Ann

McCormick and Christina V. Wiley as of the date of this Order." [Dkt. 9] [emphasis supplied]. Plaintiff argues the quoted statement constitutes a finding that it is entitled to judgment against its insured, Glenda Ann McCormick, and against Christina V. Wiley for the costs and attorneys fees it incurred defending its insured in a state court action brought by Ms. Wiley. Plaintiff additionally requests costs and attorneys' fees in this action. In its moving papers Plaintiff characterizes the August 18, 1999, Order as a "judgment in favor of the plaintiff." [Dkt. 11]. However, that order is not a judgment. Since the docket contains no entry of default as contemplated by Rule 55(a), the August 18 Order is properly viewed as a Rule 55(a) entry of default. Consequently, the motion before the court is properly viewed as the second step in the two-step Rule 55 process, which calls for a determination of the amount of judgment and entry of judgment.

According to Wright & Miller, 10A Fed. Prac.& Proc. Civ.3d § 2685, Rule 55(b)(2) requires the district judge to exercise sound judicial discretion in determining whether the judgment should be entered. This means that the court should consider a number of factors that may appear from the record before it, including: the amount of money potentially involved; whether material issues of fact exist; whether Plaintiff has been substantially prejudiced by the delay resulting from the default; how harsh an effect a default judgment might have; whether the default is largely technical or due to a good faith mistake or by excusable or inexcusable neglect; and whether the judgment would be meaningless because the court may later be obligated to set aside the default on defendant's motion. *Id.* Consideration of the aforementioned factors

and the facts and circumstances of this case leads the court to the conclusion that, while St .Paul is entitled to a Declaratory Judgment that it owes no duty to defend or indemnify, it should not be awarded monetary judgment against either Defendant for any attorneys' fees or costs.

The record suggests absolutely no legal basis for a monetary award against Ms. Wiley and the court can envision none. Ms. Wiley has no relationship whatsoever with St. Paul. Ms. Wiley was the Plaintiff in a state action for damages which she brought against an insured of St. Paul. Counsel for St. Paul urges that Ms. Wiley engaged in "artful pleading" so that her claim against St. Paul's insured would be covered by insurance. The court notes, however, that Ms. Wiley was represented by counsel and there is nothing in the record to suggest that Ms. Wiley personally played any part in the alleged "artful" drafting of the state court pleadings. If there was "artful" pleading by Ms. Wiley's attorney, an issue the undersigned does not address, that is a matter properly addressed by the state court. Accordingly, the undersigned recommends that the court decline to award any costs or attorneys fees against Ms. Wiley.

Concerning Ms. McCormick, as far as the court can tell from the record before it, Ms. McCormick did nothing more than make a claim under her policy. The expenditure of funds providing Ms. McCormick's defense was entirely within St. Paul's control. Although St. Paul believed that Ms. McCormick's actions in harming Ms. Wiley were intentional, and were therefore not covered by the policy of insurance, it none-the-less tendered a defense, albeit while reserving its rights under the policy. St. Paul could have simply declined coverage. Ms. McCormick should not have to pay

costs and fees incurred because St. Paul decided to defend under a reservation of rights and seek declaratory judgment. Under these circumstances, the undersigned recommends that the court decline to enter judgment for reimbursement of defense costs, damages or attorney fees.

**Conclusion**

The undersigned recommends that the court enter a Declaratory Judgment<sup>2</sup> that St. Paul owes no duty to defend Defendant McCormick or pay any judgment to Defendant Wiley for the claims made by Defendant Wiley in the State District Court action brought by Defendant Wiley against Defendant McCormick.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the District Court for the Northern District of Oklahoma within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Haney v. Addison*, 175 F.3d 1217, 1219-20 (10th Cir. 1999), *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 22<sup>nd</sup> Day of June, 2000.

**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

23 Day of June 2000.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

A proposed judgment is attached hereto as Exhibit "A."

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

ST. PAUL RE-INSURANCE, LTD.,

Plaintiff,

vs.

GLEND A ANN McCORMICK,  
CHRISTINA V. WILEY and STATE  
INSURANCE FUND,

Defendants.

Case No. 99-CV-484-K (M)

JUDGMENT

This action was commenced by the filing of a Complaint For Declaratory Judgment and Issuance of Summons, copies of which were served on Defendants by certified mail. Defendant State Insurance Fund filed its answer admitting all allegations of the Complaint. Defendants McCormick and Wiley failed to appear, answer or otherwise move with respect to the Complaint before the time therefor expired.

Pursuant to Plaintiff's application for default pursuant to Fed.R.Civ.P. 55(b)(2), it is hereby ADJUDGED AND DECLARED that Plaintiff, St. Paul Insurance, Ltd., owes no duty to defend Defendant McCormick or pay any judgment to Defendant Wiley for the claims made by Defendant Wiley in the State District Court action brought by Defendant Wiley against Defendant McCormick.

DATED this \_\_\_\_ Day of \_\_\_\_\_, 2000.

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Terry C. Kern  
UNITED STATES DISTRICT JUDGE

"Exhibit A"

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

**F I L E D**

JUN 22 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARY ELIZABETH VARNER, )  
 )  
 Plaintiff, )

v. )

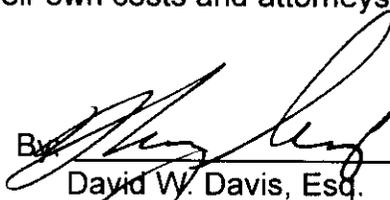
Case No. 99-CV-0965 E (E)

JOPLIN-JOHNSTON INDUSTRIAL )  
 SUPPLY d/b/a JOPLIN INDUSTRIAL )  
 SUPPLY, and AMERICAN AIRLINES, )  
 )  
 Defendants. )

ENTERED ON DOCKET  
DATE JUN 23 2000

**STIPULATION OF DISMISSAL WITH PREJUDICE**

Pursuant to Fed.R.Civ.P. 41(a)(1), Plaintiff Mary Elizabeth Varner and Defendant American Airlines, Inc. ("American"), by and through their attorneys of record, hereby jointly stipulate to the dismissal of Plaintiff's claims against American in the above-styled action, with prejudice, each party to bear their own costs and attorneys' fees incurred herein.

By  

David W. Davis, Esq.  
Harry W. Champ, Esq.  
406 S. Boulder, Suite 400  
Tulsa, Oklahoma 74103

Attorneys for Plaintiff,  
MARY ELIZABETH VARNER

21

015

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

OF COUNSEL:

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Tulsa, Oklahoma 74103-4344  
(918) 586-5711

BY: John A. Bugg  
John A. Bugg  
3700 First Place Tower  
15 East Fifth Street  
Tulsa, OK 74103-4344  
(918) 586-5711  
(918) 586-8547 (Facsimile)

Attorneys for Defendant,  
AMERICAN AIRLINES, INC.

**CERTIFICATE OF SERVICE**

I, John A. Bugg, hereby certify that on the 22<sup>nd</sup> day of June, 2000, a true and correct copy of the above and foregoing instrument was mailed to the following via first class mail, with proper postage thereon fully prepaid:

Brian E. Dittrich, Esq.  
Linda M. Szuhly, Esq.  
Whitten, McGuire, Wood, Terry, Roselius & Dittrich  
3600 First Place Tower  
15 E. Fifth Street  
Tulsa, Oklahoma 74103

John A. Bugg  
John A. Bugg

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

**FILED**

JUN 23 2000 *flw*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JASPER GEORGE PITTS, JR., )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 RON CHAMPION, )  
 )  
 Respondent. )

No. 97-CV-761-C ✓

ENTERED ON DOCKET  
DATE JUN 23 2000

**JUDGMENT**

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 22<sup>nd</sup> day of June, 2000.

*H. Dale Cook*  
H. DALE COOK, Senior Judge  
UNITED STATES DISTRICT COURT

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

**FILED**

JUN 23 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JASPER GEORGE PITTS, JR., )  
)  
Petitioner, )  
)  
vs. )  
)  
RON CHAMPION, )  
)  
Respondent. )

No. 97-CV-761-C

ENTERED ON DOCKET  
DATE JUN 23 2000

**ORDER**

Before the Court for consideration is the petition for a writ of habeas corpus (Docket #1), filed by Petitioner, a state inmate appearing *pro se*. Respondent has filed a response pursuant to Rule 5, *Rules Governing Section 2254 Cases* (Docket #5). Petitioner has filed a reply to Respondent's response (#11). For the reasons discussed below, the Court finds the petition for writ of habeas corpus should be denied.

**BACKGROUND**

Petitioner attacks his conviction entered in Tulsa County District Court, Case No. CF-95-2344. On October 12, 1995, a jury found Petitioner guilty of Larceny of Merchandise From a Retailer, After Former Conviction of Two or More Felonies, and recommended a sentence of fifty (50) years imprisonment. The trial judge sentenced Petitioner according to the jury's recommendation.

Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals ("OCCA"). On direct appeal, Petitioner raised the following propositions of error:

Proposition I: The trial court reversibly erred by allowing the state to amend the

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information after the close of evidence.

Proposition II: The appellant was denied a fundamentally fair trial by prosecutorial misconduct.

Proposition III: The trial court erred by overruling the appellant's motion for directed verdict in the second stage proceedings.

Proposition IV: Instructions which failed to accurately describe the burden of proof for purposes of the punishment stage of trial requires reversal for fundamental error.

(#5, Ex. D). On August 9, 1996, the OCCA entered its unpublished summary opinion affirming Petitioner's conviction and sentence. (#5, Ex. A).

Thereafter, Petitioner filed an application for post-conviction relief in the state trial court alleging that he was denied the effective assistance of appellate counsel because appellate counsel failed to allege ineffective assistance of trial counsel on direct appeal. Petitioner argued his trial counsel was ineffective for failing to (1) impeach key prosecution witness with prior inconsistent statements, (2) move for suppression of the second page information, (3) adequately cross-examine key prosecution witness. Petitioner also asserted that his appellate counsel failed "to adequately raise the issue with regard to the trial court allowing the State to amend the information at the close of evidence." See #5, Ex. B. The requested relief was denied by order filed February 13, 1997. Petitioner filed a post-conviction appeal in the OCCA where the denial of relief was affirmed on May 20, 1997. (#5, Ex. C).

Petitioner commenced the instant habeas corpus action on August 20, 1997. He raises four (4) grounds of error as follows:

Ground One: The trial court violated the petitioner's Due Process rights by allowing the State to amend the Information after the close of evidence.

Ground Two: Prosecutorial misconduct rendered the petitioner's state court trial

fundamentally unfair within meaning of due process clause of Fourteenth Amendment.

Ground Three: The evidence was insufficient from which a rational trier of fact could have found that the state sustained its burden of proof to show that the petitioner was a recidivist. Therefore, the jury should not have found the petitioner guilty of the second or subsequent offender charge.

Ground Four: Petitioner was denied the effective assistance of counsel on direct appeal.

(#1). In response (#5), Respondent argues that Petitioner is not entitled to habeas corpus relief on any of his claims adjudicated by the OCCA on direct and post-conviction appeal based on the standard imposed by 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act (“AEDPA”).

### *ANALYSIS*

#### **A. Applicability of AEDPA**

Petitioner filed his petition on August 20, 1997, after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act (“AEDPA”). Therefore the AEDPA’s amendments to the habeas statutes apply to this case. Michael Williams v. Taylor, 120 S.Ct. 1479, 1486 (2000) (citing Lindh v. Murphy, 521 U.S. 320 (1997)).

#### **B. Exhaustion**

As an initial matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b); see also Rose v. Lundy, 455 U.S. 509, 510 (1982). Respondent concedes (see #5) and the Court finds that Petitioner has exhausted his state remedies by presenting his claims to the OCCA on direct or post-conviction appeal. Therefore, the Court

finds that Petitioner meets the exhaustion requirements under the law.

**C. Evidentiary hearing**

The Court finds that an evidentiary hearing is not necessary as Petitioner has not met his burden of proving entitlement to an evidentiary hearing. See Michael Williams v. Taylor, --- U.S. ---, 120 S.Ct. 1479 (2000); Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998). Petitioner in this case made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court. See Michael Williams, 120 S.Ct. at 1490. Therefore, he shall not be deemed to have "failed to develop the factual basis of a claim in state court," and he is excused from showing compliance with the balance of § 2254(e)(2)'s requirements. Michael Williams, 120 S.Ct. at 1491; Miller, 161 F.3d at 1253. As a result, a determination of Petitioner's entitlement to an evidentiary hearing is governed by standards in effect prior to enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") rather than by 28 U.S.C. § 2254(e)(2), as amended by the AEDPA. Miller, 161 F.3d at 1253. Under pre-AEDPA standards, in order to be entitled to an evidentiary hearing, a petitioner must make allegations which, if proven true and "not contravened by the existing factual record, would entitle him to habeas relief." Id. Petitioner's claims in this case may be resolved based on the record. As a result, Petitioner is not entitled to an evidentiary hearing.

**C. 28 U.S.C. § 2254(d) Standard**

The AEDPA amended the standard to be applied by federal courts reviewing constitutional claims brought by prisoners challenging state convictions. Pursuant to § 2254(d),

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

adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In Terry Williams v. Taylor, --- U.S. ---, 120 S.Ct. 1495, 1523 (2000)

(O'Connor, J., concurring), the Supreme Court provided guidance in applying § 2254(d) as follows:

. . . § 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 § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied -- the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." 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.

In the instant case, each of Petitioner's claims was considered on the merits and rejected by the Oklahoma Court of Criminal Appeals on direct or post-conviction appeal. Therefore, § 2254(d) guides this Court's analysis of Petitioner's claims.

**D. Petitioner's claims**

For the reasons discussed below, the Court finds that each of Petitioner's claims should be denied.

1. *Amendment of Information violated Petitioner's due process rights (Claim 1)*

As his first proposition of error, Petitioner asserts that the trial court erred by allowing the State to amend the Information to conform to the evidence after the State had presented its evidence at trial. (#1 at 4). The record before the Court demonstrates that the original Information charged Petitioner with Grand Larceny and specified that the value of the property taken exceeded \$500.00. (#5, Ex. E). However, at the Preliminary Hearing, the State's witness testified that the total value of the property was "about \$500.00 or something like that." (Prelim. Hrg. Trans. at 19). Based on the lack of evidence conclusively demonstrating that the value of the property exceeded \$500.00, the trial court directed that the Information be amended accordingly. As a result, an Amended Information was filed, charging Petitioner with Larceny of Merchandise from Retailer and specified that the value of the property was in excess of \$50.00 but less than \$500.00, a violation of Okla. Stat. tit. 21, § 1731(4). (#5, Ex. F). At trial, the State's witness testified that the total value of the property was \$543.00. After the State rested, the trial judge allowed the Information to be again amended to Larceny of Merchandise from Retailer in excess of \$500.00, a violation of Okla. Stat. tit. 21, § 1731(5), in order to conform to the evidence. (Trans. Vol. II, at 112). The trial court judge also allowed counsel for Petitioner the opportunity to request a continuance to prepare a defense to the amended information. (Trans. Vol. II, at 117-18). Petitioner's counsel declined to request either a continuance or that the case be reopened for consideration of additional evidence in defense of the amended information. (Id.)

Petitioner argues that the amendment to the Information allowed at the close of the State's evidence converted the crime charged from a misdemeanor, under Okla. Stat. tit. 21, § 1731(4), to

a felony, under Okla. Stat. tit. 21, § 1731(5), and resulted in a denial of due process. See #11.<sup>1</sup> The determination of whether a crime is a misdemeanor or a felony clearly involves the interpretation and application of state law. It is well-established that habeas corpus relief does not lie for error of state law. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (stating that "[i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States"). However, a defendant is entitled to fair notice of the criminal charges against him under the Sixth Amendment's right to a fair trial and the Fourteenth Amendment's guarantee of due process, and claims that a charging instrument violated due process by not providing such fair notice are cognizable in habeas corpus actions. See Hunter v. New Mexico, 916 F.2d 595, 598 (10<sup>th</sup> Cir. 1990). Therefore, to the extent Petitioner's claim is premised on due process concerns, the Court will examine whether the OCCA's rejection of this claim was a reasonable application of due process principles to the facts of Petitioner's case.

A charging instrument is sufficient under constitutional standards if it sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert a double jeopardy defense. See Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Dashney, 117 F.3d 1197, 1205 (10<sup>th</sup> Cir. 1997). The Court finds that under the facts of this case, Petitioner had fair notice of the charges against him

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<sup>1</sup>The Court notes that Petitioner's argument has been rejected by the OCCA. See Walker v. State, 953 P.2d 354, 356 (Okla. Crim. App. 1998) (holding that the crime defined by Okla. Stat. tit. 21, § 1731(4) is a felony). In Walker, the defendant, unlike Petitioner in the instant case, had only one prior felony conviction. Therefore, Okla. Stat. tit. 21, § 51(A) applied and the defendant's sentence could be enhanced only if he had been convicted on an offense punishable by imprisonment in the penitentiary. Since § 1731(4) provides for punishment by incarceration in the county jail, the defendant's sentence could not be enhanced under § 51(A). See Walker, 953 P.2d at 356. In contrast, if a defendant has two or more prior felony convictions, the sentence for any felony crime, regardless of punishment, may be enhanced under § 51(B). Id. Thus, in the instant case, had Petitioner been convicted under § 1731(4) instead of § 1731(5), his conviction would have been a felony and subject to enhancement under § 51(B).

sufficient to respond and to prepare an adequate defense. While the value of the property at issue could certainly impact the severity of the sentence received where a defendant has either no or only one prior felony convictions, the value of the property would not impact a defendant's preparation of a defense to the crime of Larceny of Merchandise from a Retailer during the first stage of a two stage proceeding. In addition, in the instant case, the value of the property involved had no effect on any anticipated defense during the sentencing stage, given Petitioner's prior criminal record reflecting at least eight (8) prior felony convictions. The Court also finds it significant that Petitioner was afforded but declined the opportunity to request to reopen or seek a continuance after the Information was amended to conform to the evidence presented at trial. As a result, the Court finds that under these facts, the amendment of the Information after the close of the case was not violative of due process and the OCCA's rejection of this claim was a reasonable application of due process principles to the facts of Petitioner's case. Therefore, habeas corpus relief on this claim should be denied.

2. *Prosecutorial misconduct (Claim 2)*

As his second proposition of error, Petitioner alleges that he was denied due process as a result of prosecutorial misconduct. Specifically, Petitioner asserts that the prosecutor impermissibly aligned himself with the jurors in an attempt to curry favor, by stating during *voir dire* as follows:

As the judge stated earlier, my name is Lynn Anderson. I represent the State, the people of the great State of Oklahoma. I represent everybody in this room as well.

(Trans. Vol. I, at 58). Petitioner also claims that during *voir dire*, the prosecutor made the following statements resulting in an unfair trial:

My job in the courtroom is to be – my job is to be accountable. I'm here to present evidence to you and hold that man over there accountable for his actions. That is my

job in this courtroom and during this trial.

(Trans. Vol. I, at 66); and

My job being an accountability and proving the facts of this case. Does everybody here know what [defense counsel's] job is? Does everybody understand what her role is in this trial? That role is to get that man off these charges.

(Trans. Vol. I, at 68). Lastly, Petitioner alleges that during closing argument, the prosecutor gave his personal opinion when he stated that "I have proved the elements beyond a reasonable doubt" (Trans. Vol. II, at 137) and that he argued outside the record when he stated that the store resealed their boxes. Trans. Vol. II, at 136).

Petitioner raised his claim of prosecutorial misconduct in his state direct appeal. (See #5, Ex. D). The OCCA adjudicated the claim. Therefore, this Court may grant habeas corpus relief only if Petitioner satisfies the § 2254(d) standard as discussed above. After reviewing the record in this case, the Court finds Petitioner has failed to make the requisite showing.

Habeas corpus relief is available for prosecutorial misconduct only when the prosecution's conduct is so egregious in the context of the entire trial that it renders the trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 642-648 (1974); Cummings v. Evans, 161 F.3d 610, 618 (10th Cir.1998), *cert. denied*, --- U.S. ----, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999). Inquiry into the fundamental fairness of a trial requires examination of the entire proceedings. Donnelly, 416 U.S. at 643. "To view the prosecutor's statements in context, we look first at the strength of the evidence against the defendant and decide whether the prosecutor's statements plausibly could have tipped the scales in favor of the prosecution." Fero v. Kerby, 39 F.3d 1462, 1474 (10th Cir. 1994) (quotations omitted); see also Smallwood v. Gibson, 191 F.3d 1257, 1275-76 (10th Cir. 1999).

After reviewing the entire trial transcript, this Court does not find the OCCA's ruling to be an unreasonable application of constitutional law. Even assuming that the specific instances of

alleged misconduct were improper, this Court finds, based on careful review of the record of the entire proceedings, that none of the prosecutor's comments were of sufficient magnitude to influence the jury's decision. The jury in this case heard three witnesses testify that Petitioner was the man who loaded three boxes of heaters into his car outside of Locke Supply and then drove away. The witnesses were only 3 to 10 feet away from Petitioner at the scene of the crime (Trans. Vol. II, at 18, 38, 51 and 85). Each witness positively selected Petitioner from a photo lineup eight days after the theft of the heaters. (Trans. Vol. II, at 24, 58 and 83). Each witness identified Petitioner in open court. (Trans. Vol. II, at 19, 56 and 76). In light of the overwhelming evidence establishing Petitioner's guilt, there is no reasonable probability that the verdict in this case would have been different without the alleged misconduct. Therefore, the Court concludes that the proceedings against Petitioner were not rendered fundamentally unfair by prosecutorial misconduct. Petitioner is not entitled to habeas relief on this claim.

3. *Challenge to the sufficiency of the evidence of prior convictions (Claim 3)*

As his third proposition of error, Petitioner alleges that the evidence was insufficient from which a rational trier of fact could have found that the state sustained its burden of proof to show that the petitioner was a recidivist. The OCCA rejected this claim on direct appeal.

The enhancement issue raised by Petitioner is a matter of state law and as such is generally not reviewable by a federal court in a habeas corpus action. When reviewing a state court conviction, a federal court is limited to violations of federal constitutional and statutory law. A federal court has no authority to review a state's interpretation or application of its own laws. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Lujan v. Tansy, 2 F.3d 1031, 1036 (10th Cir. 1993).

However, Petitioner argues in reply to Respondent's response that because his sentence was

enhanced based on insufficient evidence, his resulting conviction constitutes a denial of due process. See #11 at 6. The Court disagrees with Petitioner and finds that the Judgements and Sentences which the State introduced during the second stage proceedings were sufficient to sustain the State's burden of proving the prior convictions under Oklahoma law. See Welliver v. State, 620 P.2d 438, 440 (Okla. Crim. App. 1980) (certified copy of a judgment and sentence constitutes prima facie evidence of a prior conviction for enhancement purposes). Once the state has introduced a certified copy of any prior judgment and sentence, the burden of producing evidence shifts to the defendant to rebut the prima facie case, while the state retains the ultimate burden of proving the prior conviction. Mitchell v. State, 659 P.2d 366, 369 (Okla. Crim. App. 1983).

In Parke v. Raley, 506 U.S. 20, 33-34 (1992), the Supreme Court found that this procedure comported with due process requirements. See also Mansfield v. Champion, 992 F.2d 1098, 1105-06 (10<sup>th</sup> Cir. 1993) (noting that the Kentucky procedure analyzed in Parke is virtually identical to the Oklahoma procedure). While the better practice would be for the prosecution to introduce other supporting evidence as set out in Cooper v. State, 810 P.2d 1303, 1306 (Okla. Crim. App. 1991), the Oklahoma Court of Criminal Appeals has recognized that identity of name is sufficient when the defendant's name is unique. Battenfield v. State, 826 P.2d 612, 614 (Okla. Crim. App. 1991). In the instant case, Petitioner's name is not common and his prior offenses were all perpetrated in the same county, the County of Tulsa. The Court finds that the evidence of the prior convictions was sufficient to satisfy due process requirements as established by the Supreme Court.

Petitioner has failed to demonstrate that the OCCA's rejection of this claim involved an unreasonable application of Supreme Court precedent to the facts of this case. As a result, Petitioner is not entitled to habeas corpus relief on this claim.

4. *Ineffective assistance of appellate counsel (Claim 4)*

As his fourth proposition of error, Petitioner asserts that he was denied effective assistance of appellate counsel in violation of the Sixth Amendment when his appellate counsel failed (1) to assert a claim of ineffective assistance of trial counsel based on counsel's failure to impeach a key prosecution witness with prior inconsistent statements, to move for suppression of the second page information, and to adequately cross-examine a key prosecution witness; and (2) to adequately raise the issue of the amendment of the Information allowed at the close of evidence. Petitioner presented this claim on post-conviction appeal before the OCCA. See #5, Ex. C. The OCCA considered and rejected the claim. Id.

It is well established that to prevail on an ineffective assistance of appellate counsel claim, a habeas petitioner must satisfy the two-pronged standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984). See Murray v. Carrier, 477 U.S. 478, 488-89 (1986); United States v. Cook, 45 F.3d 388, 394-95 (10th Cir. 1995). The Strickland test requires a showing of both deficient performance by counsel and prejudice to Petitioner as a result of the deficient performance. 466 U.S. at 687. To satisfy the deficient performance prong of the test, Petitioner must overcome a strong presumption that counsel's conduct fell within the "wide range of reasonable professional assistance [that] . . . might be considered sound trial strategy." Brecheen v. Reynolds, 41 F.3d 1343, 1365 (10th Cir. 1994) (citations omitted). "A claim of ineffective assistance must be reviewed from the perspective of counsel at the time and therefore may not be predicated on the distorting effects of hindsight." Id. (citations omitted). Finally, the focus of the first prong is "not what is prudent or appropriate, but only what is constitutionally compelled." Id. To establish the prejudice prong of the test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceedings would have been different." Strickland, 466 U.S. at 694. Failure to establish either prong of the Strickland standard will result in denial of relief. Id. at 696.

In the instant case, the OCCA rejected Petitioner's claim of ineffective assistance of appellate counsel on post-conviction appeal. The OCCA applied the Strickland standard in evaluating Petitioner's claim. Therefore, this Court may grant habeas relief only if Petitioner satisfies the § 2254(d) standard, i.e., only if Petitioner demonstrates that the OCCA's resolution of the claim was an unreasonable application of Strickland to the facts of Petitioner's case. 28 U.S.C. § 2254(d); Williams v. Taylor, --- U.S. ---, 120 S.Ct. 1495, 1523 (2000) (J. O'Connor, concurring). After reviewing the record in this case, the Court finds Petitioner has failed to make the requisite showing.

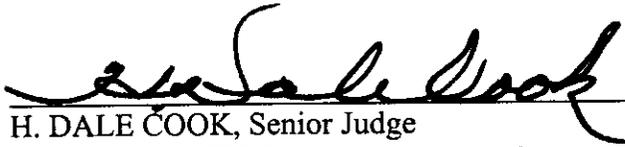
Without addressing the performance prong of the Strickland standard, the Court finds that Petitioner has not shown that he was prejudiced by his appellate attorney's allegedly deficient performance. Each of Petitioner's claimed instances of ineffective assistance of trial counsel is patently without merit and would have had no impact on the outcome of Petitioner's appeal had the claims been asserted by appellate counsel. In addition, the Court has determined in Part D(1) above, that Petitioner's claim regarding the amendment of the Information is without merit. Therefore, appellate counsel's failure to raise the claim "adequately" cannot constitute ineffective assistance of counsel. As a result, the Court finds that the OCCA's rejection of this claim on post-conviction appeal was not an unreasonable application of the legal principles announced by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), to the facts of Petitioner's case. Petitioner has failed to satisfy the § 2254(d) standard and habeas corpus relief on his ineffective assistance of appellate counsel claim should be denied.

**CONCLUSION**

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

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

SO ORDERED this 22<sup>nd</sup> day of June, 2000.

  
H. DALE COOK, Senior Judge  
UNITED STATES DISTRICT COURT

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

ENTERED ON DOCKET  
DATE JUN 23 2000

In re: )  
)  
COMMERCIAL FINANCIAL )  
SERVICES, INC., and )  
)  
CF/SPC NGU, INC., )  
)  
Debtors and Debtors-in-Possession, )  
)  
COMMERCIAL FINANCIAL SERVICES, INC., )  
)  
Plaintiff, )  
)  
v. )  
)  
GERTRUDE A. BRADY, )  
)  
Defendant. )

Case No. 98-05162-R  
Chapter 11

Case No. 98-05166-R  
Chapter 11 Jointly Administered  
with Case No. 98-05162-R

Case No. 99-CV-402-H ✓

**FILED**

JUN 22 2000 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of the Defendant, Gertrude A. Brady, and against the Plaintiff, Commercial Financial Services, Inc., pursuant to and in accordance with the "Order Disposing of All Claims of Plaintiff Commercial Financial Services, Inc. and Defendant Gertrude A. Brady" entered by this Court contemporaneously herewith, as follows:

A. Judgment is entered in favor of Ms. Brady and against CFS on Count VI (breach of contract) of the Second Amended Complaint.

B. Judgment is entered in favor of Ms. Brady and against CFS on Count I (fraud), Count II (breach of fiduciary duty), Count III (conversion of estate property), Count IV

(unauthorized post-petition transfers), Count V (violations of the automatic stay) and Count VII (breach of warranty) of the Second Amended Complaint.

C. Counts VIII and IX of the Second Amended Complaint are dismissed with prejudice.

D. Count X of the Second Amended Complaint is dismissed without prejudice.

IT IS SO ORDERED.

This 22<sup>ND</sup> day of June, 2000.



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Sven Erik Holmes  
United States District Judge

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

**FILED**

JUN 22 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

In re: )  
)  
COMMERCIAL FINANCIAL )  
SERVICES, INC., and )  
)  
CF/SPC NGU, INC., )  
)  
Debtors and Debtors-in-Possession, )  
)  
COMMERCIAL FINANCIAL SERVICES, INC., )  
)  
Plaintiff, )  
)  
v. )  
)  
GERTRUDE A. BRADY, )  
)  
Defendant. )

Case No. 98-05162-R  
Chapter 11

Case No, 98-05166-R  
Chapter 11 Jointly Administered  
with Case No. 98-05162-R

Case No. 99-CV-402-H

ENTERED ON DOCKET

DATE JUN 23 2000

**ORDER DISPOSING OF ALL CLAIMS OF PLAINTIFF COMMERCIAL  
FINANCIAL SERVICES, INC. AND DEFENDANT GERTRUDE A. BRADY**

By order of the Court, this case proceeded to a jury trial on Count VI (breach of contract) of the Second Amended Complaint filed by the Plaintiff, Commercial Financial Services, Inc. ("CFS"), and the defense thereto (constructive termination) of the Defendant, Gertrude A. Brady, under the Management Retention Agreement between CFS and Ms. Brady.

By order of the Court, the jury was submitted a Verdict Form which required the jury to answer two questions. A copy of the Verdict Form is attached hereto as Exhibit A.

The jury returned its verdict on June 6, 2000, answering both questions on Exhibit A, finding that Ms. Brady was constructively terminated and that Ms. Brady was not terminated for cause.

At a pre-verdict hearing conducted on June 1, 2000, the Court found clear and convincing evidence that the testimony of CFS General Counsel Caroline Benediktson was not credible and found Ms. Benediktson in her capacity as General Counsel of CFS in contempt for her statements to the Court inter alia that she had no involvement in the instant litigation and that she had never seen the discovery requests of Defendant Brady. As a result of Plaintiff's failure to provide highly probative documents expressly requested by Defendant in discovery and the contumacious conduct which prevented the Court from determining whether Plaintiff's discovery violation was willful, the Court, pursuant to Fed. R. Civ. P. 37(d) struck CFS Exhibit #22. Also, pursuant to and in accordance with this sanction, the Court granted Brady's Rule 50 motion on the unauthorized transfer allegations of CFS in the Second Amended Complaint, finding as a matter of law the evidence did not support the claims of CFS that there was critical financial information on the computer equipment, that there was an ability to access the computers, and that the computers were owned by CFS.

At a pre-verdict hearing on June 6, 2000, the Court denied CFS's Rule 50 motion regarding Ms. Brady's constructive termination claim. At a post-verdict hearing conducted on June 7, 2000, the Court vacated its denial of CFS's Rule 50 motion and, by nunc pro tunc order, took such motion under advisement. The Court then granted CFS's Rule 50 motion notwithstanding the jury's verdict based on the Court's finding as a matter of law that the evidence did not support Ms. Brady's constructive termination claim.

Also at the post-verdict hearing on June 7, 2000, the matters set forth in subparagraphs a., b., and c. below were agreed to by CFS and Ms. Brady, and concurred in by the Court, assuming the correctness of the verdict rendered by the jury as to CFS's claim for termination of Ms. Brady

for cause. Nothing in such agreement of CFS and Ms. Brady prejudices CFS's right or ability to appeal the correctness of either the verdict rendered by the jury as to CFS's claim of termination of Ms. Brady for cause, or the Court's evidentiary and other rulings in this case:

a. Based upon (i) the verdict rendered by the jury as to CFS's claim for termination of Brady for cause, and (ii) the Court's ruling pursuant to Fed. R. Civ. P. 37(d), summary judgment is hereby entered against CFS on the following counts previously severed from this case (and, therefore not tried to the jury in this matter): Count I (fraud), Count II (breach of fiduciary duty), Count III (conversion of estate property), Count IV (unauthorized post-petition transfers), Count V (violations of the automatic stay) and Count VII (breach of warranty).<sup>1</sup>

b. Prior to the commencement of the trial, CFS had moved to dismiss voluntarily Counts VIII and IX, and Brady had requested that such dismissal be with prejudice. CFS does not object to such dismissal being with prejudice. Accordingly, Counts VIII and IX of the Second Amended Complaint shall be dismissed with prejudice.

c. CFS dismissed Count X (disallowance of claims), without prejudice to CFS interposing objections to any claims that are or may be filed by Brady in the bankruptcy cases of CFS and CF/SPC NGU, Inc., Case Nos. 98-05162-R and 98-05166-R, United States Bankruptcy Court for the Northern District of Oklahoma. Accordingly, Count X of the Second Amended Complaint shall be dismissed

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<sup>1</sup> The Court notes that this summary judgment is based on the record as established by the findings of fact by the jury in the trial of Count VI in this matter.

without prejudice.

At the post-verdict hearing conducted on June 7, 2000, the Court determined that all issues concerning attorneys' fees and expenses of litigation will be dealt with by the Court in due course, and as such neither this Order nor the Judgment to be entered pursuant to this Order and filed contemporaneously herewith shall address the subject of attorneys' fees and expenses of litigation.

IT IS SO ORDERED.

This 22<sup>ND</sup> day of June, 2000.

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

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

**F I L E D**

JUN 22 2000 SA

JACK L. NEAL,  
SSN: 442-44-2003,

Plaintiff,

v.

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

Defendant.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 99-CV-530-M ✓

**ENTERED ON DOCKET**

**DATE JUN 23 2000**

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 22<sup>nd</sup> day of June, 2000.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

JUN 22 2000 SA

JACK L. NEAL,  
SSN: 442-44-2003,

PLAINTIFF,

vs.

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

DEFENDANT.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE No. 99-CV-530-M

ENTERED ON DOCKET

DATE JUN 23 2000

ORDER

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

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence

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nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born July 31, 1945 and was 53 years old when the second hearing was conducted. [R. 49, 249]. He claims to have been unable to work since August 19, 1992 due to pain in his back, hip, legs, feet, shoulders and neck, and headache and high blood pressure. [R. 83]. He filed a claim with the Social Security Administration for disability insurance benefits on April 25, 1994, which was denied initially and upon reconsideration. [R. 49-51]. After a hearing, the ALJ entered a decision on September 8, 1995, denying benefits. [R. 14-23]. The Appeals Council affirmed and Plaintiff sought review in this court. On February 26, 1998, the decision was reversed and remanded back to the Commissioner for further development and for reassessment of Plaintiff's impairments after reconsideration of the evidence. [R. 283-294]. A supplemental hearing was conducted November 3, 1998. [R. 245-279]. The ALJ then entered a decision again denying benefits on December 8, 1998, which is the subject of this appeal. [R. 228-242].

In his second decision, the ALJ determined that Plaintiff has severe impairments consisting of degenerative joint disease of the right knee, bilateral post-traumatic neuromas of the feet after surgical excision of neuromas, cervical and dorsolumbar strains, hypertension and obesity but that he retains the residual functional capacity

(RFC) to perform light work: "diminished by his inability to perform tasks requiring more than occasional bending, squatting, crawling, or climbing stairs or ramps, no climbing ladders or scaffolds, can use feet for pushing/pulling and hands for repetitive movements and grasping/gripping, alternating positions from time to time (shift weight in chair, shift weight from one leg to the other), with mild to moderate chronic pain at a level to be noticeable to the claimant but not precluding attention and responsiveness, relieved by medications that reduce symptoms and allow the claimant to remain alert in a work setting." [R. 241]. He determined that Plaintiff could not return to his past relevant work (PRW) as a mechanic but found, based upon the testimony of a vocational expert (VE), that there were other jobs in the economy in significant numbers that Plaintiff could perform with those limitations. [R. 239-240]. He found, therefore, that Plaintiff was not disabled as defined by the Social Security Act. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ did not comply with the Court's February 26, 1998 order to address the impact of Plaintiff's foot problem upon his RFC. The Court disagrees. In its order, this Court found the ALJ's previous decision did not reflect that the ALJ had properly considered Plaintiff's surgery for neuromas in his feet or his complaints of foot pain because the ALJ had not mentioned or discussed that evidence. [R. 290-291]. The Court did not imply that the ALJ was required to find Plaintiff disabled by reason of his foot problem and, in fact, expressly declined to

dictate the result of such an evaluation. [R. 295]. In his December 8, 1998 decision, the ALJ discussed the medical evidence referred to by the Court in its February 26, 1998 order as well as the new evidence consisting of a report by Garrett Watts, M.D., who treated Plaintiff in 1992. [R. 231, 298]. Contrary to Plaintiff's contention, the ALJ analyzed the medical evidence and concluded Plaintiff's ability to stand and walk was limited up to two hours at a time, up to six hours in an eight hour work day. [R. 238]. The evidence of record supports this conclusion.

Plaintiff complains the ALJ's credibility analysis in his second decision was again based upon misrepresentations of the facts in the record. The Court's February 26, 1998 order pointed out to the Commissioner that the ALJ's statement in his previous decision that Plaintiff was taking only over-the-counter medication for relief of his pain symptoms was factually inaccurate. [R. 294]. This is not so in the decision at hand. At the supplemental hearing, Plaintiff testified he takes hydrocodone at night to help him sleep and nonprescription ibuprofen during the daytime. [R. 254]. He repeated that information on the list of current medications submitted to the ALJ at the supplemental hearing. [R. 347]. He also reported to Dr. Sutton at the July 26, 1998 examination that he was taking "only over the counter ibuprofen and Tylenol extra-strength." [R. 334]. This time, the ALJ accurately represented the evidence regarding Plaintiff's medication regimen. [R. 235-236].<sup>1</sup>

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<sup>1</sup> Although not cited by Plaintiff, the Court notes the ALJ apparently misunderstood Plaintiff's testimony regarding his ability to lift his grandchild. Plaintiff testified he and his wife are raising three granddaughters, ages 6, 9 and 11. [R. 249]. Plaintiff later testified he cannot lift his grandson who weighs about 15 to 20 pounds. [R. 265]. Although the ALJ discredited this part of Plaintiff's  
(continued...)

There is no dispute that Plaintiff suffers from medical impairments likely to cause pain and that there is a nexus between the impairments and his subjective complaints of pain. No evidence, however, establishes disabling pain. Plaintiff's testimony alone is not enough to prove disabling pain. Therefore, the Court defers to the ALJ's credibility determination that, although Plaintiff was subject to a degree of back and leg pains and headaches from the lumbar and cervical strains and foot pain from the neuroma excisions and resulting neuritis and that his RFC was reduced to accommodate those limitations, he was not incapable of all work activity at any exertional level. [R. 236]. The Court concludes there is substantial evidence showing Plaintiff's pain is not so severe that it precludes work activity and renders Plaintiff disabled.

Plaintiff challenges the ALJ's reasons for discrediting the RFC assessment of Dr. Pyles on March 30, 1993. However, the ALJ articulated specific and legitimate reasons for his conclusion. See *Goatcher v. United States Dep't of Health & Human Servs.*, 52 F.3d 288, 290 (10th Cir. 1995) (listing factors ALJ should consider, including support by relevant evidence and consistency with the record as a whole). The Court cannot reweigh the evidence as Plaintiff urges it to do. See *Hamilton*, 961 F.2d at 1500. Specifically, Plaintiff complains the ALJ violated the treating physician

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<sup>1</sup> (...continued)  
testimony because he was confused as to which grandchild Plaintiff claimed inability to lift, the ALJ ultimately concluded Plaintiff was limited to lifting 25 pounds occasionally and 10 pounds frequently. [R. 238]. There is sufficient evidence in the record to support the ALJ's conclusion in this regard.

rule by giving more weight to the opinion of Dr. Sutton, a consultative physician, than to Dr. Pyles, one of Plaintiff's treating physicians.

A treating physician's opinion about the nature and severity of a claimant's impairments will be given controlling weight under certain circumstances. *Reid v. Chater*, 71 F.3d 372, 374 (10th Cir. 1995); *Castellano*, 26 F.3d at 1029. A treating physician's opinion generally is favored over that of a consulting physician. *Talbot v. Heckler*, 814 F.2d 1456, 1463 (10th Cir. 1987). However, "[t]he treating physician rule governs the weight to be accorded the medical opinion of the physician who treated the claimant ...relative to other medical evidence before the factfinder, including opinions of other physicians." *Kemp v. Bowen*, 816 F.2d 1469, 1476 (10th Cir. 1987). Plaintiff was treated by Dr. Pyles and by specialists to whom he was referred by Dr. Pyles, for his back problems in 1992 and 1993. The RFC form filled out by Dr. Pyles in March 1993, listed extreme restrictions in Plaintiff's sitting, standing and walking activities but indicated Plaintiff could work 8-hour days. [R. 303-304]. Dr. Sutton's June 26, 1998 report was based upon a thorough examination of Plaintiff and a comprehensive understanding of Plaintiff's medical history. [R. 333-344]. As pointed out by Defendant, Dr. Sutton's opinion was rendered only 6 months after the expiration of Plaintiff's insured status and at a time that Plaintiff contended his condition had worsened. [R. 97, 262, 263]. The Court finds the ALJ properly gave more weight to the more recent examination and adequately stated his reasons for doing so. See *Goatcher*, 52 F.3d at 290.

Moreover, it is the ALJ, not the physician who decides a claimant's RFC. A medical source opinion that an individual has a particular RFC, that concerns whether an individual's RFC prevents him or her from doing past relevant work, or that concerns the application of vocational factors, is an opinion on an issue reserved to the Commissioner. Every such opinion must be considered in adjudicating a disability claim. However, the adjudicator will not give any special significance to such an opinion because of its source. See SSR 96-5p, "Titles II and XVI: Medical Source Opinions on Issues Reserved to the Commissioner." And, contrary to claimant's assertion, the ALJ did not rely conclusively on the consultative report from Dr. Sutton. His RFC determination flows from the medical evidence in the record as well as from his assessment of Plaintiff's impairments. Plaintiff asserts his treating physicians, Drs. Covington, Hayes, Altshuler and the Outbound Medical Network "all stated that he had trouble with prolonged standing, walking and sitting." Limitations on these activities were included by the ALJ in his hypothetical to the VE. The VE identified a significant number of jobs existing in the economy that would allow for these restrictions. Therefore, the conclusion that Plaintiff was not disabled when his insured status expired is supported by substantial evidence.

The ALJ's decision demonstrates that he considered all of the medical reports and other evidence in the record in his determination that Plaintiff retained the capacity to perform light work with restrictions. The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled.

Accordingly, the decision of the Commissioner finding Plaintiff not disabled is  
AFFIRMED.

Dated this 22<sup>nd</sup> day of JUNE, 2000.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

5-26-00  
7/8/00

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

NANCY KNIGHT, as Personal )  
Representative of the Estate of Andrew )  
James Ridgeway, deceased, )  
 )  
Plaintiff, )

vs. )

TIM C. McDANIEL, TRACEY R. )  
POWELL, DON LEWIS, JENKS POLICE )  
DEPARTMENT, CITY OF JENKS, and )  
CITY OF GLENPOOL, )  
 )  
Defendants. )

ENTERED ON DOCKET  
JUN 23 2000  
DATE \_\_\_\_\_

Case No. 00CV0106H (E)

**FILED**

JUN 22 2000 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Now upon this 19<sup>th</sup> day of May, 2000, this matter comes on for hearing upon Defendant's Motion to Dismiss. After reviewing Defendant's Motion to Dismiss, Plaintiff's Response and Defendant's Reply, and upon hearing the arguments of counsel, the Court ORDERS, ADJUDGES and DECREES that Defendant's Motion to Dismiss is granted in part and denied in part. Specifically, the Court makes the following rulings:

1. The Motion to Dismiss as to Defendant Chief of Police Larry Bible is granted.

The Court finds no basis for personal liability of Defendant Bible as plead in paragraph 10 of Plaintiff's Complaint.

2. The Motion to Dismiss as to Defendant City of Glenpool is denied.

The Court finds no heightened pleading standard to be required for a municipality pursuant to the language contained in Leatherman v. Tarrant County Narcotics Unit, 507 U.S. 163 (1993).

Additionally, the Court finds factual allegations raised by Defendant City of Glenpool as to the status of co-defendant Tracey Powell's on or off duty status at the time this incident occurred makes the Motion inappropriate for consideration under a Motion to Dismiss.

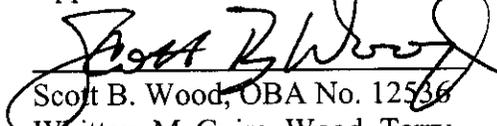
3. The Motion to Dismiss as to Defendant Glenpool Police Department is granted.

The Court finds that Defendant Glenpool Police Department is not a proper entity subject to suit and is therefore dismissed.

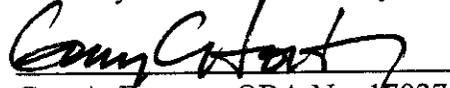
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss is granted in part and denied in part.

  
\_\_\_\_\_  
Judge Sven Holmes

Approved as to Form and Content:

  
\_\_\_\_\_  
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Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_ day of \_\_\_\_\_, 2000, a true and correct copy of the foregoing was mailed, with proper postage thereon, fully prepaid, to:

Clark O. Brewster  
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Stephen L. Oakley  
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Tulsa, Oklahoma 74119

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Scott B. Wood

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 23 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LORRI K. CROSS,

Defendant.

Case No. 00CV0160H(E) ✓

ENTERED ON DOCKET  
DATE JUN 23 2000

NOTICE OF DISMISSAL

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

Dated this 23rd day of June, 2000.

UNITED STATES OF AMERICA

Stephen C. Lewis  
United States Attorney

*Phil Pinnell*

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

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of June, 2000, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Lorri K. Cross, 2511 E 57th, , Tulsa, OK 74105.

*Ann L. Hankins*

Ann L. Hankins  
Financial Litigation Agent

cl<sup>2</sup>

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

FILED

JUN 22 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DON F. RATLIFF,  
SSN: 446-40-8427,

Plaintiff,

v.

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

Defendant.

CASE NO. 99-CV-466-M ✓

ENTERED ON DOCKET  
JUN 22 2000  
DATE \_\_\_\_\_

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 22<sup>nd</sup> day of June, 2000.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 22 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DON F. RATLIFF, )  
SSN: 446-40-8427, )

PLAINTIFF, )

vs. )

CASE No. 99-CV-466-M ✓

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

DEFENDANT. )

ENTERED ON DOCKET  
DATE JUN 22 2000

ORDER

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

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less

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<sup>1</sup> Plaintiff's August 1, 1995 (protective filing date July 5, 1995) application for Disability Insurance benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held March 4, 1997. By decision dated April 17, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on April 13, 1999. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born August 18, 1943 and was 53 years old at the time of the hearing. [R. 33, 83]. He claims to have been unable to work since July 1995 due to asthma with fatigue, cough and shortness of breath, headaches, hand tremor and memory and concentration problems.<sup>2</sup> [R. 131A].

The ALJ determined that Plaintiff has a severe impairment consisting of asthma, with associated symptoms of headaches, cough, shortness of breath and sinus congestion and drainage, but that he retains the residual functional capacity (RFC) to perform light work diminished by significant non-exertional limitations which require him to work in reasonably clean air. [R. 24]. He determined that Plaintiff is unable to perform his past relevant work (PRW) as assistant store manager, self-employed tool

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<sup>2</sup> Plaintiff's onset date is alleged to be November 25, 1993. [R. 40]. He resigned his job at Builders Square on July 24, 1995 after his employment disability insurance benefits ran out. [R. 42, 117].

salesman and manager. He found, however, based upon the testimony of a vocational expert (VE) that there are other jobs in the economy in significant numbers that Plaintiff could perform with those restrictions and concluded that Plaintiff is not disabled as defined by the Social Security Act. [R. 24, 27]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the decision of the ALJ is not supported by substantial evidence. He contends the ALJ's evaluation of the medical evidence was improper, that his analysis of Plaintiff's credibility was inadequate and that he erroneously relied upon a response of the VE to a hypothetical question which did not contain all of Plaintiff's impairments. Basically, Plaintiff challenges the ALJ's RFC assessment as contrary to his treating physician's opinion and as based upon an improper credibility determination. Incorporated within those arguments, Plaintiff complains that the ALJ misstated facts, misinterpreted the medical record, substituted his opinion for that of the treating physician, improperly used boilerplate language and conducted an incomplete inquiry during the hearing. For the reasons discussed below, the Court affirms the decision of the Commissioner.

Medical records from 1994 through 1996 indicate Plaintiff was treated at Springer Clinic in Tulsa, Oklahoma, by J.L. Myers, M.D., Scott C. Sexter, M.D., and Mark P. Britt, M.D. He was diagnosed with nasal polyposis in January 1994 after complaining of chronic sinus infections for several months. [R. 291-298]. Surgery to

remove nasal polyps and sinus duct debridement was performed in February 1994. [R. 290]. Plaintiff continued to complain of headache, shortness of breath, congestion and drainage and underwent allergy testing in March 1994 [R. 277-288]. In June 1994, Plaintiff complained of neck pain from a "pinched nerve" in his neck and was given pain medication and ibuprofen. [R. 275-276]. In August 1994, Plaintiff underwent "Asthma Education" by a registered nurse. [R. 272]. He was given a peak flow meter for "early recognition of asthma exacerbation and for back-up medication decisions." *Id.* Plaintiff's exposure to dust at work and to his wife's smoking was noted at that time. *Id.* At the follow-up appointment with the nurse in September 1994, Plaintiff reported he had a sinus infection and that he had to leave work to use the nebulizer. [R. 269]. Plaintiff was referred to Dr. Gifford, because of persistent nasal congestion and discharge complaints despite examinations that revealed "improving sinuses" and no polyposis. [R. 274]. X-rays and CT scans revealed mucosal thickening or fluid retention in the sinuses. [R. 265, 271]. Plaintiff continued treatment at Springer Clinic through the remainder of 1994 with frequent adjustments of medication in attempts to alleviate his symptoms. [R. 245-264]. In January 1995, Plaintiff was released to return to work. [R. 200-201, 244, 250-251]. Plaintiff did not return to work and was seen by Jerry H. Puckett, M.D., an ear, nose and throat specialist. [R. 180, 202]. A one-week restriction from work was signed by Dr. Britt on January 23, 1995, effective through January 31, 1995. [R. 196]. A March 29, 1995, treatment note by Dr. Sexter records Plaintiff's history and an assessment of steroid dependent asthma and nasal polyps with probable allergies. [R. 180]. An April

12, 1995 CT exam revealed progressive changes since 11/28/94 due to polyposis with total opacification (darkening) of most of paranasal sinuses, upper parts of nasal cavities and osteomeatal complexes. [R. 174]. Plaintiff continued treatment under Drs. Britt, Sexter and Puckett through 1995. [R. 141-173]. During that time, a chest X-ray was reported as negative and stable and Plaintiff's symptoms were reported as "controllable with medications" [R. 142, 158].

The ALJ's decision reflects a thorough, reasoned evaluation of the pertinent medical evidence which provides abundant support for the ALJ's findings on Plaintiff's breathing difficulties. [R. 19-21]. By way of challenge, Plaintiff cites the last treatment note found in the record which Plaintiff maintains is a "final opinion of Dr. Sexter that the claimant was disabled due to his 'underlying asthma'." [Plaintiff's Brief, p.6]. The note in question, dated January 13, 1997, reports that Plaintiff's "[a]sthma symptoms are fairly well controlled with current medications, although he has occasional exacerbations." [R. 330]. In the treatment plan portion of the note, Dr. Sexter wrote:

Patient informs me that he will be losing Pacificare insurance until 7/97 at which time he will be under his wife's plan. I explained to the patient that his asthma condition is most likely a chronic problem which will have unpredictable occasional exacerbations which may require more intense treatment including possible hospitalization. I informed Mr. Ratliff that I feel that he is disabled from a pulmonary standpoint due to his underlying asthma.

*Id.* In discussing this portion of Dr. Sexter's records, the ALJ stated:

Dr. Sexter's medical observations do not support a finding of disability. He consistently records only minor aberrations in lung findings and even a reduction in Prednisone, although the claimant is Prednisone-dependent. In fact, on

the same page, Dr. Sexter notes that the asthma is under fair control with medications and is better with the recent change to Accolate."

[R. 21]. Elsewhere in his decision, the ALJ also discussed Dr. Sexter's previous treatment notes as well as the records of Plaintiff's other treating and examining physicians. [R. 23-24]. It was always the opinion of his treating physicians, including Dr. Sexter, and his asthma educator, Registered Nurse Lee, that exacerbation of Plaintiff's symptoms was caused by dust and mold at his former work site. [R. 152, 269, 272]. And, as noted by the ALJ, although Plaintiff's physicians wrote that Plaintiff reported he had left work early, shortened his working hours, was unable to go back to work and was applying for disability, there is no indication they thought him incapable of performing any work activity as he was released to return to work or, when taken off work, it was only for specific periods of time with eventual return to work obviously expected. [R. 142, 145, 244, 251]. In fact, Plaintiff's treating physician described him as "disabled x 1 week" on January 23, 1995, the very day that he reported being short of breath after taking a shower and getting dressed. [R. 201].

The report in question is not inconsistent with the ALJ's determination that Plaintiff could not work at his past job and that he would need to work in reasonably clean air. [R. 24, 330]. Likewise, the letter from Dr. Britt dated January 16, 1997 serves as support for the ALJ's determination as it states that it is "difficult for [Plaintiff] to breathe in dusty environments and makes it difficult for him to work in these environments." [R. 332]. Neither doctor stated that Plaintiff is disabled from any

and all work activities due to asthma. The ALJ's RFC assessment, which found that Plaintiff is limited to light work diminished by significant non-exertional limitations which require him to work in reasonably clean air, is consistent with the medical records.

The ALJ's decision indicates the ALJ recognized the substantial weight to which Plaintiff's treating physicians' opinions are entitled. [R. 21]. See 20 CFR 416.927(d) (treating physician's opinion, if it is well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in claimant's record be given controlling weight); *Castellano*, 26 F.3d at 1029; *Frey v. Bowen*, 816 F.2d 508, 512 (10th Cir. 1987). Because the Court does not reweigh the evidence on appeal or substitute its judgment for that of the Commissioner, there is no reason to disturb the ALJ's decision regarding the opinions of Plaintiff's treating physicians. It is the ALJ's province, as fact finder, to decide the appropriate weight to be given medical evidence. *Kemp v. Bowen*, 816 F.2d 1469, 1476 (10th Cir.1987) (noting it is fact finder's responsibility to resolve genuine conflicts between opinion of treating physician and other contrary evidence). The record does contain substantial evidence supporting the ALJ's decision denying benefits. See *Glenn v. Shalala*, 21 F.3d 983, 987-88 (10th Cir.1994) (despite existence of evidence contrary to ALJ's finding, appellate court must affirm if, "considering the record as a whole, including whatever fairly detracts from the findings, there is sufficient evidence which a reasonable mind might accept as adequate to support a conclusion" (citation, further quotation omitted)). The Court's

role is to verify whether substantial evidence underlies the ALJ's decision, not to substitute its judgment for his. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992).

As to Plaintiff's peripheral complaints of the ALJ's review of the medical portion of the record, the Court finds the ALJ's misstatement regarding the peak flow threshold for Plaintiff's use of the nebulizer to be harmless as it is clear in reading the decision that the ALJ did not misinterpret this portion of the medical evidence. Likewise, the comments of the ALJ regarding Plaintiff's dosages of prednisone and its side effects do not indicate a misunderstanding of the medical record or a misinterpretation of the facts.

Plaintiff asserts that, because the ALJ expressed some doubt about the accuracy of the "diary," he was required to question him at the hearing regarding such concerns. He also complains about the ALJ's reference to his attendance at auto races and argues that the ALJ should have made further inquiry at the hearing regarding Plaintiff's activities. [Plaintiff's Brief]. The ALJ examined Plaintiff's diary and the disability reports wherein Plaintiff reported his daily activities. [R. 22-24]. Plaintiff admits his diary was an attempt to "reconstruct" a certain time period. [Plaintiff's Reply Brief]. At any rate, despite his reservations regarding the actual composition of the diary, the ALJ recognized that Plaintiff experiences breathing difficulties related to asthma that is exacerbated by exposure to dust and mold. Accordingly, he found Plaintiff was unable to return to his past work which required such exposure. It is also plain from the ALJ's decision that Plaintiff's attendance at auto races was just

one of a host of activities that the ALJ considered which led to the determination that Plaintiff is not disabled within the meaning of the Social Security Act. Review of the record reveals no evidence that overwhelms the ALJ's determination. In fact, the record contains ample support for the ALJ's credibility determination even without the diary and attendance at auto races evidence. [R. 44, 46, 63, 117, 118, 120, 127-128]. The Court finds no merit to Plaintiff's contention that further inquiry was required in order to afford adequate support for the ALJ's credibility determination based upon Plaintiff's diary and daily activities. The ALJ is under no duty to "exhaust every potential line of questioning." *Glass v. Shalala*, 43 F.3d 1392, 1396 (10th Cir.1994). Nor is there any merit to Plaintiff's contention that the ALJ was swayed by a miscalculation of the amount of money Plaintiff earned from work in 1995. The ALJ clearly recognized that Plaintiff was absent from work while undergoing medical treatment during the time period under review. [R. 23]. That he disbelieved Plaintiff's contention that he was unable to do any work during that time, in addition to not being able to return to his past work, is not based solely upon the 1995 earnings. The ALJ's credibility determination is sufficiently supported by the record taken as a whole. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from a disabling impairment. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990).

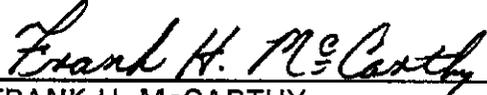
Plaintiff further attacks the ALJ's credibility determination on the grounds that the ALJ's use of "boiler plate language" resulted in his failure to apply the correct legal standards. Specifically, plaintiff argues that the ALJ failed to link his credibility findings to the evidence, as required by *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir.1995). In *Kepler*, the ALJ's credibility determination was found to be inadequate because the ALJ simply recited the general factors he considered and then said the claimant was not credible based on those factors. The ALJ did not refer to any specific evidence relevant to the factors leaving the reviewing court no indication of what evidence the ALJ relied on in evaluating the claimant's credibility. *Id.* at 390-91. Here, the ALJ did not simply recite the general factors he considered, he also stated what specific evidence he relied on in determining that Plaintiff's allegations were not entirely credible. Contrary to Plaintiff's argument, *Kepler* does not require a formalistic factor-by-factor recitation of the evidence. So long as the ALJ sets forth the specific evidence he relies on in evaluating the claimant's credibility, the dictates of *Kepler* are satisfied. The Plaintiff's criticism of the ALJ's use of the word "pain" is also meaningless as it is clear the ALJ evaluated Plaintiff's credibility regarding his complaints of pain "and/or other symptoms," including shortness of breath, under the guidelines established by the regulations and the courts.

Finally, Plaintiff complains that the ALJ failed to rely upon the fourth hypothetical to the VE, which he claims is the only hypothetical that set forth all the impairments claimed by Plaintiff. In posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the

ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). The Court finds that the restrictions expressed by the ALJ in the hypothetical posed to the vocational expert and upon which the disability determination is based, are supported by substantial evidence. The Court finds that the ALJ's hypothetical questions to the vocational expert and his reliance upon the vocational expert's testimony in his decision were proper and in accordance with established legal standards.

The ALJ's decision demonstrates that he considered all of the medical reports and other evidence in the record in his determination that Plaintiff retained the capacity to perform the light jobs identified as existing in significant numbers in the economy. The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 22<sup>nd</sup> day of JUNE, 2000.

  
FRANK H. MCCARTHY  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

JUN 21 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DEBORAH ROBINSON, D.O., )

Plaintiff, )

v. )

Case No. 96-CV-0160-K (E)

ARMEN MAROUK, D.O.; STEPHEN )

EICHERT, D.O.; GREGORY WILSON, )

D.O.; DANIEL FIEKER, D.O.; )

OSTEOPATHIC HOSPITAL FOUNDERS )

ASSOCIATION d/b/a TULSA )

REGIONAL MEDICAL CENTER; and )

NOTAMI HOSPITAL OF OKLAHOMA, )

INC., d/b/a COLUMBIA TULSA )

REGIONAL MEDIAL CENTER, )

Defendants. )

ENTERED ON DOCKET

DATE JUN 22 2000

**REPORT AND RECOMMENDATION**

The Court has referred to the undersigned for report and recommendation plaintiff's motions for attorneys' fees and costs not covered by 28 U.S.C. § 1920, as a prevailing party under 42 U.S.C. § 2000e-5(k). Having reviewed the extensive briefing and voluminous documentation submitted, and following an evidentiary hearing, the undersigned recommends that plaintiff's motions for attorneys' fees and costs (Dkt. ## 284, 287, 316, 329 and 335) be **GRANTED** in the amounts set forth below.

**Case History**

Plaintiff filed this lawsuit on February 29, 1996, alleging sexual discrimination and constructive discharge from her position as neurosurgery resident at Tulsa Regional Medical Center. She stated claims against Osteopathic Hospital Founders Association d/b/a Tulsa Regional Medical Center ("TRMC") and Notami Hospitals of Oklahoma, Inc. d/b/a Columbia Tulsa Regional Medical

Center ("Columbia") under 42 U.S.C. §§ 1983 and 1986, 42 U.S.C. § 2000e-5 ("Title VII"), 20 U.S.C. § 1681 ("Title IX"), and state law breach of contract and tort of outrage claims. Plaintiff also sued her trainers at TRMC, Dr. Marouk, Dr. Eichert, and Dr. Wilson, under 42 U.S.C. §§ 1983 and 1985, Title IX, and for the tort of outrage. She sued Dr. Fieker, TRMC Director of Medical Education, under 42 U.S.C. §§ 1983 and 1986. She sought exemplary damages against all defendants.

The Court dismissed as a matter of law the claims against TRMC and Columbia based on 42 U.S.C. §§ 1983 and 1986, and the state law tort of outrage. The Court dismissed all claims against the four doctors.

The remaining claims against TRMC and Columbia (Title VII, Title IX and breach of contract) were tried to a jury for ten days from March 30 to April 10, 1998. The jury returned a verdict for TRMC and Columbia on the Title IX and the breach of contract claims. The jury found that plaintiff was subjected to a hostile work environment and constructively discharged because of her gender in violation of Title VII, and returned a verdict in the total amount of \$779,419. The jury's award was reduced by the Court, pursuant to 42 U.S.C. § 1981a, to the \$300,000 statutory limit on compensatory damages. Judgment was entered in favor of plaintiff against TRMC and Columbia. The Court disposed of all post-trial motions by March 1999, and the fee request pursuant to Title VII ensued. Plaintiff seeks a total award for fees and costs of \$484,586.22.<sup>1</sup>

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<sup>1</sup> This amount was calculated as follows: Leslie Zieren request for \$92,240.72 (fees of \$88,575 and expenses of \$3,665.72), plus Jan Reasor request for \$20,385.00 (all fees), plus Bullock & Bullock request for \$371,960.50 (fees of \$289,162.50 and expenses of \$82,798).

### Applicable Law

Title VII provides for the award of attorneys' fees to the prevailing party:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of costs . . . .

42 U.S.C. § 2000e-5(k). A plaintiff may be considered the prevailing party if she succeeds on any significant issue in the litigation that achieves some of the benefit sought in bringing the lawsuit.

See Jane L. v. Bangerter, 61 F.3d 1505, 1509 (10th Cir. 1995).

Once the Court finds that plaintiff has prevailed, the Court must determine in its discretion what fee is reasonable. "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).<sup>2</sup> Courts are to exclude from this lodestar calculation hours that are not reasonably expended. Id.; see Robinson v. City of Edmond, 160 F.3d 1275, 1281 (10th Cir. 1998); Case v. Unified Sch. Dist. No. 233, 157 F.3d 1243, 1250 (10th Cir. 1998); Jane L., 61 F.3d at 1509-10; Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1201 (10th Cir. 1986); Ramos v. Lamm, 713 F.2d 546, 553-55 (10th Cir. 1983). Counsel for plaintiff must submit "meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks." Case, 157 F.3d at 1250; see Ramos, 713 F.2d at 553. The Court must ensure that counsel exercised billing judgment, winnowing the actual hours expended down to those reasonably expended, as they

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<sup>2</sup> Although Hensley involved an award of fees under 42 U.S.C. § 1988, the Supreme Court made clear that the standards for awarding fees "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" Hensley, 461 U.S. at 433 n. 7.

would do for a private client. Case, 157 F.3d at 1250; Ramos, 713 F.2d at 553. Hours that are excessive, redundant, unnecessary or duplicative should be excluded. See Hensley, 461 U.S. at 434; see also Case, 157 F.3d at 1250; Ramos, 713 F.2d at 554.

Once the lodestar figure is arrived at, the Court may adjust the figure upward or downward. Hensley, 461 U.S. at 434. One important factor in considering an adjustment is the “results obtained:”

Where a plaintiff has obtained excellent results, [her] attorney should recover a fully compensatory fee. . . . In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.

Id. at 435. In determining an adjustment, the Court should consider the overall relief obtained in relation to the fee awarded. Id.; see Jane L., 61 F.3d at 1511. Unsuccessful claims based on a “common core of facts” or related legal theories should be assessed in light of the time necessarily devoted to the litigation as a whole and plaintiff’s overall success. Id.; see Hensley, 461 U.S. at 435. In determining success, it is the policy being vindicated, rather than the amount of monetary recovery, which is significant. Ramos, 713 F.2d at 557.

#### Attorneys’ Fees

TRMC and Columbia object to any fee award to plaintiff because she prevailed on one claim and they prevailed on the remainder. However, the jury found that plaintiff was subjected to hostile work environment sexual harassment and that she was constructively discharged from her position in the neurosurgery residency program. The jury awarded \$750,000 compensatory damages and \$29,419 for future earnings. A civil rights plaintiff is the prevailing party when she achieves relief on the merits of her claims. See Hensley, 461 U.S. at 433; Jane L., 61 F.3d at 1509. The

undersigned proposes a finding that plaintiff is the prevailing party. The issue of unsuccessful claims is more appropriately addressed in the context of reductions from the lodestar figure.

The hourly rates charged by plaintiff's counsel are reasonable. At the evidentiary hearing, counsel for TRMC and Columbia stipulated to the hourly rates for Louis Bullock (\$200), Patricia Bullock (\$150), Leslie Zieren (\$150), and Jan Reasor (\$150). Based on a review of the attorneys' credentials and the evidence at the hearing, the undersigned proposes a finding that the rates stipulated to are current market rates in Tulsa for these attorneys. As to Michele Gehres, defense counsel stipulated that an hourly rate of \$125 is reasonable; they objected to the requested hourly rate of \$150 based on the timing of her rate increase. At the time of the initial fee request in April 1999 (Dkt. #284), Ms. Gehres' hourly rate for the entries submitted through March 1999 was \$125, and that was the rate requested. Ms. Gehres, a lawyer since 1984, has specialized in the field of employment law since at least 1990. See Pl. Ex. 3C.<sup>3</sup> By the time of the second amended fee request in April 2000 (Dkt. #329), Ms. Gehres' increased hourly rate of \$150, in effect since the spring of 1999, was requested. Ms. Gehres is an experienced employment lawyer, and a rate of \$150 in spring of 1999 (when she was a 15-year lawyer) is reasonable, and consistent with the rates charged by Ms. Zieren and Ms. Reasor, who have similar experience and expertise. Although Ms. Gehres' current rate would have been \$125 if the attorneys' fee hearing had been held immediately following entry of judgment, the Court granted plaintiff an extension of time to apply for fees and costs until after rulings on the post-trial motions, which were completed by March 1999. The Tenth Circuit has held that a delay in payment of fees should ordinarily be compensated by the courts by an award of hourly

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<sup>3</sup> Unless specified otherwise, references to "Pl. Ex." and "Def. Ex." are to those exhibits submitted by the parties at the April 21, 2000 evidentiary hearing.

rates at the time of the fee award. Ramos, 713 F.2d at 555. Thus, an award reflecting Ms. Gehres' hourly rate of \$150 is appropriate. The undersigned proposes a finding that the hourly rates requested (\$200 for Louis Bullock; \$150 for Patricia Bullock, Leslie Zieren, Jan Reasor and Michele Gehres) are reasonable.

The vast majority of objections by TRMC and Columbia to the fee requests relate to the second component of the lodestar calculation -- hours reasonably expended. First, a brief overview from the perspective of the undersigned.

This employment civil rights case involved difficult issues. One of the defenses raised -- in addition to denial of sexual harassment and constructive discharge -- was that plaintiff was not a competent neurosurgery resident. Plaintiff's counsel were compelled to prove competence as well as discrimination. The case was litigated aggressively and thoroughly by all parties. During a lengthy pre-trial process, there were motions to dismiss, numerous depositions, deposition disputes, motions to compel, motions for summary judgment, motions in limine, and motions to exclude expert witnesses. There was a ten-day trial, followed by bills of costs and objections, and post-trial motions. Even the fee request involved volumes of pleadings and exhibits, and experts at the evidentiary hearing.

What were the results obtained? Plaintiff prevailed on her claim of sexual discrimination and constructive discharge. Although her relatively large jury award was reduced to a judgment for the statutory cap, plaintiff convinced the jury that she was entitled to substantial compensation. Further, the key is that the underlying social policy -- equal opportunity for women in employment -- was vindicated. This factor is more significant than the amount of monetary recovery. See Ramos, 713

F.2d at 557. By either measurement, however, plaintiff achieved excellent results, and the undersigned proposes such a finding.

Generally, such a finding would dictate a fully compensatory fee, without reduction “simply because the plaintiff failed to prevail on every contention raised in the lawsuit.” Hensley, 461 U.S. at 435. As stated previously, TRMC and Columbia seek a significant reduction in the total hours requested (by 66%) for unsuccessful claims. See Def. Ex. 1. Such a reduction is within the Court’s discretion, Ramos, 713 F.2d at 556, but is not reasonable in this case. Here, plaintiff’s claims for relief involved a common core of facts and were based on related legal theories. Counsel’s time was devoted generally to the litigation as a whole, and it would be difficult if not impossible to divide the hours expended on a claim-by-claim basis. This lawsuit was not a series of discrete claims. See Hensley, 461 U.S. at 435. The undersigned recommends that the Court reject a mathematical approach to fee reduction, see Ramos, 713 F.2d at 556 n. 7, with the following exception.

It does seem appropriate to disallow two-thirds of the time spent by plaintiff’s counsel responding to the motions for summary judgment related to the unsuccessful claims, particularly against the four doctors.<sup>4</sup> The undersigned has identified the specific hours that were expended, so that this Court can make an equitable judgment. See Appendix A. The testimony was that Leslie Zieren’s time spent on pre-trial motions related primarily to motions in limine. Thus, the undersigned recommends a reduction to the Bullock & Bullock fee, as detailed in Appendix A, in

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<sup>4</sup> If the case had been filed against TRMC and Columbia only, there would have been fewer pleadings, but in all likelihood discovery would have encompassed the same key players and issues concerning their behavior. In other words, the work would have been substantially the same except for responding to motions for summary judgment.

the amount of \$19,780, for two-thirds of the time spent in responding to defendants' motions for summary judgment.

Further, it seems appropriate to reduce the trial time for one lawyer. Although plaintiff's counsel "exercised billing judgment" and eliminated items they determined were duplicative or excessive, the fee request seeks hours for three attorneys to attend the ten-day trial. Louis Bullock was lead trial counsel and handled the trial with the exception of a few witnesses. Ms. Zieren handled some of those witnesses; Ms. Gehres handled some witnesses. Ms. Gehres took a lead role in the instruction conference. Although this was a complex trial with many witnesses and exhibits, TRMC and Columbia utilized two lawyers and a legal assistant for the defense. "[T]he presence of more than two lawyers during trial . . . must be justified to the court." Ramos, 713 F.2d at 565 n.4. Plaintiff has failed to justify the need for three attorneys at trial.<sup>5</sup> The presence of more than two lawyers at a trial such as this is excessive, especially where the contribution of two of them is limited. See id. Two attorneys and a legal assistant could have conducted this trial and brought it to the same conclusion. Thus, the undersigned recommends that the trial time of Leslie Zieren be treated as legal assistant time. The issue then becomes the appropriate rate for such time. Although as a legal assistant Ms. Zieren would be "overqualified," TRMC and Columbia have stipulated that \$60 is a reasonable hourly rate for a legal assistant in this community. Thus a reduction in Ms. Zieren's hourly rate for trial from \$150 to \$60, or by \$90 per hour, is recommended. Based on a

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<sup>5</sup> TRMC and Columbia also seek to reduce the hours expended for more than one attorney at depositions, and at case management, settlement, and pretrial conferences. In this district, participation in such conferences by all counsel who will conduct the trial is encouraged, if not required (see Fed. R. Civ. P. 16(d); N.D. Okla. LR 16.1A, 16.3D). The time of more than one counsel at such conferences was reasonably expended in this case due to the number of claims and the vigorous defense. Likewise, participation of more than one lawyer at certain depositions was necessitated by the breadth and complexity of the issues, and therefore reasonable.

review of the contemporaneous time records submitted by Leslie Zieren, she billed 92.1 trial hours, which multiplied by \$90 per hour amounts to \$8,289. See Appendix B. The undersigned recommends that the fees of Leslie Zieren be reduced by \$8,289.

The undersigned has extensively reviewed the contemporaneous billing records submitted by Leslie Zieren, Jan Reasor, and Bullock & Bullock and proposes a finding that they are the detailed records required by Ramos and the Tenth Circuit precedent previously cited. They reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks.<sup>6</sup> See Case, 157 F.3d at 1250; Ramos, 713 F.2d at 553. In addition, the record reflects that counsel exercised billing judgment, winnowing actual hours down to those reasonably expended. Particularly with regard to Ms. Gehres, the Bullock & Bullock fees have been voluntarily reduced before submission. Further, the Bullock & Bullock firm reduced all time for conferences by dividing the time spent by the number of participants, and billing only the fractional amount per attorney.

Following the maxim that no good deed goes unpunished, TRMC and Columbia argue that Leslie Zieren and Jan Reasor should have their fees reduced by a similar “proportionate billing” for conferences with co-counsel. The amount of the requested reduction is \$5,835. Def. Ex. 4. The reduction on this basis should be rejected for the following reason: Leslie Zieren testified that the conferences with co-counsel were for the express purpose of work division and assignments to avoid

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<sup>6</sup> The undersigned has also reviewed the time records of Leslie Zieren and Jan Reasor for alleged “block billing” objected to by TRMC and Columbia. The records could be more meticulous; however, they are not “sloppy and imprecise.” See Jane L., 61 F.3d at 1510. Based on the time records, as well as Leslie Zieren’s testimony that the “motions” she responded to in late 1997/early 1998 were motions in limine and not for summary judgment, it is not impossible to tell how these attorneys used large blocks of time. The undersigned recommends no reduction for alleged block billing.

duplication, and that her records “understate extraordinarily” the time spent conferring with Louis Bullock. She exercised billing judgment in not recording all of her time. The undersigned proposes a finding that conferences with co-counsel in this case promoted efficiency, and recommends that the fees of Leslie Zieren and Jan Reasor not be reduced to reflect “proportionate billing” for conferences.

Similarly, Bullock & Bullock reduced their travel time by 50%; Leslie Zieren did not. TRMC and Columbia request a 50% reduction of Ms. Zieren’s travel time, although they did not identify the time to which they are referring. While it is true that in Jane L., the affirmance of a reduction of 35% of compensable hours included “excessive travel time,” 61 F.3d at 1510, here there is no evidence that Ms. Zieren’s travel time was excessive. In fact, other than a trip to Kansas City and back on December 10, 1997, for an “aborted” deposition of Dr. Arnold that was not caused by Ms. Zieren, it appears she had approximately 16 hours of travel time for trips to Philadelphia, Kansas City, and Pawnee. Such travel time was necessary and not excessive. The undersigned recommends no reduction for Ms. Zieren’s travel time.

TRMC and Columbia seek reductions for “duplicate billing,” such as more than one attorney at a case management conference, settlement conference, or deposition. Def. Ex. 2. A review of the time records for defense counsel shows that more than one attorney attended conferences and depositions for defendants. Pl. Ex. 4A, 4B, 4C, 5C. As observed above, this case was hard fought. Ramos acknowledged that one of the factors in analyzing “hours reasonably expended” is “the responses necessitated by the maneuvering of the other side.” Ramos, 713 F.2d at 554. Defendants brought vigor to this dispute, and the plaintiff countered and won.

The evidence of the hours expended by defense counsel is not, of course, an immutable yardstick of reasonableness, and it may be disregarded or discounted as a comparative factor if found to be unreasonable in its own right. However, here the effort expended by the defendants suggests at least that they viewed the case as sufficiently complex and serious to warrant the expenditure of large amounts of attorney time, and it highlights the tooth-and-nail litigating approach the [defendants] used in this case. In light of this tenacious effort by the [defendants] and [their] lawyers, the amount of attorney time expended by the plaintiff[] begins to look more reasonable, not less.

Robinson, 160 F.3d at 1284. Based on a thorough review of all evidence presented, the undersigned proposes a finding that plaintiff's attorney time is reasonable in light of the maneuvering of the other side, and that the Court make no further reductions to the fee requests for alleged "duplicate billing."

Dr. Arnold is a neurosurgical expert called at trial by plaintiff. TRMC and Columbia object to what they calculate to be more than 120 hours in attorney time spent meeting with Dr. Arnold.<sup>7</sup> The objection classifies this time as familiarizing the attorneys with a new area of law. The undersigned disagrees. The time is more appropriately described as familiarizing the attorneys with a new area of medicine. Plaintiff's counsel, with expertise in civil rights and employment law, brought suit for claims arising from the sexual harassment of a neurosurgical resident. The defense raised the issue of the competency of Dr. Robinson. Thus, plaintiff's counsel was put to the task of proving her competence, which included interpretation and analysis of medical records. Plaintiff's counsel do not contest that time spent with Dr. Arnold included a "learning curve" in neurosurgery and its terms. However, that curve was necessitated by the defense raised. If defendants had not

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<sup>7</sup> In fact, Patricia Bullock testified and the time records confirm that, of the 120 hours, in excess of 50 hours were travel hours where the hourly rate was reduced by one-half, 22 hours were for the "aborted" deposition, 30 hours were to prepare for Dr. Arnold's deposition, 17 hours were to prepare for direct testimony at trial, 6.5 hours were spent working on an expert report, and 9.7 hours were spent cross-referencing medical exhibits for Dr. Arnold.

raised lack of competence, surely many fewer hours would have been spent with Dr. Arnold. The undersigned recommends no reduction in hours expended meeting with Dr. Arnold.

A challenge is made by TRMC and Columbia to hours expended in connection with focus groups and a jury consultant.<sup>8</sup> Def. Ex. 3. The challenge is based, in part, on a prior unpublished decision by this Court denying expenses for a trial consultant and focus groups, stating that they fall within the “luxury” category. Paul Saladin v. Terry Turner, et al., Case No. 94-CV-0702-K (N.D. Okla.), Order of Dec. 30, 1996, at 13. Plaintiff submitted the testimony of Patricia Bullock to explain that focus groups and a jury consultant were used in this case because it was set for trial during the Jones v. Clinton news coverage, and plaintiff’s counsel were concerned about the impact of that publicity on the jury in this case. In addition, the jury consultant created a jury questionnaire which, although not given to the jury, formed the basis for a number of questions used during voir dire.

This case is distinguishable from Saladin because that was a non-jury trial with less difficult issues and less than perfect results. The Court performed a cost-benefit analysis and found that the amount of damages potentially possible in Saladin did not justify the expenses sought for the trial consultant and focus groups. See Saladin Order at 12-13. In its discretion, the Court declined to assess those items against defendant.

Here, however, the issues were more complex and the results excellent. Performing the cost-benefit analysis leads to the conclusion that some amount of jury selection assistance should be compensable because of the concern that adverse publicity concerning alleged sexual harassment in

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<sup>8</sup> TRMC and Columbia also object to the expenses sought in connection with these tasks; expenses are discussed infra.

the Clinton case would create adverse results for plaintiff. It is not uncommon in this community for parties to use jury consultants to draft jury questionnaires or to assist in jury selection. Here, a jury was selected which was not adverse to plaintiff's claims. Thus, the hours expended in working with a jury consultant appear to be "reasonably expended" and are few in number (6 according to Def. Ex. 3), and the undersigned recommends that the hours not be reduced for time spent working with the jury consultant.

Focus groups in addition to a jury consultant, however, fall into the "luxury" category. While focus groups may have been helpful to counsel in identifying issues and determining trial strategy, they do not predict jury results. Under a cost-benefit analysis, the undersigned recommends that the hours expended on focus groups (summarized in Appendix C) be disallowed, and that the fees requested be reduced by \$2,850 for focus group work.

Having addressed the objections raised by TRMC and Columbia, the Court must now consider the lodestar calculation and resulting potential fee award in relation to the overall relief.

The lodestar calculation described above results in the following fee award:

Bullock & Bullock	\$267,132.50 <sup>9</sup>
Leslie Zieren	79,686.00 <sup>10</sup>
Jan Reasor	<u>20,385.00<sup>11</sup></u>
Total Fee Award:	\$367,203.50

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<sup>9</sup> Fee request of \$289,162.50 less \$19,780 (App. A), and less \$2,250 (App. C).

<sup>10</sup> Fee request of \$88,575 less \$8,289 (App. B), and less \$600 (App. C).

<sup>11</sup> Fee request as submitted.

The issue is whether such a fee award is reasonable in light of the time necessarily devoted to the litigation and plaintiff's overall success. The jury awarded compensatory damages of \$750,000; plaintiff's counsel should not be penalized because of the statutory cap on the judgment. Plaintiff stood up to an institution and her trainers, and she vindicated the policy at issue. Her success was enormous, and in light of the tenacious efforts by defendants, the fee award looks more reasonable, not less.

The Court should ensure compensation "adequate to attract competent counsel." See Robinson, 160 F.3d at 1281. The Tenth Circuit has stated:

It goes without saying that if a court's compensation is not adequate to match what the market will bear for a lawyer's services, then competent lawyers will go elsewhere to offer their services. Such a result would to irreparable damage to our system of private enforcement of federal civil rights.

Id. The fee award here, if reduced further, would not be adequate to attract the type of counsel who represented plaintiff. The undersigned proposes a finding that a total fee award of \$367,203.50 is reasonable in light of plaintiff's overall success, and recommends that such amount be awarded.

Finally, plaintiff's counsel seek an enhancement or adjustment to the lodestar figure to compensate for delay in payment. TRMC and Columbia object. The Tenth Circuit has stated that any delay should ordinarily be compensated by an award of current hourly rates. Ramos, 713 F.2d at 555. As discussed above, it is recommended that the lodestar be calculated at current hourly rates, including the current hourly rate of Ms. Gehres. Although the hourly rates of the other lawyers have not changed (or in the case of Ms. Zieren and Ms. Reasor, are no longer a market rate because of their current positions), the delay was caused by discovery and trial date extensions, and by an extension of the deadline for fee requests until after post-trial motions were fully determined. The

latter extension was requested by plaintiff's counsel. The fee requests were supplemented up to May 15, 2000, and the award covers attorney time through May 12, 2000. The undersigned proposes a finding that current hourly rates, including that of Ms. Gehres, adequately compensate plaintiff's counsel, and recommends that the fee not be enhanced by an interest adjustment.

### Costs

An award of attorneys' fees in a civil rights case should include reasonable expenses incurred in representing the client if such expenses are usually billed in addition to the attorneys' hourly rates. Case, 157 F.3d at 1257; Ramos, 713 F.2d at 559. Plaintiff requests \$86,463.72 in untaxed costs: Bullock & Bullock - \$82,798;<sup>12</sup> Leslie Zieren - \$3,665.72. The expenses are itemized in the fee applications.

TRMC and Columbia seek reductions to the expenses, including a 66% reduction for unsuccessful claims. Def. Ex. 1. For the same reasons discussed above with regard to attorneys' fees, the undersigned recommends that the Court not reduce the expenses for unsuccessful claims.

Specific objection is made to the costs and expenses pertaining to the jury consultant and the focus groups. Def. Ex. 3. For the same reasons discussed above with regard to attorneys' fees, the undersigned recommends that the expenses of the jury consultant (\$3,826.60) and copies for the jury consultant (\$105) be allowed, and the expenses related to focus groups (\$770) be disallowed. See Def. Ex. 3.

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<sup>12</sup> The Bullock & Bullock expenses are broken down as follows: photocopying/printing - \$5,359.10; postage/delivery - \$801.87; long distance - \$547.95; electronic research - \$5,281.03; travel expenses - \$491.15; transcripts - \$3,430.10; process server - \$100; trial expenses; \$4,877.27; witness fees - \$1,531.40; expert fees - \$28,612.06; paralegals - \$28,692; untaxed costs - \$3,074.07. Pl. Ex. 2D.

Travel expenses in the amount of \$1,939.32 are requested by Ms. Zieren. See Pl. Ex. 1 (December 1997 and January 1998 expenses). Plaintiff's attorneys' fees expert testified that the standard in this community is to bill clients for out-of-pocket travel expenses, and in fact Ms. Zieren billed plaintiff for such expenses. The expenses requested for travel were itemized and are reasonable. Thus, the undersigned recommends that they not be disallowed.

Although expert fees are recoverable under Section 2000e-5(k), plaintiff requests \$5,300 in fees for Dr. Jeri Fritz, whose testimony was disallowed at trial. See Pl. Ex. 2D. Patricia Bullock testified that \$5,300 should be deducted from the expenses requested because the witness did not testify. The undersigned recommends that \$5,300 in expert fees requested by Bullock & Bullock be disallowed.

TRMC and Columbia object to the Bullock & Bullock photocopying charges at twenty cents per page for in-house copies. Patricia Bullock testified that the rate is one which is charged to clients of Bullock & Bullock, and which has previously been approved by courts. Plaintiff's attorneys' fees expert testified that the standard in the community is twenty cents per page, but that some firms charge less. In a recent decision this Court found that fifteen cents per page was somewhat excessive and reduced the award to reflect a ten cent per page photocopy charge. See Dara Jones, et al. v. La Petite Academy, Inc., et al., Case No. 97-CV-0898-K (N.D. Okla.), Order of March 21, 2000, at 9. In that case, plaintiff's attorneys practiced with a larger firm. A smaller firm like Bullock & Bullock does not have the luxury of copy clerks, and their overhead for copies is more likely than not higher than that of a larger firm. The copy expenses are somewhat excessive; however, the undersigned

recommends that they be reduced from twenty to fifteen cents per page, or by 25%.<sup>13</sup> See Appendix D. The undersigned recommends that the photocopying charges be reduced by \$644.

An additional objection to the photocopying charges is plaintiff's failure to describe the purpose of the copies or the validity of the charges. In a case of this magnitude, it would be virtually impossible for counsel to describe the purpose for each copy. Bullock & Bullock seeks two types of photocopying charges: those related to trial, included in the Bill of Costs, and not taxed by the Clerk; and those other charges incurred during the course of the litigation. The Clerk taxed \$6,015.81 as fees for exemplification and copies of paper necessarily obtained for use in the case. See Dkt. #310. Plaintiff seeks \$631.65 in untaxed costs, and an additional \$5,359.10 for photocopying and printing not included in the Bill of Costs. The latter number is before the reduction described in the preceding paragraph. After the 25% reduction for in-house copies, plaintiff seeks approximately \$5,300 for copies and printing, in addition to more than \$6,000 awarded by the Clerk. Although photocopying charges were summarized by month, it is difficult to tell what was being copied. The Tenth Circuit did hold in another case that \$11,000 in copying costs was excessive. See Case, 157 F.3d at 1258. However, a large number of copies (of pleadings, documents, and cases) were reasonable and necessary in this case, due to the complexity of the issues and the tenacity of the defense. The practice in this community is to bill fee-paying clients for such charges; it is not feasible to describe every copy made. While the undersigned does not encourage over-zealous copying, it is not appropriate to second-guess the judgment of expert civil rights lawyers such as Bullock & Bullock as to what copies are needed to prosecute the case. To further

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<sup>13</sup> This reduction relates only to those copies made in-house and billed at twenty cents per page. All outside printing and copies were billed at cost. See Pl. Ex. 2D.

reduce the copying costs might chill the enthusiasm for adequate preparation. Thus, the undersigned recommends no further disallowance for copying costs.

Bullock & Bullock seek electronic research (Westlaw) expenses of \$5,281.03. Patricia Bullock and plaintiff's attorneys' fees expert testified that it is common practice in this community to bill such expenses to fee-paying clients. TRMC and Columbia do not dispute that such charges are normally itemized and billed in addition to the hourly rate. Rather, they object on the ground that there is no way to determine what the research was for. Although a Westlaw charge reduction was affirmed in Case for failure to differentiate between claims researched, 157 F.3d at 1258, here the trial was based on "a common core of facts" and "interrelated legal theories." To be consistent with the disallowance of two-thirds of the fees in responding to summary judgment motions, however, a two-thirds reduction of January and February, 1998 Westlaw charges is appropriate. Thus, the undersigned recommends an \$863 reduction in the Bullock & Bullock request for Westlaw charges. See Appendix D. The balance of approximately \$4,600 is reasonable for a case that lasted four years and involved complex legal issues. The undersigned proposes a finding that the remaining Westlaw charges are reasonable, necessary, and not excessive.

Plaintiff has submitted bills for paralegals in the amount of \$27,657. The hourly rate is \$60 per hour, which TRMC and Columbia have stipulated is a reasonable rate. The undersigned proposes a finding that \$60 per hour is a market rate for paralegals in this community and is reasonable. TRMC and Columbia object to compensation of paralegal time for what they describe as "purely clerical tasks." Examples cited are "document control" or "document inventory." Louis Bullock testified that the paralegal work described as "document control" was actually a process for managing discovery documents, and not merely clerical tasks of filing. Paralegal expense in the total

amount requested is quite reasonable for a four year period in a complicated case with a tenacious defense. The undersigned recommends no reduction to the paralegal expense.

The undersigned has reviewed the remaining costs requested and proposes a finding that they are reasonable and are the types of costs that plaintiff's counsel and firms in this community normally charge fee-paying clients. The undersigned recommends that the remaining costs in the total amount of \$78,886.72 be awarded. See Appendix D.

### **Conclusion**

Based upon the foregoing, the undersigned recommends that plaintiff's motions for attorneys' fees and costs (Dkt. ## 284, 287, 316, 329, and 335) be **GRANTED** in the total amount of \$446,090.22, payable as follows: \$342,353.50 to Bullock & Bullock; \$83,351.72 to Leslie Zieren; and \$20,385 to Jan Reasor. See Appendix E.

### **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); see also Fed. R. Civ. P. 72(b). **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 21<sup>st</sup> day of June, 2000.

Claire V Eagan  
CLAIRE V. EAGAN  
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

22 Day of June 2000, Mass.  
[Signature]

APPENDIX A

Reduction for Two-Thirds of Time Spent Responding to Motions for Summary Judgment

Louis Bullock Hours

1/07/98	.10
1/09/98	5.00
1/10/98	3.00
1/10/98	.10
1/12/98	.30
1/15/98	1.00
1/17/98	.75
1/20/98	6.50
1/21/98	6.00
1/22/98	6.75
1/23/98	7.75
1/24/98	6.50
1/25/98	.10
1/26/98	10.50
1/27/98	4.75
1/28/98	.75
1/30/98	.25
2/25/98	<u>.50</u>

$$60.60 \times \$200 = \$12,120 \times 2/3 = \$8,080$$

Patricia Bullock Hours

1/20/98	1.00
1/29/98	.50
1/30/98	<u>.50</u>

$$2.00 \times \$150 = \$300 \times 2/3 = \$ 200$$

Michele Gehres Hours

1/05/98	5.75
1/06/98	5.75
1/07/98	3.50
1/08/98	4.00
1/09/98	8.25
1/10/98	6.50
1/12/98	7.00
1/13/98	5.75
1/14/98	7.75
1/15/98	6.25
1/16/98	3.75
1/19/98	7.25
1/20/98	7.25
1/21/98	7.75
1/22/98	7.00
1/23/98	7.75
1/24/98	2.00
1/26/98	6.00
1/27/98	3.75
1/28/98	<u>2.00</u>

$$115.00 \times \$150 = \$17,250 \times 2/3 = \underline{\$11,500}$$

\$19,780

**APPENDIX B**

Leslie Zieren Trial Time Reduced by \$90 Per Hour

Leslie Zieren Hours

3/30/98	6.3
3/31/98	11.3
4/01/98	10.7
4/02/98	11.2
4/03/98	9.5
4/06/98	11.3
4/07/98	8.2
4/08/98	10.6
4/09/98	9.6
4/10/98	<u>3.4</u>
	92.1 X \$90 = \$8,289

APPENDIX C

Reduction for Hours Disallowed for Focus Groups

Louis Bullock Hours

3/11/98	1.00		
3/12/98	.25		
3/17/98	.50		
3/18/98	1.00		
3/19/98	<u>4.00</u>		
	6.75	X \$200 =	\$1,350

Patricia Bullock Hours

3/16/98	1.00		
3/18/98	1.00		
3/19/98	<u>4.00</u>		
	6.00	X \$150 =	<u>\$ 900</u>

Bullock & Bullock \$2,250

Leslie Zieren Hours

3/19/00	4.00	X \$150 =	<u>\$ 600</u>
			\$2,850

APPENDIX D

Expenses After Reductions for Disallowances

Bullock & Bullock

Requested	\$82,798
<u>Less</u> Focus Groups	- 770
Dr. Fritz Fee	- 5,300
Copying Costs \$2,576 X 25% (Pl. Ex. 2D)	- 644
Westlaw \$1295 X 2/3	<u>- 863</u>
	\$75,221

Leslie Zieren

Requested (No Disallowances)	\$ 3,665.72
	<hr/>
	\$78,886.72

**APPENDIX E**

Total Award for Fees and Costs

	<u>FEES</u>	<u>COSTS</u>	<u>TOTAL</u>
Bullock & Bullock	\$267,132.50	\$75,221.00	\$342,353.50
Leslie Zieren	79,686.00	3,665.72	83,351.72
Jan Reasor	<u>20,385.00</u>	<u>—</u>	<u>20,385.00</u>
TOTAL:	\$367,203.50	\$78,886.72	\$446,090.22

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHRISTOPHER C. WREN;  
NEIGHBORHOOD HOUSING SERVICES  
OF AMERICA, INC.;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

**FILED**  
IN OPEN COURT

JUN 21 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JUN 21 2000

CIVIL ACTION NO. 95-C-0095-BU ✓

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 21st day of June, 2000, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on March 20, 2000, pursuant to an Order of Sale dated November 17, 1999, of the following described property located in Tulsa County, Oklahoma:

Lot Three (3), Block Four (4), POWDER AND POMEROY ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

Appearing for the United States of America is Wyn Dee Baker, Assistant United States Attorney. Notice was given the Defendants, Christopher C. Wren; Neighborhood Housing Services of America, Inc.; and County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, by mail, and they do not

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appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

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

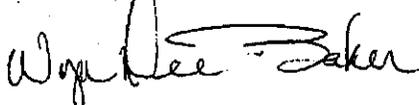
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United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

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

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



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

Report and Recommendation of United States Magistrate Judge  
Case No. 95-CV-0095-BU (Wren)

WDB:css

CERTIFICATE OF SERVICE

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

21st day of June, 192000.  
C. Peltalla, Deputy Clerk.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

JOHN E. PIVONKA;  
EUNICE PIVONKA;  
STATE OF OKLAHOMA ex rel.  
Oklahoma Tax Commission;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

**FILED**  
IN OPEN COURT

JUN 21 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE **JUN 21 2000**

CIVIL ACTION NO. 99-CV-0334-H (J)

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

NOW on this 21st day of June, 2000, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on March 20, 2000, pursuant to an Order of Sale dated December 15, 1999, of the following described property located in Tulsa County, Oklahoma:

Lot Three (3), Block One (1), ROLLING HILLS THIRD ADDITION, an Addition in the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, John E. Pivonka; Eunice Pivonka; State of Oklahoma ex rel. Oklahoma Tax Commission, through Kim D. Ashley, Assistant General Counsel; and County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A.

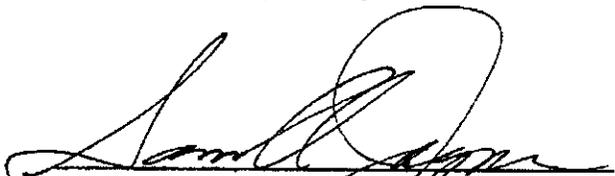
23

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

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

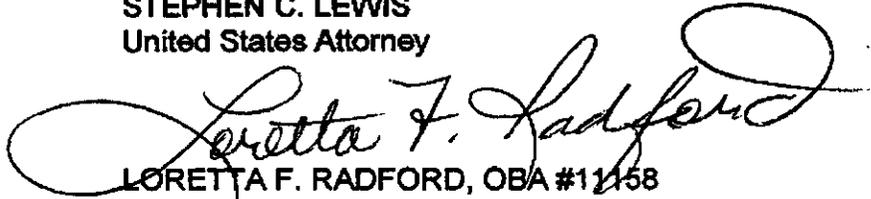
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United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

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

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



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

Report and Recommendation of United States Magistrate Judge  
Case No. 99-CV-0934-H (J) (Pivanka)

LFR:cae

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

21st Day of June, 192000.  
C. Portillo, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

CHARLES W. PARSONS  
aka Charles Wayne Parsons aka Charles Parsons;  
SHONDA L. PARSONS aka Shonda Lynn Parsons  
aka Shonda Parsons aka Shonda Shallenburger;  
TRANSAMERICA FINANCIAL SERVICES, INC.;  
SEARS, ROEBUCK AND COMPANY;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

**FILED**  
IN OPEN COURT

JUN 21 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JUN 21 2000

CIVIL ACTION NO. 98-CV-0886-B (M)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 21st day of June, 2000, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on March 20, 2000, pursuant to an Order of Sale dated September 24, 1999, of the following described property located in Tulsa County, Oklahoma:

Lot Four Hundred Twenty-eight (428), of the Re-Subdivision of Lots 11, 12, 13, 14, 15, Block 2, RODGERS HEIGHTS SUBDIVISION, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Charles W. Parsons aka Charles Wayne Parsons aka Charles Parsons; Shonda L. Parsons aka Shonda Lynn Parsons aka Shonda Parsons aka Shonda Shallenburger aka Shonda Klingaman; Transamerica Financial Services, Inc. through its vice president Morris Churchill; Sears,

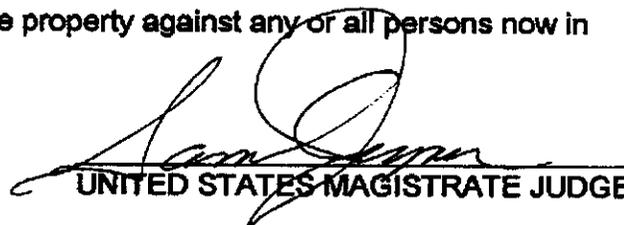
ala

Roebuck and Company through its service agent The Corporation Company; County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, by mail,, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

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

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

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

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

*Loretta F. Radford*

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

Report and Recommendation of United States Magistrate Judge  
Case No. 98-CV-0686-B (M) (Parsons)

LFR:ces

**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

21st Day of June, 192000  
C. P. Kelly, Deputy Clerk



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

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

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

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

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

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

Report and Recommendation of United States Magistrate Judge  
Case No. 99-CV-0201-B (J) (Holman)

PB:css

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy  
of the foregoing pleading was served on each  
of the parties hereto by mailing the same to  
them or to their attorneys of record on the  
21<sup>st</sup> Day of June, 2000, 2000.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

JUN 20 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

v. )

OLIVER J. BARKUS, a single person; )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma, )  
 )  
Defendants. )

ENTERED ON DOCKET

DATE JUN 21 2000

) CIVIL ACTION NO. 99-CV-1007-B (M)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20<sup>th</sup> day of JUNE

2000. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendant, Oliver J. Barkus, a single person, appears by his attorney Laura Emily Frossard.

The Court being fully advised and having examined the court file finds that the Defendant, Oliver J. Barkus, a single person, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on January 19, 2000.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their

Answers on December 15, 1999; that the Defendant, Oliver J. Barkus, a single person, filed his Answer on February 14, 2000.

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

LOT TEN (10), BLOCK THREE (3), TEEL TERRACE ADDITION TO  
THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA,  
ACCORDING TO THE RECORDED PLAT NO. 1955.

The Court further finds that on November 4, 1996, Defendant, Oliver J. Barkus, a single person, executed and delivered to Countrywide Home Loans, Inc., his mortgage note in the amount of \$42,840.00, payable in monthly installments, with interest thereon at the rate of 8.750 percent per annum.

The Court further finds that as security for the payment of the above-described note, Defendant, Oliver J. Barkus, a single person, executed and delivered to Countrywide Home Loans, Inc., a real estate mortgage dated November 4, 1996, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on November 14, 1996, in Book 5861, Page 0715, in the records of Tulsa County, Oklahoma.

The Court further finds that Countrywide Home Loans, Inc. assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs. This Assignment of Mortgage was recorded on July 28, 1998, in Book 6084, Page 330, in the records of Tulsa County, Oklahoma. The Secretary of Veterans Affairs

reamorized this loan pursuant to which the entire amount due was made principal and the interest rate changed to 7.0 percent per annum.

The Court further finds that the Defendant, Oliver J. Barkus, a single person, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Oliver J. Barkus, a single person, is indebted to the Plaintiff in the principal sum of \$48,005.92, plus administrative charges in the amount of \$278.95, plus penalty charges in the amount of \$15.92, plus accrued interest in the amount of \$2,935.52 as of June 18, 1999, plus interest accruing thereafter at the rate of 7.0 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$90.20 (\$82.20 fees for service of Summons and Complaint, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of 1999 ad valorem taxes in the amount of \$340.00, plus penalties and interest. Said lien is superior to the interest of the Plaintiff, United States of America.

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

The Court further finds that by the Order filed June 13, 2000, summary judgment was granted against Defendant, Oliver J. Barkus, a single person.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans

Affairs, have and recover in rem judgment against Defendant, Oliver J. Barkus, a single person, in the principal sum of \$48,005.92, plus administrative charges in the amount of \$278.95, plus penalty charges in the amount of \$15.92, plus accrued interest in the amount of \$2,935.52 as of June 18, 1999, plus interest accruing thereafter at the rate of 7.0 percent per annum until judgment, plus interest thereafter at the current legal rate of 6.375 percent per annum until paid, plus the costs of this action in the amount of \$90.20 (\$82.20 fees for service of Summons and Complaint, \$8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$340.00, plus penalties and interest, for 1999 ad valorem taxes, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Oliver J. Barkus, a single person, and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Oliver J. Barkus, a single person, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell

according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

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

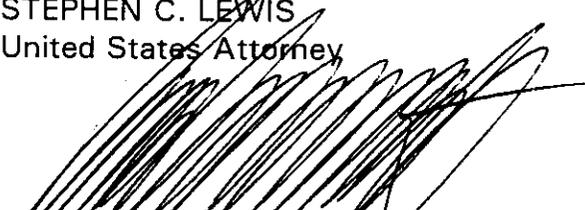
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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

  
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



---

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



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**DICK A. BLAKELEY, OBA #0852**  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4835  
Attorney for Defendants,  
County Treasurer and Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Case No. 99-CV-1007-B (M) (Barkus)

PB:css

*Laura Emily Frossard*

**LAURA EMILY FROSSARD, OBA #3151**

Legal Services of Eastern Oklahoma, Inc.

115 West 3<sup>rd</sup> Street, Suite 700

Tulsa, Oklahoma 74103

(918) 584-3338

Attorney for Defendant, Oliver J. Barkus

Judgment of Foreclosure

Case No. 99-CV-1007-B (M) (Barkus)

PB:css

**F I L E D**

**JUN 20 2000**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
ROSS S. BURNHAM, )  
)  
Defendant. )

Case No. 99-C-1057-B(E)

ENTERED ON DOCKET

DATE JUN 21 2000

ORDER

The Court has for decision Plaintiff's Motion for Summary Judgment (Docket #4) to which no response has been filed nor extension of time to respond sought. Response to motion was due on or before May 28, 2000 and Plaintiff's motion may now be deemed confessed pursuant to N.D. LR 7.1 C. The Court however has reviewed the motion on the merits and finds it should be granted as follows:

Summary Judgment Standard

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

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

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." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

\* \* \*

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

*Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

#### Undisputed Material Facts

The undisputed material facts are:

1. On or about July 24, 1986, Defendant executed a promissory note to secure a loan

from Bank IV, Coffeyville, Kansas at 8% interest per annum. This loan obligation was guaranteed by Nebraska Student Loan Program and then reinsured by the Department of Education under loan guarantee programs authorized under Title IV-B of the Higher Education Act of 1965, as amended, 20 U.S.C. §1071 et seq. (34 C.F.R. Part 682). The holder of the student loan demanded payment according to the terms of the note and credited \$0.00 to the outstanding principal owed on the loan. The borrower defaulted on the obligation on June 8, 1992, and the holder filed a claim on the guarantee.

2. As of November 17, 1999, defendant owes a total of \$4,429.97 which consists of principal in the amount of \$2,894.92 and accrued interest in the amount of \$1, 535.05 on the student loan. Interest is accruing on the student loan at the rate of 8% per annum.

#### Arguments and Authority

The United States filed its complaint in this matter on December 10, 1999 to recover payment on a defaulted federally-insured student loan. Defendant, through retained counsel filed answer on February 6, 2000. However, the answer does not set forth any factual issues which preclude summary judgment and does not allege any affirmative relief or equitable defenses to repayment. Defendant takes the position only that he was unable to complete his education and did not receive full benefit from the loan.

No evidence has been presented that Defendant does not owe the debt. The record establishes that Defendant signed a promissory note to obtain a student loan funded by two disbursements, which loan has never been repaid. Plaintiff is entitled to summary judgment under these facts.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT Plaintiff's

Motion for Summary Judgment (Docket # 4) is granted.

DONE THIS <sup>th</sup> 21 DAY OF JUNE, 2000.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

**F I L E D**

**JUN 20 2000**

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

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**UNITED STATES OF AMERICA,** )  
 )  
 **Plaintiff,** )  
 )  
 **vs.** )  
 )  
 **ROSS S. BURNHAM,** )  
 )  
 **Defendant.** )

**Case No. 99-C-1057-B(E)**

**ENTERED ON DOCKET  
DATE JUN 21 2000**

**J U D G M E N T**

In accord with the Order filed this date sustaining the Plaintiff's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Plaintiff, United States of America, and against the Defendant, Ross S. Burnham, for the amount of \$2,894.92, plus accrued interest in the amount of \$1,535.05 at the rate of 8% per annum through today's date, plus post judgment interest from this date forward at the legal rate of 6.375 per cent per annum, plus filing fee in the amount of \$150.00 and other costs of this action upon proper application pursuant to N.D. LR 54.1.

DATED this 20<sup>th</sup> day of June, 2000.

  
**THOMAS R. BRETT**  
**UNITED STATES DISTRICT JUDGE**

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

**FILED**  
JUN 20 2000  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ALLSTATE INSURANCE COMPANY, )  
an Illinois corporation )

Plaintiff, )

vs. )

BRIAN L. RICE, )

Defendant/Counterplaintiff )

vs. )

ALLSTATE INSURANCE COMPANY, )  
an Illinois corporation )

Case No. 99-CV-0768-E(J) ✓

ENTERED ON DOCKET  
DATE JUN 21 2000

JUDGMENT

In accord with the Order filed this date sustaining the Plaintiff's and Counter-Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Plaintiff and Counter-Defendant, Allstate Insurance Company. and against the Defendant and Counter-Plaintiff, Brian L. Rice.

IT IS SO ORDERED THIS 20<sup>th</sup> DAY OF June, 2000.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

**FILED**  
JUN 20 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ALLSTATE INSURANCE COMPANY, )  
an Illinois corporation )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
BRIAN L. RICE, )  
 )  
Defendant/Counterplaintiff )  
 )  
vs. )  
 )  
ALLSTATE INSURANCE COMPANY, )  
an Illinois corporation )

Case No. 99-CV-0768-E(J)

ENTERED ON DOCKET

DATE JUN 21 2000

**ORDER**

Now before the Court are the Motions for Summary Judgment of the Plaintiff, Allstate Insurance Company, (Docket #11) ("Allstate"), the Defendant and Counter Plaintiff, Brian L. Rice (Docket #12) ("Rice") and Counter Defendant, Allstate (Docket #14). This dispute involves the question of whether an umbrella liability insurance policy issued by Allstate to Rice covers damages and the cost of defense of a lawsuit filed against Rice by a co-worker. The claims asserted against Rice were for sexual assault and battery and violation of the Violence Against Women Act.

**BACKGROUND**

Rice and Jessica A. A. Moore ("Moore") were both employed by Barrett Resources Corporation (Barrett) during the relevant period of August 1997 to October 1998. Rice was

22

Moore's direct supervisor. Moore filed charges of sexual discrimination and harassment with the Equal Employment Opportunity Commission against Rice and Barrett and upon receiving a notice of right to sue from the EEOC, Moore brought an action in the United States Court for the Northern District of Oklahoma for sexual discrimination against Barrett<sup>1</sup> and claims against Rice for sexual assault and battery and violation of the Violence Against Women Act, 42 U.S.C. §13981 *et seq.* Rice made a claim under his Personal Umbrella Insurance Policy issued by Allstate and demanded that Allstate provide a defense to Moore's lawsuit. Allstate denied coverage and brought this action for declaratory judgment seeking an order of this Court that there was no coverage under the umbrella policy. Rice has counterclaimed against Allstate for breach of contract and bad faith. Both parties have moved for summary judgment on the issue of coverage of the insurance policy.

## **DISCUSSION**

### **A. Facts**

The Court finds that the following material facts are not in dispute. Allstate insured Rice under an Allstate Personal Umbrella Policy , numbered 085071925. The policy provides that Allstate will pay when an insured becomes legally obligated to pay for personal injury<sup>2</sup> or property damage caused by an occurrence<sup>3</sup>. The policy further provides that

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<sup>1</sup>Also named as a Defendant in both the EEOC action and the lawsuit was Associated Resources, Inc. Associated's relationship to Barrett is not clear to the Court and is not relevant for the purposes of this order.

<sup>2</sup>Personal injury is defined as  
a) bodily injury, sickness, disease or death of any person. Bodily injury includes disability, shock, mental anguish and mental injury;

Allstate will defend an insured if sued as the result of an occurrence *covered by the policy* even if the suit is groundless, false or fraudulent.

The policy includes an exclusion which states that the policy does not apply to any intentionally harmful act or omission of an insured.<sup>4</sup> However, the Policy also provides that the "intentional acts" exclusion shall not apply to certain parts of the definition of Personal Property, the pertinent part being part d) regarding discrimination and violations of civil rights. The policy covers the personal activities of an insured. It does not cover activities that are related to any business or business property. "Business" is defined as any full or part-time activity of any kind engaged in for economic gain.

On January 6, 1999, Moore filed suit against Barrett and Rice in the United States District Court for the Northern District of Oklahoma, Case No. 99-cv-0017H. Moore asserted a claim against Barrett for sexual discrimination and harassment in violation of Title

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\* \* \*

d)discrimination and violation of civil rights, where recovery is permitted by law. Fines and penalties imposed by law are not included.

<sup>3</sup>Occurrence is defined as an accident or a continuous exposure to conditions. An occurrence includes personal injury or property damaged caused by an insured while trying to protect persons or property from injury or damage.

4. This policy will not apply:

\* \* \*

8. To any intentionally harmful act or omission of an insured even if:

a) the personal injury or property damage resulting from the act or omission occurs to a person or property other than the person or property to whom the act or omission was intended or is of a different nature or magnitude than was intended; or

b) the insured lacks the mental capacity to govern his or her own conduct if the act or omission is substantially certain to probably certain to cause personal injury or property damage.

VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Moore asserted two claims against Rice; the first being a claim for sexual assault and battery and the second being a claim for violation of the Violence Against Women Act., 42 U.S.C. §13981 *et seq.*

Moore's allegations against Rice assert that during Moore's and Rice's employment at Barrett, Rice made various sexual assaults upon Moore as well as sexual statements and the conduct included unwelcome touching and caressing of the Moore's breasts, unwelcome touching of Moore's buttocks and performing unwelcome sexual acts upon Moore's body. Moore alleges that Rice's conduct was intentional and purposeful and done with such evil intent and malice that punitive damages should be awarded. Moore also alleges that Rice committed sexual assault and battery upon her and that Rice's intentional conduct has caused Moore to suffer emotional distress and emotional pain and suffering. Moore further alleges that Rice's conduct constitutes a crime of violence motivated by gender as defined in the Violence Against Women Act.

In Moore's deposition, she described detailed specific instances where Rice allegedly committed unwelcome groping, fondling and penetration of Moore's body. These events are alleged to have occurred over many months. Moore was afraid she would lose her job if she complained about Rice's conduct, but she did consider Rice's conduct to be criminal and eventually reported the incidents to the Tulsa Police Department Sex Crimes Unit. Moore also testified that she has been treated by two psychologists for her emotional distress and has been diagnosed as having post-traumatic stress disorder.

Rice gave notice to Allstate of Moore's claims against him on April 13, 1999. On June 1, 1999, Allstate notified Rice's counsel by letter that Allstate's position was that the policy in question did not cover Rice's conduct and Allstate was refusing to defend Rice. After further communications with Rice's counsel, Allstate agreed to initiate the defense of Rice with a complete reservation of rights. When defense counsel, hired by Allstate, contacted Rice's counsel about defending the action against Rice, he was informed that the litigation with Moore had been settled. Thereafter Allstate filed this declaratory judgment action seeking a ruling that the Allstate policy did not provide coverage for Rice's conduct.

#### **B. Summary Judgment Standard**

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

The plain language of Rule 56(c) mandates the entry of summary judgment... and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, the nonmovant "must establish that there is a genuine issue of material facts..." The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the moving party can demonstrate

its entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

### **C. Analysis of Coverage**

Allstate's liability for indemnification of Rice's liability to Moore for any amounts Rice paid to Moore in settlement of her lawsuit, and for providing a defense to Rice will be determined by whether Moore's injury was caused by an "occurrence". within the meaning of the policy. The policy defines "occurrence" as "an accident or a continuous exposure to conditions.

The term "accident" as found in liability insurance policies has been construed in several Oklahoma cases. See *Massachusetts Bay Insurance Company v. Gordon*, 708 F. Supp. 1232 (W.D. OK 1989). The Oklahoma Supreme Court in *United States Fidelity and Guaranty Co. v. Briscoe*, 205 Okl. 618, 239 P.2d 754 (1952), defined "accident" as "an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event, chance, or contingency". It also "accidental" as "happening by chance or unexpectedly, undesigned; unintentional; unforeseen, or unpremeditated". The *Briscoe* Court stated that "the words 'accident' and 'accidental' have never acquired any technical meaning in law, and when used in an insurance contract, they are to be construed and considered according to common speech and common usage of people generally." 239 P.2d at 756. The Court in *Briscoe* held that if the insured performs a voluntary act, the natural, usual, and to-be-expected result is not an accident in any sense of the word, legal or colloquial. *Id.* at 757. The *Briscoe* decision has been followed in *Massachusetts Bay, supra*,

*Republic National Life Insurance v. Johnson*, 317 P.2d 258 (Okla.1957) and in *Leggett v. Home Indemnity Co.*, 461 F.2d 257 (10th Cir.1972).

Regardless of Rice's subjective intent, Moore's alleged injuries were the natural, reasonably foreseeable, and to-be-expected result of Rice's alleged sexual assaults upon Moore. Therefore, the Court finds that Moore's injuries were not caused by an "accident" within the meaning of the policy. *Briscoe* 239 P.2d at 756-757..<sup>5</sup>

The case of *Lumbermens Mut. Ins. Co. v. Blackburn*, 477 P.2d 62 (Okla.1970) does not apply here because Allstate's policy limits coverage to an "accident" and the policy in *Blackburn* did not contain such a provision. See *Massachusetts Bay Ins. Co. v. Gordon*, *supra* at 1233.

#### **D. Duty to Defend**

The allegations in the federal complaint filed by Moore will determine the extent of Allstate's duty to defend Rice. *Allstate Insurance Company v. Thomas*, 684 F. Supp. 1056, 1057 (W.D. OK 1988) The general rule is that the insurer must defend the insured if the allegations even arguably come within the terms of the policy. *Id.*, at 1058. However, under Oklahoma law, a liability insurer is not obligated to defend an action against its insured where the insurer would not be liable under its policy for any recovery in such suit. *Torres v. Sentry Insurance*, 558 P.2d 400, 401-402 (Okla.1976); *Leggett v. Home Indemnity Co.*,

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<sup>5</sup> Due to the extreme similarity in facts, the Court also finds the unpublished opinion in *American Manufacturers Mutual Insurance Company v. Wodarski*, 1995 WL 610888 (10<sup>th</sup> Cir. (Okla.)) very persuasive. (allegations of intention to cause emotional distress by sexual harassment).

461 F.2d 257, 260 (10th Cir.1972). Under the terms of the policy, an "occurrence," or accident causing bodily injury, is a condition precedent to the Allstate's duty to defend a suit brought against an insured. As shown previously, Moore's injuries were not the result of an "accident" or "occurrence." Therefore Allstate was under no duty to defend Rice in the previous federal court action.

In light of the above findings, there remains no genuine issue as to any material fact, and Allstate is entitled to judgment as a matter of law. Allstate's motions for summary judgment, both as Plaintiff and as Counter-defendant, are GRANTED and Defendant Rice's cross-motion for summary judgment is DENIED.

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

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
on behalf of the Secretary of Veterans Affairs, )  
  
Plaintiff, )  
v. )  
  
LARRY LA WAYNE LUCAS aka Larry L. Lucas; )  
JOYCE A. COOPER fka Joyce A. Lucas; )  
SPOUSE OF JOYCE A. COOPER; )  
STATE OF OKLAHOMA ex rel. )  
Oklahoma Tax Commission; )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma, )  
  
Defendants. )

**FILED**  
IN OPEN COURT

JUN 21 2000 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE JUN 21 2000

CIVIL ACTION NO. 99-CV-0687-K (d)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 21st day of June, 2000, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on March 20, 2000, pursuant to an Order of Sale dated December 6, 1999, of the following described property located in Tulsa County, Oklahoma:

Lot Eleven (11), Block Nineteen (19), VALLEY VIEW ACRES ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Peter Bernhardt, Assistant United States Attorney. Notice was given the Defendants, Larry La Wayne Lucas aka Larry L. Lucas; Joyce A. Cooper fka Joyce A. Lucas; Melvin Cooper, Spouse of Joyce A. Cooper; State of Oklahoma ex rel. Oklahoma Tax Commission through Kim D. Ashley, Assistant General Counsel; County Treasurer, Tulsa County, Oklahoma

and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

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

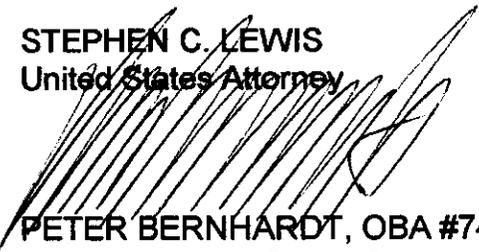
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United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

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

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

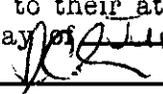
  
PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

Report and Recommendation of United States Magistrate Judge  
Case No. 99-CV-0887-K (J) (Lucas)

PB:css

CERTIFICATE OF SERVICE

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

21 Day of June 2000, 2000  


UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

JUN 21 2000

**DONALD HOPKINS,** )  
 )  
 **Plaintiff,** )  
 )  
 **v.** )  
 )  
 **KENNETH S. APFEL, Commissioner,** )  
 **Social Security Administration,** )  
 )  
 **Defendant.** )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 99-CV-308-EA

ENTERED ON DOCKET ✓

DATE JUN 21 2000

**ORDER**

On February 3, 2000, the Court reversed and remanded the Commissioner's decision for further proceedings. The Commissioner had submitted an agreed motion to remand. The Judgment was also entered on February 3, 2000, thereby making plaintiff the prevailing party. Plaintiff has submitted an application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), seeking an award in the amount of \$230.75 for his local counsel, \$6,088.50 for his Indianapolis counsel, and \$150.00 in costs.

The Commissioner objects to plaintiff's motion, claiming that the amount requested for attorney fees is excessive and that plaintiff has requested compensation for tasks that are not properly compensable under the EAJA. Specifically, the Commissioner argues as follows: plaintiff may not recover fees to compensate his counsel for filing his action in an improper venue; plaintiff requested compensation for research and briefing time is not reasonable; and a portion of the amount requested for tasks performed by his lead counsel's paralegal represents secretarial overhead expense. The Court agrees.

EAJA permits a court to award attorney fees to a "prevailing party" for work found by the court to be necessary for the preparation of the party's case. See 28 U.S.C. § 2412(d). Plaintiff's

counsel initially filed plaintiff's cause of action in Indiana even though counsel knew that plaintiff had moved to Oklahoma. The Social Security Act requires that a claimant file his complaint in the judicial district in which he resides. 42 U.S.C. § 405(g). Although the matter was ultimately transferred to this jurisdiction, plaintiff's counsel seeks fees for time spent on tasks related to the transfer. If plaintiff's counsel had not erred in filing the case in the wrong jurisdiction, there would have been no need to transfer the case.

The Commissioner also requests that the lead counsel's request be reduced for excessive time she spent researching Tenth Circuit law and writing a brief that cites to one case and primarily addresses only one issue. Further, plaintiff's counsel spent 27.5 hours writing the five-page brief. Plaintiff's case did not involve novel or difficult issues that required the excessive time plaintiff's counsel spent researching and writing.

Finally, the fee requested for lead counsel's paralegal involves tasks such as spell-checking, printing, and mailing documents, docketing due dates, and preparing standard correspondence and cover letters. As these are tasks that are not traditionally performed by an attorney or requiring an attorney's education and expertise, they are not properly compensable. The Commissioner has acknowledged that many of the entries for the paralegal group together tasks that are compensable with those that are not, and since it is not feasible to distinguish among those entries, the Commissioner requests only a 50% reduction in compensation for those entries. The Court deems this a reasonable request.

**IT IS THEREFORE ORDERED** that plaintiff be awarded attorney fees in the amount of \$2,698.83 and costs of \$150.00 for a total award of \$2,848.83 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 Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so **ORDERED** this 21<sup>st</sup> day of June, 2000.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

**JUN 21 2000**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )

v. )

Civil No. 97-CV-00993-B

HAROLD V. STEPHENS; )  
VERA H. STEPHENS; )  
KAYLN E. STEPHENS; )  
DEBORAH ANN STEPHENS; )  
AMERICAN MORTGAGE AND )  
INVESTMENT COMPANY; )  
PEOPLES STATE BANK; STATE OF )  
OKLAHOMA, ex rel. Oklahoma Tax )  
Commission; STATE OF )  
OKLAHOMA, ex rel. Oklahoma )  
Employment Security Commission, )  
)  
Defendants. )

ENTERED ON DOCKET  
DATE JUN 21 2000

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

NOW on this 21st day of June, 2000, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on December 28, 1999, pursuant to an Order of Sale dated December 14, 1998 of the following described property located in Tulsa County, Oklahoma:

Lot 6, Block 8, Rondo Valley Addition, a subdivision of Tulsa, Oklahoma,

Appearing for the United States of America is Wyn Dee Baker, Assistant United States Attorney. Notice was given the Defendant Harold and Vera Stephens through their attorney James A. Conrady, and they do not appear. Upon hearing, the Magistrate Judge makes

the following report and recommendation.

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

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

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

**S/Sam A. Joyner**  
**U.S. Magistrate**

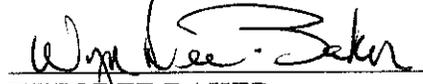
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UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

**STEPHEN C. LEWIS**

United States Attorney



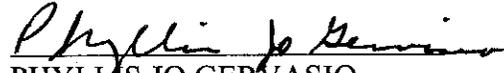
WYN DEE BAKER

Assistant United States Attorney

333 West 4th Street, Suite 3460

Tulsa, Oklahoma 74103

(918) 581-7463



PHYLLIS JO GERVASIO

Trial Attorney, Tax Division

U.S. Department of Justice

P.O. Box 7238

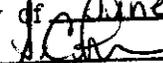
Ben Franklin Station

Washington, D.C. 20044

Telephone: (202) 514-6539

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

21 Day of June 2000, OK  


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

JUN 21 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ELLEN CAMPBELL,  
Plaintiff,  
  
v.  
  
KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,  
Defendant.

Civil 99-CV-1047-J

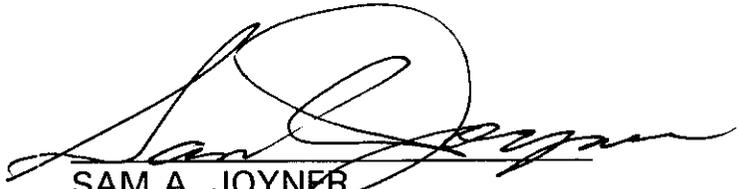
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DATE JUN 21 2000

JUDGMENT

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

Judgment for Plaintiff and against Defendant is hereby entered pursuant to the Court's Order and in accordance with Fed. R. Civ. P. 58.

THUS DONE AND SIGNED on this 21 day of June 2000.

  
SAM A. JOYNER  
United States Magistrate Judge

11







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

**FILED**

JUN 21 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DOUGLAS C. SHAFFER, )  
)  
Petitioner, )  
)  
vs. )  
)  
BOBBY BOONE, )  
)  
Respondent. )

Case No. 96-CV-1141-K ✓

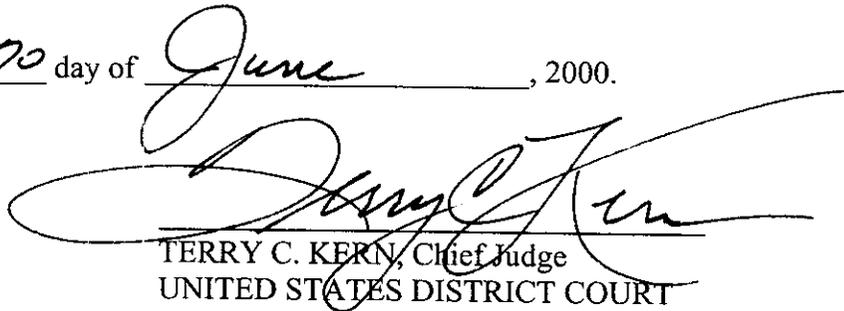
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DATE JUN 21 2000

JUDGMENT

This matter came before the Court upon Petitioner's second amended 28 U.S.C. § 2254 petition for writ of habeas corpus, as supplemented. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 20 day of June, 2000.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

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

DOUGLAS C. SHAFFER, )  
)  
Petitioner, )  
)  
vs. )  
)  
BOBBY BOONE, )  
)  
Respondent. )

ENTERED ON DOCKET  
DATE JUN 21 2000

Case No. 96-CV-1141-K

**F I L E D**

JUN 21 2000 *JA*

**ORDER**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Before the Court for consideration is the second amended petition for a writ of habeas corpus (Docket #7), as supplemented (#43), filed by Petitioner, a state inmate appearing *pro se*. Respondent has filed a response pursuant to Rule 5, *Rules Governing Section 2254 Cases* (Docket #34), and a supplemental response (#45). Petitioner has filed a reply to Respondent's response (#36). Petitioner has also filed a motion for summary judgment (#46). For the reasons discussed below, the Court finds Petitioner's motion for summary judgment and his second amended petition, as supplemented, should be denied.

**BACKGROUND**

Petitioner attacks his conviction entered in Tulsa County District Court, Case No. CF-90-5022. Petitioner was tried jointly with his codefendant, Michael Lawson, for the murder of Ralph Nelson. A third codefendant, Jessica Terry, entered a plea of guilty to Second Degree Felony Murder, and received a sentence of ten (10) years imprisonment. On October 17, 1991, the jury found Petitioner guilty of Second Degree Felony Murder, After Former Conviction of Two or More

*44*

Felonies, and recommended a sentence of sixty (60) years imprisonment. The trial judge sentenced Petitioner according to the jury's recommendation.

Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals ("OCCA").

On direct appeal, Petitioner raised the following propositions of error:

- Proposition I: Introduction of the non-testifying codefendant's confession was reversible error.
- A. Admission of the non-testifying codefendant's confessions was "plain error" despite counsel's failure to object
  - B. Counsel's failure to object to the introduction of the non-testifying codefendant's confession inculcating the defendant was ineffective assistance of counsel in this case
- Proposition II: Comments on the defendant's right to remain silent constitute reversible error.
- Proposition III: Admission of state's exhibits one, three and eight was an abuse of the trial court's discretion.
- Proposition IV: Improper closing argument denied defendant due process.

(#34, Ex. A). On August 31, 1994, the OCCA entered its unpublished summary opinion affirming Petitioner's conviction and sentence. (#14, Ex. A).

Thereafter, Petitioner filed an application for post-conviction relief in the state trial court alleging that (1) the Information filed in his case failed to state the facts that constituted the elements of the crime with which he was charged, (2) the trial court lacked subject matter jurisdiction as the Information was not verified, (3) the trial court was without jurisdiction to sentence petitioner under the provisions of 21 O.S. § 51 since the sentences of the prior convictions were not complete, and (4) the trial court incorrectly instructed the jury that Petitioner was presumed "not guilty" rather than presumed "innocent." See #14, Ex. B. The requested relief was denied by order filed March 15,

1996. Petitioner filed a post-conviction appeal in the OCCA where the denial of relief was affirmed on June 26, 1996. (#14, Ex. C).

Petitioner also filed an "Application for Writ of Habeas Corpus" in the trial court raising the same issues previously raised in his application for post-conviction relief. The trial court construed the pleading as a second application for post-conviction relief and, by order filed December 18, 1996, rejected the claims as barred by *res judicata*. (#14, Ex. D). Petitioner again appealed to the OCCA where, on March 19, 1997, the denial of relief was affirmed. (#14, Ex. F).

The record indicates that Petitioner filed a third application for post-conviction relief alleging again that the Information was not verified, that his conviction was improperly enhanced by former convictions, and that a "presumed not guilty" instruction was used at trial. In addition, Petitioner asserted ineffective assistance of counsel during all stages of trial and on direct appeal and claimed that he is innocent of the crime for which he was convicted. By order filed April 15, 1997, the trial court denied the requested relief. (#14, Ex. G). Petitioner appealed to the OCCA, where, on July 2, 1997, the trial court's denial of the requested relief was affirmed. (#14, Ex. H).

Petitioner commenced the instant habeas corpus action on August 22, 1996, by filing his petition in the United States District Court for the Eastern District of Oklahoma. (Docket #1). The action was transferred to this Court where it was received for filing on December 10, 1996. On November 17, 1997, Petitioner filed the second amended petition presently before the Court (#7). He also filed a brief in support (#10). He raises ten (10) grounds of error. In his brief, Petitioner identifies his claims as follows:

Proposition One: Ineffective assistance of trial counsel deprived Petitioner of his Sixth Amendment right to counsel.

- Proposition Two: Admission of non-testifying codefendant's confession, in a joint trial, violated Petitioner's sixth Amendment right to confront his accusers.
- Proposition Three: Comments on the defendant's right to remain silent constitute reversible error.
- Proposition Four: Improper closing argument denied defendant due process.
- Proposition Five: Petitioner received ineffective assistance of appellate counsel, thereby violating Petitioner's Sixth Amendment rights.
- Proposition Six: The trial court's use of the variant jury instruction, "presumed not guilty" instead of the required "presumed innocent" was fundamental error in violation of the Fifth Amendment and the Oklahoma court's recognition of such was an intervening change in law.
- Proposition Seven: Failure of the information to state all the essential elements of the alleged grand larceny of personal property violated Petitioner's rights under the Fifth and Fourteenth Amendments and Article II Section 7, 16, and 20 of the Oklahoma Constitution.
- Proposition Eight: The enhancement of Petitioner's sentence by use of two "uncompletely (sic) executed" prior convictions violated Petitioner's right to equal protection and due process of the law. U.S. Const. Amend. V and XIV.
- Proposition Nine: Failure of the State to verify the Indictment/Information sheet divested the trial court of subject matter jurisdiction to try Petitioner and thereby denied Petitioner his right to due process of law. U.S. Const. Amend. XIV.
- Proposition Ten: Petitioner asserts his factual innocence to the crimes charged in Counts I and III of the Information CF-90-1072.

(#10). In response (#34), Respondent argues that Petitioner is not entitled to habeas corpus relief on those claims adjudicated by the OCCA on direct appeal, i.e., claims one through four, based on the standard imposed by 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Respondent asserts that the remainder of Petitioner's claims, i.e., claims five through ten, are procedurally barred.

On September 20, 1999, the Court allowed Petitioner to supplement his second amended petition with an additional claim (#43). Petitioner states his supplemental claim as follows: "the extending of leniency to his co-defendant in exchange for her testimony against Petitioner at his trial was violative of Petitioner's 14th Amendment rights to due process as it violated the provisions of 22 O.S. § 456." Petitioner presented this claim to the state courts via a fourth application for post-conviction relief. After the trial court denied relief, Petitioner appealed to the OCCA. However, because his petition in error was filed more than thirty (30) days after entry of the district court order denying post-conviction relief, the OCCA dismissed the appeal, citing Okla. Stat. tit. 22, § 1087, and Rule 5.2(C), *Rules of the Oklahoma Court of Criminal Appeals*.

In response to Petitioner's supplemental claim, Respondent argues that the issue raised involves the application and interpretation of state law, and, therefore, is not cognizable in federal habeas corpus. (#45).

### *ANALYSIS*

#### **A. Applicability of AEDPA**

Petitioner filed his petition on August 22, 1996, after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Therefore the AEDPA's amendments to the habeas statutes apply to this case. Michael Williams v. Taylor, 120 S.Ct. 1479, 1486 (2000) (citing Lindh v. Murphy, 521 U.S. 320 (1997)).

#### **B. Exhaustion**

As an initial matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b); see also Rose v. Lundy, 455 U.S. 509, 510 (1982).

Respondent concedes (see #14) and the Court finds that Petitioner has exhausted his state remedies by presenting his claims to the OCCA on direct or post-conviction appeal. Therefore, the Court finds that Petitioner meets the exhaustion requirements under the law.

**C. Evidentiary hearing**

The Court finds that an evidentiary hearing is not necessary as Petitioner has not met his burden of proving entitlement to an evidentiary hearing. See Michael Williams v. Taylor, --- U.S. ---, 120 S.Ct. 1479 (2000); Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998). Petitioner in this case made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court. See Michael Williams, 120 S.Ct. at 1490. Therefore, he shall not be deemed to have "failed to develop the factual basis of a claim in state court," and he is excused from showing compliance with the balance of § 2254(e)(2)'s requirements. Michael Williams, 120 S.Ct. at 1491; Miller, 161 F.3d at 1253. As a result, a determination of Petitioner's entitlement to an evidentiary hearing is governed by standards in effect prior to enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") rather than by 28 U.S.C. § 2254(e)(2), as amended by the AEDPA. Miller, 161 F.3d at 1253. Under pre-AEDPA standards, in order to be entitled to an evidentiary hearing, a petitioner must make allegations which, if proven true and "not contravened by the existing factual record, would entitle him to habeas relief." Id. Petitioner's claims in this case are contravened by the record. As a result, Petitioner is not entitled to an evidentiary hearing.

**D. 28 U.S.C. § 2254(d) Standard**

The AEDPA amended the standard to be applied by federal courts reviewing constitutional

claims brought by prisoners challenging state convictions. Pursuant to § 2254(d),

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

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

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

28 U.S.C. § 2254(d). In Terry Williams v. Taylor, --- U.S. ---, 120 S.Ct. 1495, 1523 (2000)

(O'Connor, J., concurring), the Supreme Court provided guidance in applying § 2254(d) as follows:

... § 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 § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied -- the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." 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.

In the instant case, Petitioner's claims numbered one through four were considered on the merits and rejected by the Oklahoma Court of Criminal Appeals on direct appeal. Therefore, § 2254(d) guides this Court's analysis of those claims. For the reasons discussed below, the Court finds that each claim should be denied.

*1. Confrontation Clause challenge (Claim 2)*

As his second proposition of error, Petitioner asserts that the admission of his non-testifying

co-defendant's confession, in a joint trial, violated his Sixth Amendment right to confront his accusers. The "confession" at issue is the hand-written statement of Petitioner's co-defendant, Mike Lawson, introduced at trial as State's Exhibit 10. See Trans. at 144. The statement is part of the record before the Court and is found at Petitioner's Appendix, Page 5, attached to the second amended petition for writ of habeas corpus. (#7).

A defendant's right of confrontation includes the right not to have the incriminating hearsay statement of a nontestifying codefendant admitted in evidence against him. See Bruton v. United States, 391 U.S. 123, 137 (1968). However, in Schneble v. Florida, 405 U.S. 427, 432 (1972), the Supreme Court held that "unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required." Furthermore, "[e]ven if statements implicate the defendant directly, their admission, under the facts of the case, may be harmless error." Plantz v. Massie, No. 99-6075, 2000 WL 743677 (10th Cir. June 8, 2000) (citing Brown v. United States, 411 U.S. 223, 231 (1973) (Bruton errors are harmless if erroneously admitted testimony was cumulative to other overwhelming uncontroverted evidence properly before jury); United States v. Glass, 128 F.3d 1398, 1403 (10th Cir. 1997) (Bruton violation is harmless if, considering totality of evidence and context of challenged testimony, properly admitted evidence of defendant's guilt is overwhelming and prejudicial effect of co-defendant's statement was insignificant by comparison)).

In the instant case, Petitioner complains that in his statement, Lawson directly inculpates Petitioner as the person who "strangled" the victim. In his statement, given to police on December 4, 1990, Lawson described his role in and his understanding of the robbery scheme as well as what he had been told by his co-defendant, Jessica Terry, concerning the actual robbery. In his statement, Lawson refers to Petitioner one time, by first name only, stating as follows:

I just met Douglass & Derrick about a week ago. I don't know which one strangled him.

Derrick came back early he said he went to a pool hall and that his friends dropped him off.

(#7, Petitioner's Appendix at 5). After reviewing the entire trial transcript, the Court finds that even if the admission of Lawson's statement violated the Confrontation Clause under Bruton, the error was harmless. In addition to Lawson's statement, the jury heard Jessica Terry<sup>1</sup> testify concerning the robbery and the condition of the robbery victim when she and Petitioner departed from the scene of the robbery. Terry's testimony was consistent with the information contained in Lawson's statement. The jury also heard Georgia Dawn Winkle testify that during a December 4, 1990 conversation with Petitioner, he told her "he had killed someone." Trans. at 67. Based on the properly admitted uncontroverted evidence before the jury, the Court finds that Lawson's statement was cumulative as to Petitioner. As a result, to the extent the trial court's admission of the statement was a violation of the Confrontation Clause under Bruton, the Court finds the error was harmless error. Thus, Petitioner has failed to satisfy the § 2254(d) standard and habeas corpus relief should be denied on this claim.

In his motion for summary judgment (#46), Petitioner asserts that because he believes Respondent failed to controvert the legal argument posed as to the Confrontation Clause claim, he is entitled to summary judgment. However, having concluded that Petitioner is not entitled to habeas corpus relief on his Confrontation Clause claim, the Court finds Petitioner's motion for summary judgment should be denied.

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<sup>1</sup>At trial, Jessica Terry confirmed that she had received a sentence of ten (10) years imprisonment after pleading guilty to Second Degree Felony Murder as a result of her role in the death of Ralph Nelson. Trans. at 16. She also confirmed that she was testifying pursuant to her plea agreement. Trans. at 32.

2. *Ineffective assistance of trial counsel (Claim 1)*

As his first proposition of error, Petitioner asserts that he was denied effective assistance of trial counsel in violation of the Sixth Amendment when his trial counsel failed to object to the admission of his co-defendant's confession which implicated Petitioner by name. On direct appeal before the OCCA, Petitioner presented this claim as subpart B to his first proposition of error. See #34, Ex. A. The OCCA rejected the claim. Id.

It is well established that to prevail on an ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984). See Murray v. Carrier, 477 U.S. 478, 488-89 (1986); United States v. Cook, 45 F.3d 388, 394-95 (10th Cir. 1995). The Strickland test requires a showing of both deficient performance by counsel and prejudice to Petitioner as a result of the deficient performance. 466 U.S. at 687. To satisfy the deficient performance prong of the test, Petitioner must overcome a strong presumption that counsel's conduct fell within the "wide range of reasonable professional assistance [that] . . . might be considered sound trial strategy." Brecheen v. Reynolds, 41 F.3d 1343, 1365 (10th Cir. 1994) (citations omitted). "A claim of ineffective assistance must be reviewed from the perspective of counsel at the time and therefore may not be predicated on the distorting effects of hindsight." Id. (citations omitted). Finally, the focus of the first prong is "not what is prudent or appropriate, but only what is constitutionally compelled." Id. To establish the prejudice prong of the test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694. Failure to establish either prong of the Strickland standard will result in denial of relief. Id. at 696.

In the instant case, the OCCA rejected Petitioner's claim of ineffective assistance of counsel on direct appeal. The OCCA routinely applies the Strickland standard in evaluating claims of ineffective assistance of counsel. See, e.g. Stemple v. State, 994 P.2d 61 (Okla. Crim. App. 2000); Romano v. State, 942 P.2d 222 (Okla. Crim. App. 1997); Walker v. State, 933 P.2d 327 (Okla. Crim. App. 1997). Therefore, this Court may grant habeas relief only if Petitioner satisfies the § 2254(d) standard, i.e., only if Petitioner demonstrates that the OCCA's resolution of the claim was an unreasonable application of Strickland to the facts of Petitioner's case. 28 U.S.C. § 2254(d); Williams v. Taylor, --- U.S. ---, 120 S.Ct. 1495, 1523 (2000) (J. O'Connor, concurring). After reviewing the record in this case, the Court finds Petitioner has failed to make the requisite showing.

Without addressing the performance prong of the Strickland standard, the Court finds that Petitioner has not shown that he was prejudiced by his attorney's allegedly deficient performance. As stated above, although the admission of the non-testifying co-defendant's handwritten statement may have constituted a Confrontation Clause violation under Bruton, the Court is convinced the error was harmless because the evidence contained in the statement was cumulative of other evidence presented at trial. Having found any error as to admission of the statement to be harmless error, the Court finds that Petitioner cannot satisfy the prejudice prong of the Strickland standard. Petitioner cannot demonstrate that there is a reasonable probability that had trial counsel objected to the written statement of co-defendant Lawson, the outcome of this trial would have been different. As a result, the Court finds that the OCCA's rejection of this claim on direct appeal was not an unreasonable application of the legal principle announced by the Supreme Court in Strickland v. Washington to the facts of Petitioner's case. Petitioner has failed to satisfy the § 2254(d) standard and habeas corpus relief on his ineffective assistance of trial counsel claim should be denied.

3. *Improper comment on right to remain silent*

As his third proposition of error, Petitioner asserts that comments by the prosecutor on Petitioner's right to remain silent constitutes reversible error. Specifically, Petitioner complains that during closing argument, the prosecutor stated on three (3) separate occasions that the State's evidence was uncontroverted, as follows:

Robin Brown testified she was there. He seemed distant. He said something, "I can't believe what we did." Then he whispered something in Georgia Dawn Winkle's ear. Robin told you that later she found out. That testimony, Georgia Dawn Winkle's testimony, is uncontroverted. It is totally uncontroverted. No one has taken the witness stand and said anything else happened. Uncontroverted evidence.

(Trans. at 278).

Ladies and gentlemen, the evidence in the case came from the witness stand. Uncontroverted evidence was established beyond a reasonable doubt these 2 defendants acted in concert in the commission of a felony.

(Trans. at 309).

Use your common sense, your reason, base your verdict upon the testimony. Do what is right based upon the uncontroverted evidence, find these defendants guilty in concert with Jessica Terry.

(Trans. at 310). Petitioner asserts that these statements by the prosecutor were comments on his failure to testify and justify a new trial pursuant to Oklahoma statute. See Okla. Stat. tit. 22, § 701.

It is settled that prosecutorial comment upon the silence of the accused violates the Fifth Amendment privilege against self-incrimination. Griffin v. California, 380 U.S. 609 (1965). Thus, had Petitioner remained silent in exercise of this right, comment upon his failure to speak would have been clearly improper. However, this is not a case where the comments of the prosecutor directly and unequivocally called attention to the failure of the accused to testify, as in Griffin. See also Collins v. United States, 383 F.2d 296 (10th Cir. 1967). Nor is this a case where the jury would

naturally and necessarily understand the statement to be a comment on the failure of the accused to testify. See Knowles v. United States, 224 F.2d 168 (10th Cir.1955).

In Knowles, the Tenth Circuit held that reversible error exists if a prosecutor's remarks were "manifestly intended or [were] of such character that the jury would naturally and necessarily take [them] to be a comment on the failure of the accused to testify." Id. at 170; accord United States v. Hooks, 780 F.2d 1526, 1533 (10th Cir.1986). In Knowles, a tax fraud case, the prosecutor stated that the defendant "had every opportunity in the world given to make an explanation of it, to prove it was in error, to cast doubt upon it. And it wasn't done." Knowles, 224 F.2d at 170. The circuit court construed this as a comment on the fact that the evidence was unrefuted, not that the defendant failed to testify. Id.

After reviewing the comments in this case, in light of the trial record, the Court finds that the remarks were not "manifestly intended" to draw attention to Petitioner's silence. Petitioner claims that these are comments on his failure to testify because only he could have impeached the testimony described as "uncontroverted." Nonetheless, the Court finds that the prosecutor's references to uncontroverted testimony cannot be said to refer to Petitioner's failure to take the stand. Rather, they refer to the defense's failure to put on any witnesses to counter the witnesses for the prosecution. Under the circumstances, a jury would not naturally and necessarily take these statements to be a reference to Petitioner's failure to testify, nor does the evidence show that they were so intended. After reviewing the record, the Court finds that the challenged statements were not intended to have the effect of emphasizing the failure of Petitioner to testify. Habeas corpus relief on this claim should be denied.

4. *Prosecutorial misconduct during closing argument*

As his fourth proposition of error, Petitioner alleges that he was denied due process as a result of the prosecutor's improper closing argument. Specifically, Petitioner asserts that the "State alluded that defense was a smokescreen; State alluded that Petitioner had sold the stereo equipment to the deceased so that he could steal it back; State said, 'use your common sense, your reason, base your verdict on the evidence, base your verdict upon the testimony. DO WHAT IS RIGHT based on the evidence, find these defendants guilty.'" (#7 at 10). Petitioner raised this claim in his state direct appeal. The OCCA adjudicated the claim. Therefore, this Court may grant habeas corpus relief only if Petitioner satisfies the § 2254(d) standard as discussed above. After reviewing the record in this case, the Court finds Petitioner has failed to make the requisite showing.

Habeas corpus relief is available for prosecutorial misconduct only when the prosecution's conduct is so egregious in the context of the entire trial that it renders the trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 642-648 (1974); Cummings v. Evans, 161 F.3d 610, 618 (10th Cir.1998), *cert. denied*, --- U.S. ----, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999). Inquiry into the fundamental fairness of a trial requires examination of the entire proceedings. Donnelly, 416 U.S. at 643. "To view the prosecutor's statements in context, we look first at the strength of the evidence against the defendant and decide whether the prosecutor's statements plausibly could have tipped the scales in favor of the prosecution." Fero v. Kerby, 39 F.3d 1462, 1474 (10th Cir. 1994) (quotations omitted); see also Smallwood v. Gibson, 191 F.3d 1257, 1275-76 (10th Cir. 1999).

After reviewing the entire trial transcript, this Court does not find the OCCA's ruling to be an unreasonable application of constitutional law. Even assuming that the specific instances of alleged misconduct were improper, this Court finds, based on careful review of the record of the

entire proceedings, that none of the prosecutor's comments were of sufficient magnitude to influence the jury's decision. In light of the evidence establishing Petitioner's guilt, there is no reasonable probability that the verdict in this case would have been different without the alleged misconduct. Therefore, the Court concludes that the proceedings against Petitioner were not rendered fundamentally unfair by prosecutorial misconduct. Petitioner is not entitled to habeas relief.

#### **E. Procedural Bar**

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 724; see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

In the instant case, Petitioner first raised his claims numbered five through ten in post-conviction proceedings. With the exception of Petitioner's claims seven and nine, both involving challenges to the trial court's jurisdiction, the OCCA declined to evaluate the merits of the claims, ruling that Petitioner had waived his claims by failing either to raise the claims on direct appeal or to

raise the claims in prior post-conviction applications. Applying the principles of procedural default to these facts, the Court concludes Petitioner's claims numbered five, six, eight and ten, as well as claims seven and nine, to the extent those claims challenge the sufficiency of the Information based on due process concerns, are procedurally barred from federal habeas corpus review.<sup>2</sup> Based on Okla. Stat. tit. 22, § 1086, the OCCA routinely bars claims that could have been but were not raised at the first opportunity, either on direct appeal or in a first application for post-conviction relief. The state court's procedural bar as applied to these claims was an "independent" ground because Petitioner's failure to comply with state procedural rules was "the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because, as stated above, the OCCA consistently declines to review claims which could have been but were not raised on direct appeal or in a first application for post-conviction relief. Okla. Stat. tit. 22, § 1086.

Because of his procedural default of his claims in state court, this Court may not consider Petitioner's claims numbered five through ten unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 501 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains."

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<sup>2</sup> To the extent Petitioner's claims seven and nine challenge the trial court's subject matter jurisdiction based on an allegedly insufficient Information, the claims are not procedurally barred and are discussed separately in Part F.

United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner in this case argues ineffective assistance of appellate counsel as "cause" for his failure to raise claims six through ten on direct appeal. Petitioner also raises ineffective assistance of appellate counsel as a separate claim in claim five. It is well established that in certain circumstances, counsel's ineffectiveness can constitute "cause" sufficient to excuse a state prisoner's procedural default. Carrier, 477 U.S. at 488-89. However, the assistance provided by appellate counsel must rise to the level of a constitutional violation. Id. Furthermore, the ineffective assistance of appellate counsel claim must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. Id. at 489.

Petitioner has in fact presented his ineffective assistance of appellate counsel claim as an independent claim to the state courts of Oklahoma in his third application for post-conviction relief. See #18, Ex. F. Thus, Petitioner has satisfied the requirement that his ineffective assistance of appellate counsel claim be presented as an independent claim to the state courts before it may be used to establish cause for the procedural default of other claims. However, by order dated July 2, 1997, the OCCA affirmed the trial court's denial of post-conviction relief, finding that Petitioner had procedurally defaulted his claim by failing to raise in his prior post-conviction proceedings. (#14, Ex. H). The OCCA's finding of procedural default as to Petitioner's ineffective assistance of appellate counsel claim is both "independent" and "adequate" and must be recognized by this Court. Cf. Smallwood v. Gibson, 191 F.3d 1257, 1268-69 (10th Cir. 1999) (finding petitioner's failure to raise the factual bases for his ineffective assistance of counsel claims in his first application for state post-

conviction relief precluded habeas review absent a showing of cause and prejudice or a fundamental miscarriage of justice); Moore v. Reynolds, 153 F.3d 1086, 1097 (10th Cir. 1998) (same).

The United States Supreme Court recently held that an ineffective assistance of counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted and cannot serve as "cause" to excuse the procedural default unless the prisoner can satisfy the "cause and prejudice" standard with respect to that claim. Edwards v. Carpenter, --- U.S. ---, 120 S.Ct. 1587, 1592 (2000). Thus, in this case, because Petitioner procedurally defaulted his ineffective assistance of appellate counsel claim, that claim cannot serve as "cause" to excuse the procedural default of claims numbered six through ten unless Petitioner can demonstrate "cause and prejudice" for the procedural default of his ineffective assistance of appellate counsel claim. The Court notes that in response to the Petitioner's second amended petition, Respondent argued that the ineffective assistance of appellate counsel claim was itself procedurally barred and that, in the absence of a showing of "cause and prejudice" for the default, this Court could not consider the claim. See #34 at 18-19. In his reply to Respondent's response (#36), Petitioner made no effort to demonstrate "cause and prejudice" for the default of his ineffective assistance of appellate counsel claim, choosing instead to "stand[] upon the argument and authority set forth in his Brief in Chief." Because Petitioner chose not to address the issue of cause and prejudice necessary to overcome the procedural default of the ineffective assistance of appellate counsel claim and the Court finds nothing in the record suggesting the existence of "cause and prejudice" sufficient to overcome the default, the Court concludes the claim is procedurally barred from this Court's review and cannot serve as "cause" to excuse the procedural default of claims six through ten.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence

under the fundamental miscarriage of justice exception. Herrera v. Collins, 506 U.S. 390, 403-404 (1993); Sawyer v. Whitley, 505 U.S. 333, 339-341 (1992). However, Petitioner does not claim to be actually innocent of the crime for which he was convicted. As a result, the Court concludes that Petitioner has failed to make a colorable showing of actual innocence and finds that the "fundamental miscarriage of justice" exception to the procedural default doctrine has no application to this case. Claims five through ten should be denied as procedurally barred.

**F. Challenge to trial court's jurisdiction based on insufficiencies of the Information**

To the extent Petitioner challenges the jurisdiction of the trial court in claims seven and nine, the Court finds the claims are not cognizable under § 2254 and should be denied. As ground seven, Petitioner claims that because the Information failed to list all of the essential elements of the underlying felony, it was fundamentally defective and insufficient to confer subject matter jurisdiction on the trial court. (#7 at 16). Petitioner asserts that any criminal information sheet which does not allege all the essential elements of the offense charged is insufficient, and the defect goes to the jurisdiction of the court and is not waivable. (#10). As ground nine, Petitioner asserts that the trial court was divested of jurisdiction because the Information was "unverified." (#7 at 20). Petitioner's argument is based on Okla. Stat. tit. 22, § 303, mandating that the information be endorsed and verified to confer jurisdiction on the trial court. See Okla. Stat. tit. 22, § 303; Lynch v. State, 909 P.2d 800, 803 (Okla. Crim. App. 1996). Petitioner asserts that neither the Information, see #7, Petitioner's Appendix at 15-17, nor the Amended Information<sup>3</sup> was verified as required by state statute thereby divesting the trial court of jurisdiction. In affirming the trial court's denial of post-

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<sup>3</sup>The amended information is not part of the record before this Court.

conviction relief and after noting that a challenge to the trial court's jurisdiction may be raised at any time, the OCCA found that Petitioner did not "provide[] any evidence or authority which supports his arguments or establishes that any alleged defects in the information, or in his former convictions, destroyed the jurisdiction of the District Court." (#14, Ex. F).

Even if Petitioner's assertions are true, the Court finds both of these claims raise issues of interpretation of state law and as such are not cognizable in a federal habeas case. See Tyrrell v. Crouse, 422 F.2d 852 (10th Cir. 1970); see also Poe v. Caspari, 39 F.3d 204, 207 (8th Cir. 1994) (stating that "[j]urisdiction is no exception to the general rule that federal courts will not engage in collateral review of state court decisions based on state law: 'The adequacy of an information is primarily a question of state law and we are bound by a state court's conclusion respecting jurisdiction . . . This determination of jurisdiction is binding on this [federal] court.' Chandler v. Armontrout, 940 F.2d 363, 366 (8th Cir. 1991); see Johnson v. Trickey, 882 F.2d 316, 320 (8th Cir. 1989) (adequacy of information is question of state law binding on federal courts)"); Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991) ("We are not persuaded that a constitutional violation necessarily occurs when the convicting state court acts without jurisdiction purely as a matter of state law."); United States v. Mancusi, 415 F.2d 205, 209 (2d Cir. 1969) ("no federal court to our knowledge has ever granted a writ where a state court's asserted lack of jurisdiction resulted solely from the provisions of state law"); Wills v. Egeler, 532 F.2d 1058, 1059 (6th Cir. 1976). Therefore, habeas corpus relief on these claims should be denied.

**G. Claim raised in supplement to second amended petition**

On September 20, 1999, the Court allowed Petitioner to file a supplement to the second

amended petition (Docket #43). In his supplement Petitioner added one additional claim: that “the extending of leniency to his co-defendant in exchange for her testimony against Petitioner at this trial was violative of Petitioner’ 14th Amendment rights to Due Process as it violated the provisions of 22 O.S. § 456.”<sup>4</sup> (#43). Petitioner presented this claim to the state courts of Oklahoma in a fourth application for post-conviction relief. After the state district court denied the requested relief, Petitioner filed an appeal in the OCCA. However, on January 6, 1999, the OCCA dismissed the appeal as untimely filed. (#44, Ex. A).

Petitioner asserts that his claim should not be subject to a procedural bar because the claim presents “a novel issue of law in Oklahoma and has yet to be decided by a Court of this jurisdiction.” Petitioner further asserts “that a similar issue was recently considered by the Tenth Circuit in regards to a federal statute prohibiting or not prohibiting prosecutors from offering leniency in exchange for testimony in Singleton v. U.S., (citation unknown).” Apparently, Petitioner relies on the Tenth Circuit’s July 1, 1998 decision in United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), wherein the Tenth Circuit held that 18 U.S.C. § 201(c)(2) prohibited the federal government from offering leniency to persons in exchange for their testimony. By order entered July 10, 1998, the Tenth Circuit vacated its July 1, 1998, opinion and ordered the appeal be reheard by the court *en banc*. After hearing oral argument on the issues, the *en banc* court held that § 201(c)(2) does not include the United States acting in its sovereign capacity, and thus does not include an assistant United States attorney acting as alter ego of the United States in offering an accomplice leniency in exchange for truthful testimony. United States v. Singleton, 165 F.3d 1297 (10th Cir. 1999).

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<sup>4</sup>The Court notes that Okla. Stat. tit. 22, § 456, defining the form of a bench warrant to be issued if the offense is a felony, appears unrelated to the argument asserted by Petitioner in his supplemented claim.

Petitioner's attempt to frame his claim as a "novel issue of [Oklahoma] law" based on Singleton does not excuse his default of this claim in the state courts. Had Petitioner presented his claim in a timely filed post-conviction appeal, the OCCA would have undoubtedly imposed a bar, based on Okla. Stat. tit. 22, § 1086, finding that Petitioner could have but did not raise the claim in prior proceedings. That finding would be based on independent and adequate grounds and must, therefore, be respected by this Court. Petitioner has not demonstrated that his default should be excused. See discussion in Part E, above. Therefore, the claim should be denied as procedurally barred. In addition, the claim clearly involves interpretation and application of state law and is not cognizable in federal habeas corpus. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (stating that "[i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States"). For these reasons, the Court concludes that Petitioner's claim asserted in his supplement to the second amended petition should be denied.

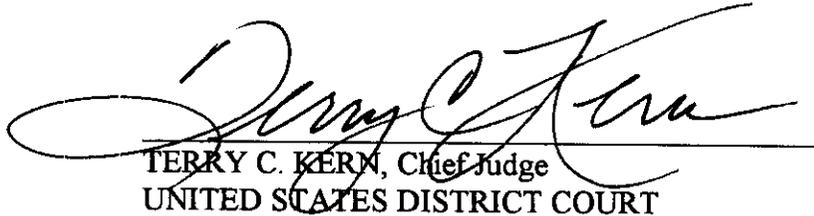
*CONCLUSION*

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

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

1. The second amended petition for a writ of habeas corpus, as supplemented, is **denied**.
2. Petitioner's motion for summary judgment (#46) is **denied**.

SO ORDERED this 20 day of June, 2000.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

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

DOUGLAS BOWEN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 INCOME PRODUCING MANAGEMENT )  
 OF OKLAHOMA, INC., a Kansas )  
 corporation, )  
 )  
 Defendant. )

ENTERED ON DOCKET  
DATE JUN 21 2000

Case No. 96-CV-603-K ✓

**FILED**

JUN 21 2000 ✓

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER AND JUDGMENT**

In accordance with the decision by the United States Court of Appeals for the Tenth Circuit filed February 1, 2000 in Case Nos. 98-5037 and 98-5051, the Judgment dated and filed June 30, 1997 and entered on the docket on July 1, 1997 (docket no. 65) in favor of Plaintiff and against Defendant, is hereby VACATED in its entirety, and Judgment is hereby entered in favor of Defendant, Income Producing Management of Oklahoma, Inc., against Plaintiff, Douglas Bowen, on all claims, and the costs of this action are hereby taxed against Plaintiff.

ORDERED this 20 day of June, 2000.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

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**F I L E D**

JUN 19 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

JOSEPH J. LEBLANC, III,  
Individually and as Testamentary Executor  
of the Successions of Joseph J. LeBlanc, Jr.  
and Audrey B. LeBlanc, and as Personal  
Representative of Decedents, Joseph J. LeBlanc, Jr.  
and Audrey B. LeBlanc, and of the Successions of  
Joseph J. LeBlanc, Jr. and Audrey B. LeBlanc,  
and/or for and on behalf of the Successions  
(Estates) of Joseph J. LeBlanc, Jr. and Audrey B.  
LeBlanc, LISA LEBLANC DUFRIEND and  
LAURIE LEBLANC BECNEL,  
Plaintiffs

versus

DIVCO, INC., WEST STAR AVIATION, INC.  
and UNISON INDUSTRIES, INC., formerly  
known as SLICK ELECTRO, INC. and/or  
SLICK AIRCRAFT PRODUCTS,  
Defendants

\*\*\*\*\*

CIVIL ACTION

NO.: 99CV0508 "B" (E)

ENTERED ON DOCKET  
DATE JUN 20 2000

**ORDER GRANTING**  
**JOINT MOTION FOR PARTIAL DISMISSAL**

Considering the annexed Joint Motion for Partial Dismissal and the grounds therein recited, the Court finds that the motion should be and it is hereby granted.

**IT IS THEREFORE ORDERED** that defendant, DIVCO, Inc., be and it is hereby dismissed as a defendant in the above entitled and numbered cause, with prejudice, with full reservation of all of plaintiffs' rights, remedies and claims against all other parties, including, without limitation, defendants herein, West Star Aviation, Inc., Unison Industries, Inc., formerly

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known as Slick Electro, Inc. and/or Slick Aircraft Products, AVCO Corporation, Textron, Inc.  
and Textron Industries, Inc.

DATED, THIS 30<sup>th</sup> DAY OF June, 2000.

  
UNITED STATES DISTRICT JUDGE

**SUBMITTED BY:**

Respectfully submitted,

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