October 12, 2016

Hon. Richard R. Cooch
New Castle County Courthouse
500 North King Street, Suite 10400
Wilmington, DE 19801
(302) 255-0664

By electronic filing

Re: Rudenberg v. Delaware DOJ, C.A. No.: N16A-02-006 RRC

AMERICAN CIVIL LIBERTIES UNION FOUNDATION of DELAWARE
100 W 10TH ST, SUITE 603
WILMINGTON, DE 19801
T/302-654-5326
F/302-654-3689
WWW.ACLU-DE.ORG

S. ELIZABETH LOCKMAN
PRESIDENT

KATHLEEN M MacRAE
EXECUTIVE DIRECTOR

RICHARD H MORSE
LEGAL DIRECTOR

Dear Judge Cooch:

Your Honor has asked the parties to address whether the Court should consider new facts raised in the Declaration of Russell D. Hansen, whether Appellant may take the deposition of Mr. Hansen, and whether the matter ought to be remanded to the Chief Deputy Attorney General.

These proceedings arise under the newly amended version of Delaware FOIA as an appeal "on the record" from the determination of the Chief Deputy Attorney General. 29 Del. C. § 10005(b). By filing a Statement of Interest, the United States Department of Justice (DOJ) has sought to interject into this appeal the Declaration of Special Agent Hansen concerning the redaction of certain information from State Police purchase orders. As a non-party, the DOJ did not seek leave for this filing or cite any procedural basis for it under the Rules of the Superior Court. The DOJ effectively seeks a second chance to submit this information, since the FBI already coordinated with the State Police concerning these redactions at the administrative stage of this matter and could have offered this evidence and argument at that time.

Notwithstanding the procedural improprieties, in the interest of a full and fair airing of these important issues, Appellant would not object to the Court considering the new evidence if he is permitted to depose Special Agent Hansen and to submit a counter-declaration. However, if Appellant is not permitted to explore the basis for the FBI's assertions, then Appellant asks the Court to enforce the general rule that a non-party is not permitted to insert new evidence into a pending appeal.

The United States seeks to submit new evidence into an appeal after the FBI already had its position represented at the underlying proceeding

After the State Police denied Mr. Rudenberg's request for information concerning their use of cell site simulators, he filed a § 10005(e) petition with the Chief Deputy Attorney General challenging the denial. R. at 2. Before responding, the State Police consulted with counsel for the FBI. R. 3-5. The FBI requested that the State Police redact any purchase orders that would be produced to Appellant—the

redactions at issue in the Statement of Interest. R. 14. After those discussions with counsel for the FBI, the State Police submitted their arguments to the Chief Deputy Attorney General as to why the purchase orders should be redacted.

Appellant did not receive notice of the positions taken and arguments made by the FBI and State Police or an opportunity to respond before the Chief Deputy ruled. After the adverse ruling, Appellant filed his appeal "on the record to Superior Court" as required by the statute. § 10005(b)-(d).

Even though the FBI coordinated with the State Police during the pendency of the administrative stage of this case, the DOJ now asks this Court to consider further arguments and facts presented by the FBI concerning the impact of disclosing the redacted information, citing the federal statute that empowers the Department of Justice to "attend to the interests of the United States in a suit pending in a court of the United States." 28 U.S.C. § 517.

The DOJ should not be permitted to submit new evidence into this appeal without leave of the parties, which Appellant is willing to grant so long as Appellant can appropriately explore and contest the evidence

When the United States files a Statement of Interest but does not seek to intervene in a pending suit, such filings pursuant to § 517 have been treated as amicus briefs. *E.g., United States ex rel. King v. Solvay S.A.*, 823 F. Supp. 2d 472, 504 (S.D. Tex. 2011). Since the United States is not a party, the best characterization of its role in this case is as *amicus curiae*.

An entity that files an amicus brief is not ordinarily permitted to introduce new evidence. *See United States v. State of Mich*., 940 F.2d 143, 165 (6th Cir. 1991) (amicus "has never been recognized, elevated to, or accorded the full litigating status of a named party or a real party in interest"); *Smith v. Pinion*, No. 1:10-CV-29, 2013 U.S. Dist. LEXIS 105412, at *25 (M.D.N.C. July 29, 2013) (rejecting evidence submitted by amicus). Even if the United States had the standing of a party in this action, it would be improper to submit new evidence at this stage of the proceeding—an appeal on the record.[1] *See Clark v. D.O.W. Fin. Corp.*, C.A. No.: 98A-11-012-FSS, 2000 Del. Super. LEXIS 238, at *13 (Super. Ct. May 26, 2000) (refusing to entertain new evidence in appeal on the record).

However, as indicated above, Appellant is willing to withhold objection to the introduction of this new evidence provided that he has the opportunity to depose the declarant and respond with a counter-declaration. This would maximize the information available to the Court about these important issues without prejudicing Appellant.

[1] Moreover, unlike Appellant, the FBI already had an opportunity to have its views on the propriety of redacting the purchase orders presented at the earlier stage of this proceeding.

Basic fairness requires that the evidence should only be considered if Appellant has the opportunity to depose the declarant. *See United States v. Michigan*, No. G84-63, 1986 U.S. Dist. LEXIS 27576, at *8-9 (W.D. Mich. Mar. 27, 1986) (allowing amicus to present witnesses under special circumstances but only because the Defendant "has had a full opportunity to depose and otherwise discover the testimony of the [] amicus' proposed witnesses."); *see also United States ex rel. Thomas v. Siemens AG*, 991 F. Supp. 2d 540, 544 (E.D. Pa. 2014) (noting that the plaintiff was entitled to depose the witness presented by the United States as a non-party in a False Claims Act case).

The specific discovery that Appellant seeks is the opportunity to depose Special Agent Hansen. In addition to learning the factual basis for Special Agent Hansen's declarations so that Appellant can appropriately respond to them (either by conceding the point or disputing it), there are basic questions of interpretation left open by Special Agent Hansen's affidavit. For example, it is unclear whether Special Agent Hansen is testifying that mere disclosure of model names leads to the harms he envisions, or whether he is testifying that there is some other information in the redacted sections, or the combination of that information with model names, that leads to the harm.[2] This kind of clarification, and others like it, is essential for the Court to be able to appropriately assess the impact of this evidence, and is unlikely to involve the further disclosure of anything the United States views as sensitive.[3]

The Court should not remand this matter to the Chief Deputy

This appeal should not be remanded to the Chief Deputy. The Superior Court Rules of Civil Procedure provide that the rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every proceeding." Super. Ct. Civ. R. 1. Under these unusual circumstances, this ought to include the limited expansion of the record before a determination on this appeal.

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[2] Because counsel for the State Police represented that the redacted information was model names, the parties have only briefed the disclosure of model names. Br. 22-23; Opp. Br. 15-16, 24, 26, 32, 34; Reply Br. 10-14. Hansen's declaration suggests that the redactions also include "the component parts and software necessary to configure CSS systems." Hansen Decl. ¶ 19. This is a good example of why Appellant contends that FOIA respondents must identify the reason for redactions and connect them to what is being redacted. Allowing Appellant to explore further Hansen's opinions could potentially result in an outcome in which Appellant and the FBI do not disagree about what should be disclosed.

[3] To the extent that subjecting Special Agent Hansen to cross-examination may implicate some of the secrets that the United States is seeking to conceal, the Department of Justice is undoubtedly competent to raise appropriate objections during that discovery or to file a protective motion, and the parties can resolve those matters in due course as they would in any other litigation.

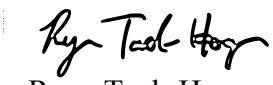
Remand would unduly delay the resolution of this matter for little substantive benefit. The question of the propriety of the redactions to the purchase orders is only one of the several issues that remain in this case. Other issues include the disclosure of information about what court authority is sought by the State Police before using these devices. Delaying the resolution of the rest of the issues is unfair to Appellant, who has already seen his request subject to significant delays beyond what is authorized under Delaware FOIA (having waited 195 days for a determination from the Chief Deputy). Br. 6. It would be especially unfair to further delay resolution of this matter as the result of the FBI's new submission since the FBI already had the opportunity for its views to be considered.

Moreover, one of the issues in this case is what the proceeding before the Chief Deputy Attorney General is supposed to involve. The State Police take the position that the Chief Deputy had no obligation to notify Appellant of their arguments or to consider his response. Opp. Br. 25-26. Appellant contends that he should have had notice of the State Police's arguments and an opportunity to respond to them before the Chief Deputy ruled. Remanding the case before deciding that issue may result in yet another determination that must be nullified for failing to follow necessary procedures. It is far better for this Court to resolve the various disputes arising in this awkward procedural posture and then set forth how cases like this ought to proceed in the future.

Conclusion

It is in the best interests of justice for the Court to consider the Hansen Declaration, but only after Appellant is able to discover the basis for the factual claims therein and to submit a counter-declaration. The Court should not remand the case, even if that would ordinarily be the correct course, because of the unusual procedural footing and because of the delays already involved in the first administrative proceedings.

Sincerely,



Ryan Tack-Hooper (No. 6209)
Richard H. Morse (No. 531)
ACLU of Delaware Foundation
100 West 10th Street, Suite 706
Wilmington, DE 19801
(302) 654-5326 x 105

cc: Patricia Davis-Oliva, Esq.
Joseph Handlon, Esq.

Compendium of Unreported Cases Cited in Letter Memorandum

1. *Clark v. D.O.W. Fin. Corp.*, C.A. No.: 98A-11-012-FSS, 2000 Del. Super. LEXIS 238 (Super. Ct. May 26, 2000)

2. *Smith v. Pinion*, No. 1:10-CV- 29, 2013 U.S. Dist. LEXIS 105412 (M.D.N.C. July 29, 2013)

3. *United States v. Michigan*, No. G84- 63, 1986 U.S. Dist. LEXIS 27576 (W.D. Mich. Mar. 27, 1986)

Clark v. D.O.W. Fin. Corp.

Superior Court of Delaware, New Castle

February 10, 2000, Submitted ; May 26, 2000, Decided

C.A. No.: 98A-11-012-FSS

Reporter
2000 Del. Super. LEXIS 238; 2000 WL 973092

JOSEPH L. CLARK, Appellant, v. D.O.W. FINANCE CORP., Appellee,

Subsequent History: [*1] Released for Publication by the Court June 2, 2000.

Disposition: Appellee's Motion to Affirm the Court of Common Pleas GRANTED.

Counsel: Mr. Joseph L. Clark, pro se, Coatesville, Pennsylvania.

Curtis J. Crowther, Esquire, White & Williams, LLP, Wilmington, Delaware, Attorney for Appellee.

Judges: Fred S. Silverman, Judge.

Opinion by: Fred S. Silverman

Opinion

ORDER

SILVERMAN, J.

This is an appeal from a trial *de novo* in the Court of Common Pleas, which entered a civil judgment against Appellant. Appellant has appeared without counsel throughout the entire proceeding. This state of affairs has not made it easy for the courts. It has taken some effort to understand what has happened and what issues Appellant is raising.

Basically, Appellant bought a car and failed to make payments. Due to his default, the car was repossessed and eventually salvaged for $ 50. The litigation has concerned Appellee's efforts to obtain a deficiency judgment. In February 1996, Appellant purchased a 1989 automobile from Deals on Wheels Trucks, obtaining financing through D.O.W. Finance Corporation. The financing agreement provided for forty-three biweekly payments at an interest rate of 35%. Appellant only made [*2] two payments and the vehicle was repossessed on May 12, 1997.

I.

Although the history of this highly contentious case is long, the Court will recite it fully for the sake of illustration. Justice of the Peace Court No. 12 entered a default judgment against Appellant on April 25, 1997 due to his failure to appear for trial. On May 5, 1997, Appellant filed a motion to vacate judgment, which the Court granted on May 21, 1997. Following a trial on July 2, 1997, the Court entered judgment against Appellant.

Appellant filed an appeal *de novo* with the Court of Common Pleas on July 14, 1997. Appellee then filed a complaint on appeal and an amended complaint on appeal with the Court of Common Pleas on August 1, 1997. Appellant filed an answer and counterclaim on August 26, 1997, in which Appellant demanded:

> Judgement against Plaintiff below/Appellee for the sum of $ 3,500 plus Interest at the rate of 55% from MARCH 5, 1996. THE Immediate removel of all derogatory claims from all credit reporting agencies AND a letter for a time until all derogatory information is Removed. and ALL Attorney fees should an attorney enter an appearance.

Appellant, however, cited no [*3] factual basis for his demands.

Appellee replied to the counterclaim on September 16, 1997. The reply included affirmative defenses, a motion to strike and a motion to dismiss. During the very hostile discovery phase, Appellee filed a motion to compel discovery on January 13, 1998, followed the next day by a motion to dismiss or strike counterclaims. The Court granted both motions on January 30, 1998. On February 20, 1998, Appellant filed an Answer to the amended complaint.

Appellant filed a motion to compel production of documents on June 2, 1998, but did not notice it. Appellant then sent a letter dated July 10, 1998 to Appellee's attorney stating that:

> TAKE NOTICE, both you and your client, D.O.W. Finance Corp., was served more than sufficient warnings of my impending legal actions against the both of you yet it went ignored. This letter served is during a priority "Bravo - 1. Joseph L. Clark in addition to all claims, demand full written apology from both attorney and client and expected within 10 consecutive days from date posted on

> this letter herein. At the close . . . of business day July 21, 1998, I will move all legal action against you to priority level Alpha - [*4] 1. This in part will include the posting to find and identify all previous victims of your clients'. Posting will take place in all media both local and national. MR Crowther how do you wish for me to engage?

On July 13, 1998, Appellant filed an Amendment to Appeal in which Appellant apparently made multiple requests for $ 90,000 and other damages.

On August 31, 1998, the Court, upon application by Appellee, entered a non-suit dismissal against Appellant due to Appellant's failure to appear for trial. Later that day, Appellant filed a motion to reopen the case, blaming his failure to appear on unforeseen traffic problems, his "not knowing how to get to Court House," parking problems, security checks, and being momentarily delayed by having to ascertain in which courtroom his case would be heard.

On September 1, 1998, Appellee filed a response in opposition to Appellant's "Motion to Vacate Non-Suit Judgment." Appellee noted that Appellant appeared for three prior proceedings, including two at the same time of day as the trial. In addition, Appellee noted that on a previous occasion, Appellant called the Court from his cellular phone when he was going to be late, and on this [*5] occasion Appellant did not.

The Court of Common Pleas granted Appellant's motion on September 3, 1998, noting:

> A review of the Court file indicates that Mr. Clark also had a default judgment entered in the Justice of the Peace Court for his failure to appear. Given this record, [Appellee's] legal and factual argument has merit. However, given this matter is Mr. Clark's day in court, this Court shall lift the non-suit and allow this case to proceed on the merits.

The Court of Common Pleas held the trial *de novo* on October 22, 1998. As mentioned, judgment was entered again on behalf of Appellee.

On November 19, 1998, Appellant filed his initial complaint for citation on appeal to this Court. Appellant filed his brief on October 12, 1999, which notably asked for $ 1 million from Appellee. Appellee filed a motion to strike Appellant's opening brief on October 14, 1999. The grounds cited were Appellant's failure to comply with Superior Court Rule 107, [1] Appellant's request for affirmative relief and that the brief was "not presented in such a manner as to permit a meaningful review, examination and/or response." The Court granted Appellee's motion on November 12, 1999, but [*6] granted Appellant thirty days in which to file another brief. Specifically, the Court instructed Appellant that his "brief must state in simple informative sentences precisely what errors were made by the Court of Common Pleas and the authorities, if any, on which Mr. Clark relies." Appellant filed another brief on January 18, 2000. Appellee filed a motion to affirm on January 24, 2000. On February 2, 2000, Appellant filed a "Motion to Reverse and in Opposition to Affirm." Appellant's final pleading is not contemplated by the Court's rules. But consistent with the way that all the courts have treated this *pro-se* litigant's homemade pleadings and his other procedural defaults and failures, including his failure to appear in court for trial--twice, the Court has considered Appellant's last pleading.

[*7] **II.**

Although Appellant's second brief is a great improvement over the first, it still is extremely difficult to understand. The Court will address Appellant's contentions as best it can decipher them.

Appellant appears to argue that the financing agreement violated *6 Del. C. §§ 2407* and *2408* because no "notice of cancellation" appeared above buyer's signature. Nor were any detachable "notice of cancellation[s]" given. Appellant also contends that the absence of a "notice of cancellation" provision in the contract violated 6 *Del. C.* § 504(3). Additionally, Appellant argues that Appellee's post-repossession letters to Appellant violated the reasonable notification provision of *6 Del C. § 9-504(3)*. Appellant cites to the letters from Appellee concerning the repossession and sale of the vehicle, the transcript and *Stigars v. Mellon Bank* [2] to support the argument that no reasonable notification was provided. Appellant seems to argue that the salvage documentation violated *6 Del. C. §§ 2403(4)*,

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[1] Super. Ct. Civ. R. 107(d):

Contents. All briefs shall contain the following matter arranged in the following order:

(1) A table of contents or index.

(2) A table of citations arranged alphabetically and indicating the pages of the brief on which each cited authority appears.

(3) In the first brief of each party, a statement of the case, including a statement of the nature of the proceedings and a concise chronological statement, in narrative form, of all relevant facts with page references to the transcript of testimony, if any, and to any pleadings and exhibits.

(4) A statement of the questions involved.

(5) Argument, divided into sections under appropriate headings, one section to be devoted to each of the questions involved.

[2] *1998 Del. Super. LEXIS 64*, Del. Super., C.A. No. 96A-02-009, Gebelein, J. (Jan. 8, 1998) (Order and Op.)

2512, 9-504 and 9-507. Despite the fact that this is an appeal on the record, [3] Appellant now attempts to enter "new evidence," namely a certified copy of a title [*8] search for the vehicle, in support of Appellant's allegations that Appellee, which is subject to all good claims and defenses against the dealer, violated 6 Del. C. §§ 9-504, 9-507(1) and 2403(4), by not transferring the title of the vehicle to him.

III.

Appellee's motion to affirm argues that on the face of Appellant's brief, the appeal is without merit. The issue on appeal clearly is controlled by settled Delaware law. The issue on appeal is factual and clearly there is sufficient evidence to support the findings of fact below. And the issue is one of judicial discretion and clearly there was no abuse of discretion. Furthermore, Appellee argues that Appellant did not raise 6 Del. C. §§ 2407 and 2408 before the Court of Common Pleas and therefore Appellant may not raise those issues on appeal. Appellee also argues that the contract at issue [*9] is for financing a motor vehicle sale subject to Chapter 29 of Title 5 of the Delaware Code, not Chapter 24 of Title 6, which applies to credit service organizations and therefore is inapplicable to this transaction. Furthermore, Appellee notes that Chapter 29 of Title 5, which addresses the financing of the sale of an automobile, does not require a notice of cancellation.

Concerning Appellant's argument that Appellee violated 6 Del. C. § 9-504 in connection with reasonable notification of the vehicle's sale, Appellee notes that Appellant also never raised 6 Del. C. § 9-504 before the Court of Common Pleas and he may not raise the issue for the first time on appeal. Additionally, Appellee contends that Appellant's position is contrary to established law because Appellee's July 31, 1997 letter states that "D.O.W. Finance Corp. intends to sell the vehicle at a private sale after August 14, 1997," thereby providing notice "of the time after which a private sale or other intended disposition is to be made" in accordance with 6 Del. C. § 9-504(3). Furthermore, Appellee argues the sale complied with 6 Del. C. § 9-504(3).

Stigars v. Mellon Bank [4] is argued to be [*10] inapplicable because *Stigars* concerned conversion of title to the finance company before the sale. As to Appellant's argument about the salvage receipt, Appellee's statutory support is "simply inapplicable or manifestly without merit" because Chapter 24 of Title 6 does not apply to the transaction.

IV.

Appellant's "Motion to Reverse and in Opposition to Affirm" [5] insists that Appellee is a credit service organization according to 6 Del. C. § 2402. Appellant argues:

> However, arguments of "notice of cancellation are open to interpretation, however the main concern is that Appellee states in answer to brief that Appellant is "without" merit" and at the same time fail to answer the major questions at hand. Was the security interest contract perfect, and the wrong weight accorded to the evidence?

[*11] Appellant argues that the financing agreement violated "numerous" Delaware laws but cites only 6 Del. C. § 9-103(2) and 21 Del. C. § 2510(a) and (c). As to 6 Del. C. § 9-103(2), Appellant contends that a certificate of title was required to perfect the security interest:

> Contract of record in nonperfect and invalid in accord with both 6 Del Code 9-103(2) and 21 Del Code 2510(a) and (c) the "endorsement and delivery of certificate of title upon transfer[.]

Appellant cites to the transcript to demonstrate that the dealer never transferred title to him.

Appellant insists that Appellee failed to address his contentions regarding reasonable notice because the June 10, 1997 and July 31, 1997 letters are "faulty." Specifically, Appellant argues that the June 10 letter does not meet the requirements of 6 Del. C. § 9-504 as to method, manner, time, place and terms because it states "if I do not receive payment by May 20, 1997 . . . ." Appellant further contends that:

> In agreement with 6 Del code 9-103(2) "Certificate of title for "perfection of security interest contract is also required to insure "reasonable notice" in accord with 6 Del Code [*12] 9-504 (3).

As to the July 31 letter, Appellant argues that it also fails to meet the requirements of 6 Del. C. § 9-504(3). Again, Appellant cites the certificate of title language in 6 Del. C. § 9-504 to support Appellant's argument of lack of reasonable notice.

Appellant further contends in his *sui generis* reply that the vehicle was salvaged for junk, and that under 21 Del. C. § 2512 this was the second time within the same security interest transaction that a new certificate of title was required. Again, Appellant argues that Appellee neglected its duty to maintain the records required by 21 Del. C. § 2512 (e), so therefore no reasonable notice was provided.

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[3] Super. Ct. Civ. R. 72. *See also* 10 Del. C. § 1326.

[4] 1998 Del. Super. LEXIS 64, Del. Super., C.A. No. 96A-02-009, Gebelein, J. (Jan. 8, 1998) (Order and Op.)

[5] The motion is out of order. There is no such thing as a Motion to Reverse and there is no reply to a Motion to Affirm.

Appellant makes several requests for affirmative relief in his reply. In addition to reversal of the Court of Common Pleas' judgment, Appellant seeks the return of "all purchase money security interest" given Appellee pursuant to *6 Del. C. § 9-107*; damages against Appellee for violation of *6 Del. C. § 2402*; damages pursuant to *6 Del. C. § 9-507*; "in accord with *6 Del Code 2532 (11) (12)* and at Superior Court Board discretion the award of *6 Del Code 2533*"; the removal of negative [*13] information on Appellant's credit report pursuant to *15 U.S.C. § 1681o (a)(1)-(2)* and at the Court's discretion an award pursuant to *15 U.S.C. § 1681o (a)(1)-(2)*; an award pursuant to *15 U.S.C. § 1681n (a)*1a of $ 1000, and finally attorney's fees.

> In Appellee's "answer" states "Appellant is without merit". As a matter of right, and at Superior Court Board discretion the award of reasonable Attorney Fee's and Court cost for the little merit Appellant do have.

V.

The Court notes that most of Appellant's contentions were not raised before the Court of Common Pleas. In fact, only one of the arguments in Appellant's opening brief was even mentioned in the court-below, and that was in passing and in general terms. This case has reached the point where it is too late to raise new issues. This appeal is on the record made in the court-below. Appellant's failure to raise an issue at trial precludes Appellant from raising the issue on appeal. [6] Likewise, even when a reply is permitted, Appellant may only use a reply to respond to arguments made in Appellee's opposing brief. [7] Nevertheless, the Court [*14] will address all of Appellant's arguments, as if Appellant had made them properly and in a timely way.

VI.

As to Appellant's contentions that the financing contract with Appellee violated *6 Del. C. §§ 2407* and *2408*. Appellant's contentions are misplaced because Appellee is not a credit services organization and therefore is not subject to Chapter 24 of Title 6. Six *Del. C. § 2402 (a)* defines a credit services organization as:

> [A] person who, with the respect to the extension of credit by others and in return for the payment of money or other valuable consideration, provides, or represents that the person can or will provide, any of the following services: (1) Improving a buyer's credit record, history or rating; (2) Obtaining an extension of credit for a buyer; or (3) Providing advice or assistance to a buyer with [*15] regard to paragraph (1) or (2) of this subsection.

Appellee does not fit the definition because Appellee does not obtain extensions of credit by others for consideration. Because Appellee is not a credit services organization governed by Chapter 24 of Title 6, no cancellation notice was required. Chapter 29 of Title 5, entitled "Financing the Sale of Motor Vehicles" does govern the transaction. Five *Del. C.* § 2906, which addresses the requirements and prohibitions of retail installment contracts in the sale of motor vehicles, does not require a notice of cancellation.

As to Appellant's contention with regard to 6 *Del. C.* § 504(3), there is no such section of the Delaware Code. So the Court assumes that Appellant meant *6 Del. C. § 9-504(3)*, which does not mention notice of cancellation. Concerning Appellant's contention that Appellee violated *6 Del. C. § 9-504* by failing to provide reasonable notification to Appellant, the Court does not see how Appellee's letters failed to provide reasonable notice. Although the issue of notification was addressed very generally at trial, Appellant did not cite any statute or facts to support his argument. The June 10 letter [*16] informed Appellant that:

> . the vehicle had been repossessed due to delinquent payments;
>
> . the date of the repossession; an itemized list of charges necessary to redeem the vehicle; the date, although with an error, of the time after which an auction would be scheduled;
>
> . that the proceeds from the sale would be applied to his account and a court action would be filed in the event of a deficiency;
>
> . that Appellant had fourteen days to remove any personal belongings from the vehicle,
>
> . and that he would be notified of the time and place of the sale.

Appellant emphasizes a typographical error in the letter, where Appellee states that if payment were not received by May 20, 1997, then the vehicle would be sold. Had Appellant been confused by the May 20 date, however, Appellant could have written D.O.W. or even picked up the phone to inquire. Appellant's argument is disingenuous at best because Appellant never picked up the June 10 letter from the post office. Under circumstances not present in this case, an error concerning the date might be crucial. Here, the mistake could not have made a meaningful difference.

As to the July 31 letter, it stated that [*17] "D.O.W. Finance Corp. intends to sell the vehicle at a private sale after August 14, 1997," but that Appellant could redeem the vehicle prior to the

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[6] *Craig v. State, Del. Supr., 457 A.2d 755 (1983)*.

[7] *See Jeffery v. Seven Seventeen Corp., Del. Supr., 461 A.2d 1009 (1983)*.

sale. Like the June 10 letter, the July 31 letter provided contact information had anything been unclear. The notice requirement under Delaware law is to send a notice "of the time after which a private sale or disposition is to be made . . . ." [8] The Supreme Court has addressed the issue, holding that:

> The purpose of the requirement of "reasonable notification" is threefold: (1) it gives the debtor the opportunity to exercise his redemption rights under s 9-506; (2) it affords the debtor an opportunity to seek out buyers for the collateral; and (3) it allows the debtor to oversee every aspect of the disposition, thus maximizing the probability that a fair sale price will be obtained. Any aspect of the notice that is contrary to these purposes necessarily prevents it from being "reasonable notification." [9]

Wilmington Trust further holds that notice which frustrates any of these purposes is void, not that the creditor must necessarily invite the debtor to find another buyer or become involved in the disposition process. [*18] [10] This borrower had reasonable notice.

Concerning Appellant's arguments that lack of a certificate of title constitutes a lack of reasonable notice, Appellant's arguments also are misplaced. Although the record is unclear about whether the car was registered to Appellant, registration is not important. In the Court of Common Pleas, Appellant argued that the dealer's failure to transfer title invalidated the contract. The Court of Common Pleas correctly ruled that the contract on its face should stand. Although the Court does not know exactly what happened regarding the transfer of title, Appellant has produced no evidence that the sale involved fraud or that the dealer did not fulfill its contractual obligations. Even had the security interest not been perfected, perfection is beside the point because an unperfected security interest [*19] is valid against the debtor. [11]

As to Appellant's contention that the vehicle's salvage violated *21 Del. C. § 2512*, this contention is without merit. There is not enough information before the Court to determine if a violation occurred. The statute, however, applies to salvage dealers and Appellee is not a salvage dealer. Furthermore, the statute is not a consumer protection law.

Appellant's counterclaims in Appellant's "Motion to Reverse and in Opposition to Affirm" were not raised properly. Because Appellant failed to bring counterclaims before the Justice of the Peace Court, Appellant could not bring counterclaims before the Court of Common Pleas. [12] [*20] In fact, the Court of Common Pleas granted an order striking Appellant's counterclaims. Even had the Court of Common Pleas permitted the counterclaims, the counterclaims would not be before this Court properly because Appellant did not raise them until his "reply" brief. [13]

The Court, however, will examine Appellant's counterclaims. Appellant seeks return of his purchase money security interest in accordance with *6 Del. C. § 9-107*. That law merely defines a purchase money security interest and provides no basis for recovery. As to Appellant's request for relief for the alleged violation of *6 Del. C. §§ 2402* and *2403*, the Court reiterates that Appellee is not a credit services organization and therefore is not subject to Chapter 24 of Title 6. As to Appellant's claim for damages under *6 Del. C. § 9-507* for failure to comply with *6 Del. C. § 9-504 (3)*, the Court agrees that Appellee provided reasonable notice so damages can not be awarded. As to the claims under Chapter 25 of Title 6, the Court can not see how any errors in the salvage documents constitute a deceptive trade practice, and Appellant has produced no explanation as to how they could.

Appellant's demand that the judgment against him be removed from his credit report in accordance with *15 U.S.C. § 1681o* [*21] *(a)(1)-(2)* is misguided because no inaccurate information was reported to a credit agency. A valid judgment can not constitute inaccurate information on a credit report, even if the person feels the Court's decision was wrong. In addition, Appellant contends that Appellee is liable for damages under *15 U.S.C. § 1681n* because Appellee's attorney failed to "provide notice of dispute" to the credit reporting agency. Fifteen U.S.C. § 1681s-2(3) provides that:

> If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer.

There is no dispute concerning whether the recordation of the judgment in Appellant's credit report accurately and completely revealed that a valid judgment had been entered against Appellant.

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[8] ***6 Del. C. § 9-504(3)***.

[9] *Wilmington Trust Co. v. Conner, Del. Supr. 415 A.2d 773, 776 (1980)* (citations omitted).

[10] *See id.*

[11] *See 6 Del. C. §§ 9-301-318*.

[12] *Gaster v. Belak, Del. Super., 318 A.2d 628 (1974)*.

[13] *See Jeffery v. Seven Seventeen Corp., Del. Supr., 461 A.2d 1009 (1983)*.

Concerning Appellant's request for attorney fees, even if Appellant were the prevailing party, which he is not, the Court would not award attorney fees. Delaware follows the American rule, under which parties pay [*22] their own attorney fees regardless of the outcome of the case. [14] Furthermore, there is no Delaware precedent for granting a *pro se* litigant attorney's fees. With his many last minute claims, Appellant's position begins to verge on the frivolous.

VII.

Appellant has litigated this case vigorously. The courts have taken Appellant's contentions seriously keeping in mind the troublesome truth that this case involves a loan for an old, very used car at 35% interest.

At bottom, it appears that Appellant borrowed money to buy a car. He failed to repay the loan and the car was repossessed after it was discovered in a parking lot much later. At trial it appeared that the car was a jalopy. But instead of returning it to the dealer promptly as he claimed, Appellant used the car until he abandoned it. While the law creates procedural rules as safeguards for borrowers, the truth remains that car loans must be repaid or, sooner or [*23] later, the borrowers' cars will be repossessed and in some cases a deficiency judgment will be obtained.

For the foregoing reasons, the October 22, 1998 decision of the Court of Common Pleas is **AFFIRMED**.

Fred S. Silverman, Judge

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[14] *Stephenson v. Capano, Del. Supr., 462 A.2d 1069 (1983)*.

End of Document

Smith v. Pinion

United States District Court for the Middle District of North Carolina

July 29, 2013, Decided; July 29, 2013, Filed

1:10-CV-29

Reporter
2013 U.S. Dist. LEXIS 105412

KALVIN MICHAEL SMITH, Petitioner, v. TODD PINION, Respondent.

Subsequent History: Habeas corpus proceeding at, Motion denied by *Smith v. Pinion, 2013 U.S. Dist. LEXIS 105415 (M.D.N.C., July 29, 2013)* Appeal dismissed by, Certificate of appealability denied *Smith v. Pinion, 2014 U.S. App. LEXIS 1272 (4th Cir. N.C., Jan. 23, 2014)*

Prior History: *Release of the Silk Plant Forest Citizen Review Committee's Report & Appendices v. Barker, 719 S.E.2d 54, 2011 N.C. App. LEXIS 2142 (N.C. Ct. App., 2011)*

Counsel: [*1] For KALVIN MICHAEL SMITH, Petitioner: DAVID C. PISHKO, LEAD ATTORNEY, ELLIOT PISHKO MORGAN, P.A., WINSTON-SALEM, NC.

For TODD PINION, Superintendent, Respondent: , LEAD ATTORNEY, CLARENCE JOE DELFORGE , III, DANIELLE MARQUIS ELDER, N. C. DEPARTMENT OF JUSTICE, RALEIGH, NC.

For Co-Chair Joel D. Hollander, Silk Plant Forest Truth Committee, Amicus: RICHARD JOSEPH RUTLEDGE , JR., LAW OFFICE OF RICHARD J. RUTLEDGE, JR., PLLC, WINSTON-SALEM, NC.

Judges: CATHERINE C. EAGLES, UNITED STATES DISTRICT JUDGE.

Opinion by: CATHERINE C. EAGLES

Opinion

MEMORANDUM OPINION AND ORDER

Catherine C. Eagles, District Judge.

Petitioner Kalvin Michael Smith filed a petition for writ of habeas corpus pursuant to *28 U.S.C. § 2254* on January 12, 2010. Respondent has filed a motion to dismiss. (Doc. 8.) [1] Because Mr. Smith's claims are untimely filed and he has not shown that he is equitably excused from complying with the limitations period, the motion to dismiss should be granted.

BACKGROUND

Following a 1997 jury trial in Forsyth County Superior Court, Mr. Smith was convicted of armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury. (Doc. 2 at 1.) The evidence at trial showed that, on December 9, 1995, Jill Lee Marker was assaulted in the Silk Plant Forest store in Winston-Salem, North Carolina. (Doc. 10-5 at 31-33.) Ms. Marker was unable to speak at trial, but testified by shaking her head "yes" or "no." (Doc. 10-9 at 50-56.) Ms. Marker identified Mr. Smith as the man who hit her at the Silk Plant Forest. (*Id.* at 54.) She also testified that, before trial in 1997, police had shown her a blown-up picture of Mr. Smith along with about five other photographs and that she identified Mr. Smith as her attacker. (*Id.* at 55-56.)

Eugene Littlejohn testified that he went to the Silk Plant Forest with Mr. Smith in December 1995 because Mr. Smith needed to pick up some money. (*Id.* at 29-30.) He further testified that he witnessed Mr. Smith ask Ms. Marker for money and grab her by the arm with both [*3] hands. (*Id.* at 32-33, 40.) Mr. Littlejohn then left the store and went to Toys R Us. (*Id.* at 33-34.) He later saw Mr. Smith coming out of Toys R Us. (*Id.* at 34.) Mr. Littlejohn made conflicting statements about the time lapse and about also seeing Mr. Smith go into the store. (*Id.* at 35-36, 39.) Mr. Littlejohn also testified that, when he originally spoke with police, he told them only that he heard Mr. Smith talk about the incident with Andra Wilson and that he added a little more to his statement each time he spoke with the police after that. (*Id.* at 36-38.)

Ms. Wilson testified that Mr. Smith told her that "he had beat

[1] Citations are to the docket number and the PDF page numbers appended by the CM/ECF system to the bottom of each page in the record. The docket number at the bottom of the page and the docket number reflected in the docket entry do not always match [*2] up, for reasons not clear to the Court, but the Court has consistently used the numbers the CM/ECF system appends to the bottom of each page.

the lady at the Silk Plant Forest." (Doc. 10-8 at 42.) A few weeks later, Ms. Wilson was with Mr. Smith, Mr. Littlejohn, Pamela Moore, and "a guy named Freddie" when Mr. Smith brought up the incident again and joked that he had "beat the woman." (*Id.* at 43-44.) Ms. Moore testified similarly. (Doc. 10-9 at 11, 13-14.)

After his conviction, Mr. Smith was sentenced to consecutive terms of 145-183 months for the assault and 129-164 months for the armed robbery. (Doc. 2 at 1.) The North Carolina Court of Appeals affirmed Mr. Smith's convictions on December 15, 1998. (*Id.* at 2.) [*4] Mr. Smith did not seek further direct review. (*Id.* at 2-3.)

On August 9, 1999, Mr. Smith filed a motion for appropriate relief ("MAR") in Forsyth County Superior Court. (*Id.* at 3.) The court denied his motion without a hearing on January 12, 2000. (*Id.*; Doc. 22-12.) On April 29, 2008, Mr. Smith filed a second MAR. (Doc. 2 at 4.) Following an evidentiary hearing, Mr. Smith moved to amend his MAR to add a claim alleging that the state failed to disclose Mr. Littlejohn's statement, deemed truthful during a polygraph examination, that he was not present in the Silk Plant Forest when Ms. Marker was robbed. (*Id.*; Doc. 20-15.) The court denied the motion to amend and denied his MAR on the remaining claims on May 21, 2009. (Doc. 2 at 4-5; Docs. 21-5, 22-2, 22-3.) The North Carolina Court of Appeals denied Mr. Smith's petition for writ of certiorari on September 11, 2009. (Doc. 23-10.)

On January 12, 2010, Mr. Smith filed this petition. (Doc. 2 at 1.) Mr. Smith claims that (1) the state failed to disclose favorable evidence in violation of *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, (2) his conviction was tainted by the false testimony of Mr. Littlejohn and Ms. Moore, (3) Ms. Marker's testimony was [*5] a product of unduly suggestive pretrial procedures, making it constitutionally unreliable, and (4) trial counsel provided ineffective assistance. (Doc. 2 at 5-10.)

ANALYSIS

I. Timeliness

Respondent moves to dismiss Mr. Smith's petition as untimely under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See 28 U.S.C. § 2244(d)*. Under AEDPA, a habeas petitioner has one year in which to file a *§ 2254* action, beginning from the latest of four dates:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. § 2244(d)(1). [*6] Mr. Smith concedes that his petition would be untimely under the first three dates, but contends his petition is timely under the fourth. He contends that he could not have become aware of the factual predicates for his claims by the exercise of due diligence any earlier than August 30, 2007, which he contends is within the one-year limitations period, excluding the period during which his second MAR was pending. *See id. § 2244(d)(1)(D), (d)(2)*.

Mr. Smith's *§ 2254* claims center on seven pieces of evidence: He claims *Brady* violations for the state's failure to disclose (1) a photographic lineup shown to Ms. Marker in 1996 [2] ; (2) Mr. Littlejohn's answers to his pretrial polygraph exam; and (3) the Toys R Us surveillance tape from the night of Ms. Marker's attack. Mr. Smith's undue suggestion claim also concerns the 1996 photographic lineup shown to Ms. Marker. Mr. Smith's ineffective assistance of counsel claims also arise from counsel's alleged failure to investigate the 1996 photographic lineup and the Toys R Us surveillance video, as well as (4) counsel's failure to challenge Ms. Marker's in-court identification of Mr. Smith and (5) counsel's failure to locate Freddie Reyes. Mr. Smith's [*7] claim that his conviction was tainted by false evidence is based on the recanted testimony of (6) Mr. Littlejohn and (7) Ms. Moore. For purposes of this motion, the Court will find that for Mr. Smith's petition to have been timely filed, he must show that each of these pieces of evidence was not discoverable by due diligence before August 30, 2007. [3]

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[2] This was an earlier photo lineup than the one about which Ms. Marker testified at trial, and it occurred less than a year after the attack.

[3] Mr. Smith's filing appears to be timely under this subsection only if he discovered the factual predicates for his claim no earlier than August 31, 2007, not August 30, 2007, as he contends. Working backwards, Mr. Smith filed his petition on January 12, 2010, 123 days after his petition for writ of certiorari was denied on September 11, 2009. Mr. Smith's second MAR was filed April 29, 2008. The period between April 29, 2008, and September 11, 2009, during which Mr. Smith's second MAR was pending, is excludable. *See 28 U.S.C. § 2244(d)(2)*. With 242 days remaining in Mr. Smith's statutory limitations period, he must have discovered the factual predicates no earlier than August 31, 2007. Because Respondent [*8] does not challenge Mr. Smith's August 30, 2007, calculation and because, in any event, Mr. Smith could have

A. Photographic Lineup

Mr. Smith contends that in 1996, during the investigation of the robbery, the police showed Ms. Marker a photo array containing his picture and she did not identify him. He asserts that this was exculpatory evidence which should have been disclosed to him before his trial and that he did not become aware of this photo lineup until August 30, 2007. On that day, the district attorney sent Mr. Smith's lawyer [4] a letter stating that "we think it fair to conclude that Ms. Marker viewed an array containing the defendant and that she did not identify him. . . . [I]nformation about the [1996] line-up constitutes *Brady* material that should have been provided to the defense." (Doc. 2-9 at 2.)

i. *Brady* Claim

The factual predicate for the *Brady* claim could have been discovered by the exercise of due diligence before August 30, 2007. The 1996 photo lineup was videotaped. [*9] The MAR court found that trial counsel had viewed the entire video before trial. (Doc. 21-5 at 38-41, 47 at ¶ 60.) This finding is entitled to deference. *28 U.S.C. § 2254(e)(1)*; *Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*.

Mr. Smith alleges that the finding was unreasonable, but he does not provide clear and convincing evidence to rebut the presumption of correctness. Instead, he contends that, even if he was given the full video before trial, the factual predicate of the claim could not have been discovered before the district attorney's letter. He argues that one cannot ascertain from watching the video the identities of the individuals in the photo array and that he did not know his photograph was in the photo array shown to Ms. Marker until he received the district attorney's letter.

"Due diligence does not require 'the maximum feasible diligence,' but it does require reasonable diligence in the circumstances." *Schlueter v. Varner, 384 F.3d 69, 74 (3d Cir. 2004)* (quoting *Moore v. Knight, 368 F.3d 936, 940 (7th Cir. 2004)*). The Court concludes that the exercise of reasonable diligence would have revealed and did reveal well before August 30, 2007, that Ms. Marker was shown Mr. [*10] Smith's picture in the 1996 photo lineup.

On seeing the video of the lineup, trial counsel could easily have investigated the identities of those in the photo array by asking the prosecutor or the detectives who conducted the photo lineup. [5] *See Schlueter, 384 F.3d at 74* (finding petitioner failed to exercise due diligence where a fact could be discovered merely by interviewing someone). The Duke Innocence Project and post-conviction counsel received a copy of the video in January 2005, (*see* Doc. 24-3 at 2), and began investigating the identities of the individuals in the photo array at that point. Mr. Smith gives no reason trial counsel could not have made similar efforts after viewing the video in 1997. (*See* Doc. 2-10 at 1-2.)

Mr. Smith "is confusing his knowledge of the factual predicate of his claim [*11] with the time permitted for gathering evidence in support of that claim." *Flanagan v. Johnson, 154 F.3d 196, 199 (5th Cir. 1998)*. Per the MAR court's findings of fact, Mr. Smith knew about the 1996 photo lineup before his trial in 1997. He had access to the video of the photo lineup. Nothing happened in 2005, 2007, or 2009 to make it more important to find out what pictures were shown to the victim than it was in 1997. Mr. Smith had all of the vital facts underlying his *Brady* claim in 1997. *See McAleese v. Brennan, 483 F.3d 206, 214 (3d Cir. 2007)*.

Moreover, in the August 30, 2007, letter, the district attorney wrote that a detective stated in an August 14, 2007, meeting attended by Mr. Smith's Duke representative that in 1996 he showed Ms. Marker a photo array containing Mr. Smith's picture. (Doc. 2-9 at 2.) Mr. Smith does not dispute this. Thus, there is nothing in the district attorney's August 30 letter that Mr. Smith did not know before August 30, 2007. Even assuming Ms. Marker's failure to identify Mr. Smith in the 1996 photo lineup was not discoverable by due diligence any earlier, Mr. Smith at least would have known the information by August 14, 2007. Accordingly, the factual [*12] predicate for Mr. Smith's *Brady* claim based on the photographic lineup is untimely.

ii. Undue Suggestion Claim

Mr. Smith contends that Ms. Marker's in-court identification of him as her attacker was the product of an unduly suggestive pretrial process. To the extent Mr. Smith contends that the 1997 lineup, the publicity surrounding the attack and his arrest, and Ms. Marker's mental and physical condition improperly influenced her in-court identification, he does not dispute that he knew about those things before trial. To the extent Mr. Smith bases this claim on the 1996 lineup alone or in combination with anything he knew about at trial, it is untimely. As soon as Mr. Smith became aware of the video—in 2005, at the latest—and that his picture was included—on August 14, 2007, at the latest—he would have had enough information to

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discovered the factual predicates for his claims before August 30, 2007, the Court will use his date in this Order.

[4] Attorneys with Duke University's Innocence Project had undertaken review of Mr. Smith's case.

[5] In fact, trial counsel testified before the MAR court that he could not tell whether or not Ms. Marker had made a positive identification, either when he first viewed the video or in viewing it post-conviction, and that he did not consider the video to be helpful to his client. (Doc. 21-5 at 39-40, 45.) As noted *infra* Part II, the results of this first photographic lineup were ambiguous.

bring this claim. *See* discussion *supra* Part I.A.i.

iii. Ineffective Assistance of Counsel Claim

The second MAR court found as a fact that Mr. Smith had enough information to raise in his first MAR his claim that counsel was ineffective for not determining whether Mr. Smith's photo had been shown to Ms. Marker. (Doc. 21-5 at 53.) This finding of fact is entitled [*13] to deference, and Mr. Smith has not provided any evidence, much less clear and convincing evidence, to rebut the presumption of correctness.

Moreover, it was obvious at Mr. Smith's trial that Ms. Marker's identification of him as her attacker was a crucial part of the state's case. He challenged Ms. Marker's in-court identification of him on appeal to the North Carolina Court of Appeals, (Doc. 10-11 at 27), and he raised several claims in connection with the in-court identification, including ineffective assistance of counsel, in his first MAR. (Doc. 22-9 at 7.) Even if he was unaware of the video when he filed his first MAR, Mr. Smith thus would have recognized the significance of the video of the 1996 lineup for impeachment purposes and its relevance to an ineffective assistance of counsel claim as soon as he became aware of its existence in 2005, at the latest. *See* discussion *supra* Part I.A.i. Accordingly, this claim is untimely.

B. Polygraph Answers

Mr. Smith contends that he did not know of Mr. Littlejohn's statement during a 1997 polygraph examination that he was not at the Silk Plant Forest when Ms. Marker was robbed until the state disclosed that statement in the January 2009 [*14] hearing before the MAR court. The MAR court found that, before trial, Mr. Smith was provided with the results of Mr. Littlejohn's polygraph examination and the supplemental report, which indicated that Mr. Littlejohn answered that he did not participate in the robbery, receive money or material items, or plan or scheme to rob the Silk Plant Forest. (Doc. 22-3 at 3-4.) This factual finding is entitled to deference. *See* 28 U.S.C. § 2254(e)(1); discussion *supra* Part I.A.

Mr. Smith argues that this Court should not defer to the MAR court's finding because the claim was not adjudicated on the merits. *See* *Monroe v. Angelone, 323 F.3d 286, 297 (4th Cir. 2003)*. This is a mischaracterization of the law. When a state court has not adjudicated a claim on the merits, the federal courts review "questions of law and mixed questions of law and fact . . . de novo." *Weeks v. Angelone, 176 F.3d 249, 258 (4th Cir. 1999)*, *aff'd*, *528 U.S. 225, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000)*. The state's factual findings, however, are still presumed to be correct, and that presumption must be overcome by clear and convincing evidence. *See, e.g., Conner v. McBride, 375 F.3d 643, 655 (7th Cir. 2004)* (distinguishing *Weeks* and holding that state court's [*15] factual finding, "which obviated the need to rule upon the substantive merits" of petitioner's claim, was entitled to § 2254(e)(1) deference); *Graham v. Hunt, No. 5:06-HC-2217-BO, 2008 U.S. Dist. LEXIS 12006, 2008 WL 474347, at *2 (E.D.N.C. Feb. 15, 2008)*.

Mr. Smith has not rebutted the presumption by clear and convincing evidence. He contends that the MAR court ignored that the polygraph examination report and supplemental report do not indicate that Mr. Littlejohn answered "no" to the question, "Were you present in the Silk plant [sic] Forest when the clerk was robbed?" (Doc. 29 at 10.) However, this is merely a rephrasing of the information contained in the originally disclosed polygraph report and by Mr. Littlejohn at trial. As the MAR court noted, Mr. Littlejohn never testified that he was present for the completion of the crime or that he participated in the robbery. (*See* Doc. 10-9 at 32-34; Doc. 22-3 at 5.) The answers disclosed during the January 2009 hearing provide no more information than was discovered during Mr. Smith's trial, at the latest. Accordingly, they do not constitute a factual predicate newly discovered in January 2009, and Mr. Smith's *Brady* claim relying on them is untimely.

C. Toys R Us [*16] Surveillance

Mr. Smith also contends that he first became aware at the January 2009 evidentiary hearing that a Toys R Us surveillance tape showed that neither he nor Mr. Littlejohn entered the store on the night of the attack.

i. *Brady* Claim

The MAR court found that Mr. Smith knew that the videotape existed before trial and that there was "no evidence . . . that the videotape was withheld from him before or during trial." (Doc. 20-4 at 18.) These findings are entitled to deference, *see* discussion *supra* Parts I.A, I.B, and Mr. Smith does not appear to contend that they are unreasonable. Indeed, he referenced the Toys R Us tape in his second MAR, filed in 2008, (*see* Doc. 2-3 at 1; Doc. 20-4 at 5), which would seem to conclusively establish he was aware of it before the January 2009 hearing.

Instead, Mr. Smith contends that "[m]ere knowledge that the surveillance video existed is insufficient to prove that the video contained favorable evidence" and that he could not discover the factual predicate for this claim until he discovered that the state had viewed the tape a second time. (Doc. 29 at 13.) The law does not require that the prosecution point out exculpatory evidence to the defense; [*17] it merely requires that the evidence be made available to the defense. *See* *United States v. King, 628 F.3d 693, 702 (4th Cir. 2011)* ("[T]he Government need only *disclose* exculpatory evidence, not ensure that the defense further develop and utilize that evidence."). Mr. Smith knew that the video recorded events occurring on the night of the attack in the shopping center where the attack took place. Although, on

first viewing, the detectives concluded that the videotape was of no evidentiary value to the state, that is not a conclusion that is binding on Mr. Smith; Mr. Smith has cited no law, and the Court finds none, that would require the state to notify the defendant every time it examines evidence or reevaluates the value of evidence.

The potential relevance of the surveillance video of the store right next door to the location of the assault was as obvious in 1996 and 1997 as it was in 2005, when Mr. Smith's lawyers began asking about it. Mr. Smith presumably knew whether he was at Toys R Us on the night in question, so that if he was not, the potential relevance of the video would have been heightened. *See* *Fullwood v. Lee, 290 F.3d 663, 686 (4th Cir. 2002)* (finding no *Brady* violation [*18] based on defendant's conversation with detective because defendant knew about the conversation and its subject); *Hairston v. Beck, 345 F. Supp. 2d 535, 538 (M.D.N.C. 2004)* (Dixon, M.J., recommendation, adopted by Osteen, J.) (finding defendant was not entitled to a later date under *§ 2244(d)(1)(D)* based on officer's affidavit suggesting that no weapon was involved because defendant knew whether he was carrying a gun). At the latest, Mr. Littlejohn's trial testimony, (Doc. 10-8 at 25, 33-35), should have put Mr. Smith on notice that his presence or absence at the Toys R Us was relevant and, thus, that the video was also relevant. *See, e.g.,* *Wood v. Spencer, 487 F.3d 1, 5 (1st Cir. 2007)* (holding testimony that victim spoke to police officer on the day of her death sufficient to give notice of conversation even though prosecutor did not provide information about the conversation).

ii. Ineffective Assistance of Counsel Claim

As stated above, Mr. Smith knew about the video at trial when its relevance and potential exculpatory value became obvious. This is particularly so since Mr. Smith presumably knew whether he was or was not at Toys R Us on the night of the attack, and thus he had personal [*19] knowledge of whether the video was likely to be exculpatory. He also would have been aware at trial that counsel did not cross-examine Mr. Littlejohn about the surveillance video. Under the circumstances, Mr. Smith could have exercised due diligence to inquire further into trial counsel's investigation of the surveillance tape at any point after trial. This claim is untimely.

D. Ms. Marker's In-Court Identification

In response to the motion to dismiss, Mr. Smith does not appear to contend that this ineffective assistance of counsel claim is timely. Indeed, Mr. Smith unquestionably knew at trial that counsel did not challenge Ms. Marker's in-court identification. *See* *Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000)* ("[T]he time commences when the factual predicate could have been discovered through the exercise of due diligence, not when it was actually discovered by a given prisoner. . . . [T]he trigger in *§ 2244(d)(1)(D)* is (actual or imputed) discovery of the claim's factual predicate, not recognition of the facts' legal significance." (internal quotation marks omitted)). This claim is untimely.

E. Freddie Reyes

Likewise, Mr. Smith makes no argument as to the timeliness of his claim [*20] that counsel was ineffective for failing to locate Freddie Reyes to testify. (*See* Doc. 2-10; Doc. 29.) Indeed, that claim is not timely, as Mr. Smith could have discovered the factual predicate no later than during trial, when Ms. Wilson and Ms. Moore testified that they were all with "Freddie" when Mr. Smith told them he had "beat the woman" and counsel did not call Mr. Reyes. (Doc. 10-8 at 44; *see* Doc. 10-9 at 11).

F. Mr. Littlejohn's Testimony

Mr. Smith appears to argue that he did not discover the factual predicate underlying his false evidence claim based on Mr. Littlejohn's trial testimony until the January 2009 hearing, when he discovered that the state knew that Mr. Littlejohn answered "no" to the polygraph question whether he was present for the robbery. Essentially, he contends that the factual predicate for this claim is the state's knowledge that Mr. Littlejohn was testifying falsely, which he did not discover until the January 2009 hearing.

As stated above, Mr. Littlejohn's answers to the polygraph did not contradict his trial testimony or the original polygraph reports; accordingly, they do not show that the state knew that Mr. Littlejohn's trial testimony was false and [*21] cannot serve as the factual predicate for this claim. Moreover, Mr. Smith appears to have believed that the state knowingly presented Mr. Littlejohn's false testimony as early as the filing of his first MAR, filed in 1999, in which he brought an identical claim. (Doc. 22-9 at 6.) This claim is untimely.

G. Ms. Moore's Testimony

Mr. Smith does not argue that his false evidence claim based on Ms. Moore's testimony is timely. Nor does he attempt to establish a date on which the factual predicate for this claim—specifically that the state presented Ms. Moore's testimony despite knowing that it was false—became known to him. Accordingly, Mr. Smith has not met his burden. *See, e.g.,* *Huneycutt v. Neely, No. 1:12CV1052, 2013 U.S. Dist. LEXIS 56766, 2013 WL 1703561, at *3 (M.D.N.C. Apr. 19, 2013)* (collecting cases); *Worley v. North Carolina, No. 3:09CV484-3-MU, 2009 U.S. Dist. LEXIS 119161, 2009 WL 4611473, at *2 (W.D.N.C. Dec. 1, 2009)*. This claim is untimely.

II. Actual Innocence Exception

Alternatively, Mr. Smith contends that his untimely filing should be excused because he presents a credible claim of actual innocence based on the recanted testimony of Mr. Littlejohn and Ms. Moore, Ms. Marker's alleged failure to identify Mr. Smith in the 1996 photographic [*22] lineup, the Toys R Us surveillance video, and a statement made by Mr. Reyes that he never heard Mr. Smith confess. [6]

Recently, the Supreme Court recognized in *McQuiggin v. Perkins, U.S. , , 133 S. Ct. 1924, 1928 (2013)*, an actual innocence exception to AEDPA's time limitations. To establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)*; [*23] *see McQuiggin, U.S. at , 133 S. Ct. at 1935*. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup, 513 U.S. at 324*.

Mr. Smith's evidence does not establish his innocence. In *McQuiggin*, the Supreme Court found insufficient three affidavits which offered very strong evidence that someone other than the defendant committed the crime. *McQuiggin, U.S. at , 133 S. Ct. at 1936*. One was from a witness who heard the other person confess and saw the other person in bloody clothes on the night of the murder, and another was from a dry cleaner's employee who took bloody clothes from the other person on the day after the murder. *Id. at , 133 S. Ct. at 1929-30*. None of Mr. Smith's evidence comes close to being as exculpatory; it does not identify someone else as the attacker, nor does it exonerate Mr. Smith.

The MAR court made a number of factual findings about the 1996 photo lineup and the related video. Ms. Marker was in poor physical condition when she viewed [*24] the 1996 photo lineup. (Doc. 21-5 at 47.) The detective held the photos to Ms. Marker's left side, closer to the eye blinded during the attack, and she was not wearing her glasses. (*Id.* at 34.) The MAR court found that it was apparent from the video that Ms. Marker could not clearly see the photos that were shown to her. (*Id.* at 34, 47.) It was because of these flaws in the lineup and not some other reason more probative of Mr. Smith's guilt or innocence that the MAR court found that the video showed that Ms. Marker failed make a clear identification. (*Id.* at 47.) Relatedly, the MAR court concluded that the "videotape would have been of little or no value to Defendant." (*Id.* at 47.) These factual findings are entitled to deference and are inconsistent with petitioner's arguments.

In his supplemental brief, Mr. Smith argues that these findings should not be presumed correct because they "have been drawn into serious question" by two investigative reports of Mr. Smith's criminal case and because "the integrity of [Mr. Smith's second MAR proceeding] was tainted by the continued participation of an Assistant District Attorney whose office had formally recused itself . . . and who, before [*25] the MAR evidentiary hearing, procured and secretly used a false affidavit" stating that a first responder heard Ms. Marker identify her attacker as black. (Doc. 44 at 6-7.)

First, the two reports are not in evidence. Neither party to this case proffered these reports into evidence, and they were mentioned by a party for the first time in Mr. Smith's supplemental brief. One, the Swecker Report, has been submitted to the Court by amicus, (*see* Doc. 41-1), but is not appropriate for judicial notice. Mr. Smith directs the court to a website for the other, (*see* Doc. 44 at 3 n.2), but provides no argument as to why that report is admissible. As stated above, the Court's request for supplemental briefing was not aimed at the submission of new evidence. *See supra* note 7.

In any event, neither report nor any allegedly false affidavit regarding Ms. Marker's on-the-scene comments have any bearing on the MAR court's assessment of the video. The MAR judge independently viewed the video of the 1996 photo lineup, and Mr. Smith does not contend, nor does the Court's review reveal, that anything in the reports suggests impropriety in the MAR court's analysis. Similarly, nothing about Ms. Marker's on-the-scene [*26] comments could call into question the MAR court's first-hand analysis of an entirely different event.

The remaining evidence that Mr. Smith relies on to claim actual innocence at most calls into question the credibility of Mr. Littlejohn and Ms. Moore, neither of whom testified as an eyewitness. Mr. Littlejohn's credibility was already in question at trial, where he testified inconsistently and admitted to giving inconsistent statements to police before trial. The jury's verdict was not based only on testimony of Mr. Littlejohn and Ms. Moore; in addition, the jury had before it Ms. Marker's 1997 out-of court identification of Mr. Smith, her in-court identification, and Ms. Wilson's testimony that she heard Mr. Smith admit to beating Ms. Marker several times. Nowhere in

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[6] To the extent Mr. Smith raises new factual claims in his supplemental briefs, the Court will not address them. The Court's May 29, 2013, Order clearly directed the parties to submit supplemental briefing to address the effect of the Supreme Court's decision in *McQuiggin v. Perkins, U.S. , , 133 S. Ct. 1924, 1928 (2013)*, and any other recently decided relevant cases. (Doc. 43.) This was not an invitation to raise new, untimely grounds for relief. *See Rules Governing Section 2254 Cases, Rule 2(c)(1)* ("The petition must . . . specify all the grounds for relief available to the petitioner."); *see, e.g., Gaultney v. Ballard, No. 1:09-cv-01221, 2012 U.S. Dist. LEXIS 172517, 2012 WL 6044412, at *2 (S.D.W. Va. Dec. 5, 2012)* (collecting cases).

this petition does Mr. Smith challenge Ms. Wilson's testimony.

Moreover, the state had additional inculpatory evidence that provided additional support for the verdict, including Mr. Smith's confession, which it did not put before the jury; had the allegedly exculpatory evidence discussed above been proffered, the prosecution likely would have put additional evidence before the jury, as the MAR court found with regard [*27] to the 1996 photographic lineup. (*See* Doc. 21-5 at 45, 50, 55-56); *see also House v. Bell, 547 U.S. 518, 537, 126 S. Ct. 2064, 165 L. Ed. 2d 1* ("*Schlup* makes plain that the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted . . . ." (internal quotation marks omitted)). Mr. Smith's "new" evidence does not make it more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt.

In his supplemental brief, Mr. Smith also claims that the two investigative reports support his claim for actual innocence. First, as stated above, the Court concludes that neither report is in evidence and neither should be considered. In the alternative, even if they are considered, they are insufficient to establish Mr. Smith's innocence. They merely reflect opinions differing from those of the MAR court and doubting the adequacy of the police investigation and the reliability of several pieces of evidence presented by the state. They do not present any new evidence that would tend to establish Mr. Smith's innocence. In fact, the report purportedly commissioned by the Winston-Salem City Council was directed toward [*28] reforming police procedures, and the committee was told not to make any findings of guilt or innocence. Similarly, the Swecker Report explicitly states that it "does not presume to exonerate Kalvin Michael Smith." (Doc. 41-1 at 18.) Though it recommends a new trial, it does not even suggest that Mr. Smith would not be convicted in view of the full record. Neither report is anywhere near as exculpatory as the evidence disapproved of in *McQuiggin*, which pointed directly to another person as the perpetrator. *McQuiggin, U.S. at , 133 S. Ct. at 1929-30*.

Nor is Mr. Smith entitled to an evidentiary hearing to develop his actual innocence claim. In evaluating a request for an evidentiary hearing, a district court "should consider the particular facts raised by the petitioner in support of his actual innocence claim." *Teleguz v. Pearson, 689 F.3d 322, 331 (4th Cir. 2012)*. Mr. Smith has not raised any facts that would entitle him to further exploration of his actual innocence claim. In addition to its findings regarding the video, the MAR court found incredible the recantations of Mr. Littlejohn and Ms. Moore. (*See* Doc. 21-5 at 15, 18.) The investigative reports Mr. Smith references in [*29] his supplemental brief do not constitute clear and convincing evidence to rebut the presumption of correctness as to these findings. At most, they show that the evidence before the MAR court is subject to multiple interpretations; they do not show that the MAR court's interpretation was wrong.

In the absence of clear and convincing evidence, it would be improper for the Court to second-guess the state court's findings. *Cf. Teleguz, 689 F.3d at 331* ("[T]he district court is permitted under *Schlup* to make some credibility assessments when . . . a state court has not evaluated the reliability of a petitioner's newly presented evidence that may indeed call into question the credibility of the witnesses presented at trial." (internal quotation marks and alterations omitted)). Moreover, as stated above, even assuming the credibility of Mr. Littlejohn's and Ms. Moore's recantations, it is not more likely than not that no reasonable juror would have convicted Mr. Smith.

III. Conclusion

Mr. Smith did not file his *§ 2254* petition within the one year of discovering the factual predicates for his claims, and they are untimely under AEDPA. Mr. Smith is not entitled to an equitable excuse based on [*30] a claim of actual innocence.

Finding no substantial issue for appeal concerning the denial of a constitutional right affecting the conviction, nor a debatable procedural ruling, the Court will deny a certificate of appealability. *See 28 U.S.C. § 2253(c)(2)*; *Habeas Corpus Rule 11(a)*.

It is therefore **ORDERED** that Respondent's motion to dismiss, (Doc. 8), is **GRANTED** and the petition is **DISMISSED**. A certificate of appealability shall not issue. It is further **ORDERED** that Respondent's Motion to Deem Response to Supplemental Briefing Timely Filed, (Doc. 51), is **GRANTED**.

This the 29th day of July, 2013.

/s/ Catherine C. Eagles

UNITED STATES DISTRICT JUDGE

United States v. Michigan

United States District Court for the Western District of Michigan

March 27, 1986

No. G84-63 [OPINION No. 12 OF 37 -- SEE INTRODUCTORY STATEMENT AND TABLE OF CONTENTS]

Reporter
1986 U.S. Dist. LEXIS 27576

United States of America, Plaintiff, v. State of Michigan, James J. Blanchard, Governor of Michigan, Michigan Corrections Commission; Gwen Andrew, Chairman, Michigan Corrections Commission, Thomas Eardley, G. Robert Cotton, Dwayne Waters, Don Le Duc, Members, Michigan Corrections Commission, Michigan Department of Corrections, Perry M. Johnson, Director, Michigan Department of Corrections, Robert Brown, Jr., Deputy Director, Michigan Department of Corrections, Dale Foltz, Regional Administrator, State Prison of Southern Michigan, John Jabe, Warden, Michigan Reformatory, Theodore Koehler, Warden, Marquette Branch Prison, John Prelesnik, Administrator, Reception and Guidance Center, State Prison of Southern Michigan, and Jack Bergman, Administrator, Michigan Intensive Programming Center, Defendants

Counsel: [*1] Andrew J. Barrick, Arthur Peabody, Jr., Paul S. Lawrence, Mark Pollot, R. Scott Wynn, Cynthia Katz, and Patrick Joyce, United States Department of Justice, Civil Rights Division, for Plaintiff.

Knop Amicus: Elizabeth Alexander, National Prison Project.

Hadix Amicus: Larry Bennett, Patricia Streeter.

Thomas Nelson, Brian McKenzie, & Elaine Fishoff, Michigan Office of the Attorney General, for Defendants.

Opinion by: ENSLEN

Opinion

Introductory Statement and Table of Contents

The following is a collection of opinions the United States District Court for the Western District of Michigan has issued in the case of *United States v. Michigan*, No. G84-63. The United States Department of Justice filed the case on January 18, 1984 under the Civil Rights of Institutionalized Persons Act, *42 U.S.C. §§ 1997-1997j*, following a two-year investigation into conditions in three Michigan prisons. On July 13, 1984 the Court approved a Consent Decree setting forth the parties' agreement to settle the suit. The Court has been overseeing the implementation of the Consent Decree for the past three years, during which time it has conducted numerous hearings on compliance issues and has issued numerous [*2] opinions. The opinions that are labeled "bench opinion" were issued from the bench during those hearings. The Court has not edited these opinions; what appears in written form here was taken almost verbatim from the transcripts of the hearings. The reader accordingly occasionally may find it difficult to follow the bench opinions. The Court felt, however, that it should remain faithful to the actual record of the case.

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Bench Opinion of March 27, 1986 Allowing *Knop Amicus* to Present Witnesses and [*6] Appointing an Independent Psychiatric Expert

Richard A. Enslen, U.S. District Judge

Good morning. The Court anticipates four pretty full days based upon the materials that the parties have received and based upon the information that the Court has. And to make it go as well as I can, I am going to do two or three or four things this morning as we get started, to try to help everybody with a focus so that we don't waste any time. The Court never contemplated there would be any hearing on Wednesday, April 2nd, and there will not be, and it appears to me that we will have at least one issue left over for Tuesday, April 1st, which may or may not require the whole day. I hope that we can cover the materials in the fashion that I described in the earlier order. What I am going to do first is the following:

There are four, presently four motions in front of me. First, the United States' objection to the presentation of witnesses by the

Knop amicus at the hearing, which as to be decided and I am going to decide it. Secondly, the designation of a psychiatric expert under 706(a). While that may not have to be decided today, I am going to decide it because it needs to be. Third, the [*7] State's motion to amend the mental health order of February 21st, 1986. I am going to address part of it before the hearing ends. Fourth and finally, the *Hadix* motion, renewed motion, to exclude that group from the Consent Decree. I may or may not address that issue at the conclusion of the hearing, but it is not ripe for resolution at this stage of the hearing. Then I think what I am going to do right now is decide two of the motions, and then we will move to something else. And then we will be able to get into the swing of things, I hope. First, the *Knop amicus* problem.

The United States objects to the *Knop amicus* being allowed to present two witnesses, one on mental health, and the other on sanitation and hygiene, for essentially four reasons as I understand the pleadings: First, the *Knop amicus* does not have the authority under paragraph "O" of the consent decree to present witnesses; Secondly, the introduction of witnesses would result in the *Knop* plaintiffs litigating *Knop v. Johnson* in this case; Thirdly, the presentation of witnesses would prejudice the United States which has not had an opportunity to depose the *Knop* witnesses; and, Fourth, the [*8] testimony of the *Knop* witnesses would be cumulative and unnecessary. I will address the last three of the United States' objections first rather than in seriatim fashion as I just announced them.

Initially, the Court is well aware of the position of the *Knop amicus* with respect to both its own case of *Knop v. Johnson* and this case. The two cases involve some overlapping issues, but each case also raises many unique issues. I have decided to allow the *Knop amicus* to present two witnesses on areas that I believe present substantial problems for compliance by the State under the Consent Decree. The Court has instructed the *Knop amicus* and the *Hadix amicus* that they should limit the testimony of their witnesses strictly to the issues presented in the Consent Decree and the stipulation. It is in my opinion not an abuse of the Court's discretion to allow the presentation of relevant evidence and to seek to gain a full understanding of the compliance issues in this proceeding today, and tomorrow, and Monday and Tuesday.

These efforts, moreover, cannot constitute unfair prejudice to any party. This latter point is particularly true since the defendant in this action, [*9] the party who today bears the burden of establishing that it is complying with the requirements of the Consent Decree and the stipulation, has had a full opportunity to depose and otherwise discover the testimony of the *Knop amicus*' proposed witnesses. I cannot see why allowing the *Knop amicus* to present two witnesses would prejudice the United States. The United States and *amici* presumably have the same goal of seeing that the defendant, defendants, comply with the requirements of the Consent Decree and the stipulation. At some point, of course, the introduction of testimony becomes burdensome and becomes unduly cumulative. I do not believe that allowing the *Knop amicus* to present two witnesses would exceed that point, however.

Third, I am well aware of the testimony that the United States intends to present at this hearing. The Court will not hesitate to cut off the testimony of the *Knop* witnesses, or the *Hadix* witnesses, if it feels that such testimony is not adding anything to what has already been introduced. By the same token, the Court will listen to testimony that adds to its understanding of the issues.

Finally, the Court believes that paragraph "O" [*10] of the Consent Decree grants it the discretionary authority to allow the *amici* to present witnesses at compliance hearings. Counsel may recall that there was a lengthy discussion at the hearing held on June 22, 1984, concerning the language in paragraph "O". The Court at that hearing rejected a proposal by the United States that the *amici* be allowed only to present oral argument and written submissions in regard to the compliance hearing. A fair reading of the transcript of that hearing, particularly the Court's comments on pages 35 and 36, indicates that the Court intended to retain, and did retain, the discretion to allow the *amici* to present witnesses at compliance hearings. As the Court notes, *amici* were not being granted the privileges of litigating *amici*, such as the right to participate in discovery or, as the Court demonstrated in its decision of August 21, 1985, to file motions. In summary, however, to participate, those two words, that language found in paragraph "O" of the Consent Decree, encompasses the authority with the Court's permission to present witnesses.

The Court believes, moreover, that allowing the *Knop amicus* to present two limited witnesses [*11] at this hearing is consistent with the traditional status of *amicus curiae*. See *Hoptowit v. Ray, 682 F.2d 1237*, especially at 1260, from the Ninth Circuit in 1982, in which the Ninth Circuit held the court did not abuse its discretion in allowing the United States Department of Justice and the United States Attorney to participate as *amicus curiae* in the lawsuit in which they had the full rights of a party and advocated almost exclusively in the plaintiff's behalf. The Court does not intend to allow the *Knop amicus* to participate in these proceedings as litigating *amici*, as I previously held, but as the United States Department of Justice has done in several cases. *See Hoptowit*, for example; *see In re Estelle, 516 F.2d 480, at pages 482-83*, Fifth Circuit in 1975; *see DeVonish v. Garza, 510 F. Supp. 658, at 658-59*, from the Western District of Texas in 1981. I do not believe, however, that allowing the *Knop amicus* to present two witnesses transforms them into litigating *amici*, and I will permit them to do so in this hearing.

I must now address briefly the State's response to the United States. As the Court understands the State's argument, the [*12] State is arguing that the Court must vacate paragraph "M" of the Consent Decree, which states in part that entry of the decree, quote, "shall not operate to render moot or otherwise to preclude any issues before . . . the Western District of Michigan in *Knop v. Johnson*," before it can consider the United States' objection. The State apparently feels that allowing the *Knop amicus* to claim the benefit of paragraph "M" of the Consent Decree, allowing the *Knop amicus* to present witnesses would render them parties to this proceeding, and thus also subject them to the doctrine of collateral estoppel and res judicata in their own case, meaning, of course, the *Knop v. Johnson* case.

Initially, as I have noted before, I note that I am not extending litigating status to the *Knop amicus*, and I have no, absolutely no intention of doing so. The *Knop amicus* cannot participate in discovery and, more importantly, cannot file motions in this litigation. The *amicus*' inability to file motions or take other substantive action to enforce the terms of the Consent Decree and the stipulation it by itself sufficient to refute the State's argument that they have assumed the status [*13] of a party or of litigating *amicus*. Unlike the situation in *Montana v. United States*, moreover, the *Knop amicus* clearly are not directing and/or financing the activities of the plaintiff in this action and should not be subject to the estoppel doctrines. *Compare Montana* at 145-55 in the *U.S. Volumes, 440 U.S. 154*, in 1979.

The Court sees no reason to consider whether it should vacate paragraph "M" of the Consent Decree since the activities of the *Knop amicus* in this action are not inconsistent with the benefits they derive from such paragraph. The role they will play in this proceeding is fully consistent with the status accorded them under paragraph "O" of the decree, and I see no need to modify that paragraph. The Court also does not see how the *Knop amicus* can now be considered a party to this proceeding, and thus subject to estoppel doctrines, particularly since it does not have the right to file motions. I, therefore, reject the State's argument and do not wish to consider further any arguments it has raised in motions filed in the *Knop* proceeding.

The second issue the Court must deal with this morning before beginning the hearing concerns its decision [*14] to appoint an independent psychiatric expert to assist Dr. Benton in reviewing defendants' proposed modified Comprehensive Mental Health Services Plan.

On March 19, 1986 the Court issued a Memorandum Opinion and Order in which it declined to reconsider its decision to request Dr. Benton to review defendants' proposed modified plan, and granted, quote, "the parties until March 26, 1986" -- yesterday -- "to show cause why the Court should not adhere to its prior order authorizing the Independent Expert to employ a psychiatric expert to assist him in reviewing defendants' modified mental health services plan, and accepting defendants' offer to bear the expense of such expert." End of quote. The Court is in receipt of the United States' objection to its decision to appoint an independent psychiatric expert to assist Dr. Benton. The United States argues that there is no reasonable basis for the Court to appoint an independent psychiatric expert under *Federal Rule of Evidence 706(a)*, and that it therefore would be an abuse of discretion for it to do so. Plaintiff notes that its own psychiatric expert, Dr. Robert Sovener, will review the plan and provide the Court with sufficient information [*15] on its adequacy. It concludes accordingly that there is no need to have yet another expert review the plan.

District courts enjoy broad discretion in deciding whether to appoint independent experts under *Rule 706*. As the Court of Appeals for the Ninth Circuit has stated, "under *Rule 706*, the court is free to appoint an expert of its own choosing without the consent of either party. . . . "Appointments under *Rule 706* are reviewable only for abuse of discretion." That quote comes from *Students of California School for the Blind v. Honig, 736 F.2d 538*. The quote comes from 549, and the decision of the Ninth Circuit was made in 1984. There is a long history of courts employing independent or special experts to assist them in resolving complex issues of law and fact. See, for example, *Hart v. Community School Board of Brooklyn, 383 F. Supp. 699, at 762* and 764, from the Eastern District of New York, sitting across in Brooklyn, in 1974, affirmed by the Second Circuit at *512 F.2d 37*, in 1975 also.

District courts, of course, do not enjoy unlimited discretion in deciding whether to employ independent experts to assist them in resolving particular cases or issues. I think I can say [*16] that as a district court judge, I have not been one to appoint an independent expert just because I was faced with a difficult issue of law or fact. The Court believes it is justified in this case, however, in appointing an independent psychiatric expert to assist Dr. Benton. Both parties recognize that the treatment of seriously mentally ill inmates is one of the most, if not the most, difficult compliance issues defendants face. That was evident at the February 13th hearing. Defendants in particular have had difficult in preparing a comprehensive mental health services plan that is both acceptable to them and acceptable to the Court. I wish to resolve this issue once and for all and to get defendants busy implementing a satisfactory plan.

Dr. Benton and his associate, Mr. Stoughton, have been extremely helpful to the Court. I believe that the assistance of the psychiatric expert Dr. Benton has chose, Dr. James, will be of equal benefit to the Court. The Court does not doubt in the slightest the competency of the United States' psychiatric expert. It believes, however, that it would also benefit from independent advice on this issue, and I have no hesitation in

appointing Dr. James [*17] to provide me with that advice. This appointment, moreover, will not result in considerable expense to the United States as the State has agreed to bear Dr. James' fees and expenses.

The Court, therefore, pursuant to its authority under *Federal Rule of Evidence 706(a)*, appoints Dr. James Franklin James to assist its Independent expert. Dr. F. Warren Benton, to review and to report on defendants' proposed Modified Comprehensive Plan for Mental Health Services. Dr. James shall work under the authority and at the direction of Dr. Benton. He shall be compensated in accordance with the arrangment Dr. and he have made with defendants. The report he shall prepare, in conjunction with Dr. Benton, on defendants' proposed modified plan shall be due on April 18, 1986, and shall be served on the parties and the *amici* as well as submitted to the Court on that same day. In accordance with *Rule 706(a)*, moreover, Dr. James will be subject to the deposition by any party and shall be available to testify at the hearing on defendants' proposed modified plan to be held on May 8th and May 9th, 1986. Now then as required by *Rule 706(a)*, I will enter an appropriate order of appointment in accordance [*18] with this opinion sometime in the next two or three days.