

Preliminary Statement

On August 3, 2007, Elkins appeared before this Court to enter a plea of guilty to contempt of an order of this Court. The plea of guilty was part of an agreement (“Settlement Agreement”) between Elkins and the Department to resolve two securities enforcement cases and a contempt citation related to those cases pending before this Court against Elkins.

In connection with his plea, this Court asked Elkins if he was changing his plea to guilty and whether he understood that there had been “an agreement reached in this matter.” Elkins replied that he was changing his plea to guilty and referred to the agreement as a “global settlement.” Elkins acknowledged to this Court that he understood the “global settlement” to include the guilty plea, disgorgement and a permanent injunction. He further testified that as part of the “global settlement” he was entering a plea of guilty to indirect contempt and agreed to abide by certain conditions.

This Court expressly found that the plea was part of the Settlement Agreement and found the Settlement Agreement to be fair and just. This Court accepted the plea of guilty and deferred the sentencing of Elkins to August 2, 2012 (“Sentencing Order”).

On February 27, 2008, the Department filed an *Application to Accelerate Deferred Sentence Against Clyde Edward Elkins* alleging that Elkins engaged in acts that constitute violations of the Sentencing Order.

On March 11, 2008, Elkins filed the Motion to Dismiss.

A. District Court Has Discretion to Accelerate Deferred Sentence

In *Frick v. State*, 1973 Ok.Cr. 172, ¶8, 509 P.2d 135,137 (1973), the Court held that acceleration of a deferred sentence “is left to the discretion of the trial court after hearing all the evidence.” Likewise, a district court has broad discretion to revoke probation when its

conditions are violated. *United States v. Dane*, 570 F.2d 840, 843 (9th Cir.1977), *cert. denied*, 436 U.S. 959, 98 S.Ct. 3075, 57 L.Ed.2d 1124 (1978). In requesting an acceleration of a deferred sentence, the State must establish by a fair preponderance of the evidence that the defendant has violated a condition of his probation. *State v. Evans*, 1980 OK CR 17, 609 P.2d 784 (1980).

Elkins argues that the Department has not stated facts upon which its requested relief may be granted. However, due process requires that the application to accelerate allege sufficient facts to put a defendant on notice of the reasons for the application and sufficient facts necessary to allow him to prepare a meaningful defense. *Edwards v. State*, 1987 Ok.Cr. 276, 747 P.2d 968 (1987). The Department has clearly met this notice standard.

B Elkins' Deferred Sentence Should Be Accelerated

1. Totality of the Circumstances is Standard for Review of Guilty Plea

In *King v. State*, 1976 Ok.Cr. 103, 553 P.2d 529 (1976), procedures were adopted for a trial court's acceptance of a defendant's plea of guilty. Central to these procedures is the requirement that the trial court determine whether a plea of guilty is the result of a plea agreement and, if so, the trial court shall then require the full disclosure of the plea agreement. This requirement, as well as all procedures for the trial court's acceptance of a plea of guilty, are to be determined from "the totality of the circumstances surrounding the entry of the guilty plea which will provide a proper record to determine its validity." *Ocampo v. State*, 1989 Ok.Cr. 38, ¶ 8, 778 P.2d 920 (1989).

The procedures adopted in *King v. State, supra*, were employed in the Elkins' guilty plea when the Court inquired into the totality of the circumstances surrounding his plea. Elkins acknowledged that the plea was part of a global settlement that included disgorgement,

restitution, and a permanent injunction. Further, Elkins recited additional conditions to which he agreed to comply during the term of the deferment.

In cases involving the acceleration of deferred sentences, courts speak of “terms and conditions” and “rules and conditions.” In *Silva v. State*, 1995 Ok.Cr. 38, 900 P.2d 450 (1995) at 453, the Court stated: “[w]hen the State seeks to accelerate or revoke, the Defendant is being accused of committing acts in violation of the terms and conditions of his or her probation.” See also *State v. Durant*, 892 A.2d 302 (Conn.App. 2006). In *Lewis v. State*, 2001 Ok.Cr. 6, 21 P.3d 64 (2001), the State filed a *Motion to Accelerate Judgment and Sentence* alleging various violations of “rules and conditions” of probation.

A “totality of the circumstances” standard is consistently applied when courts address acceleration requests. The courts do not limit the scope of their review to the sentencing deferment document but look at the totality of the deferment. When the Tenth Circuit Court of Appeals applied the *King v. State* criteria in *Marshall v. Allen*, 21 F.3d 1121, 1994 WL 118189 (10th Cir. (Okla.)), it stated, “the validity of a guilty plea should be determined in light of the entire record.” Elkins urges this Court to disregard the circumstances and conditions critical to both the Department’s agreement to resolve Elkins’ violations of the securities law and the contempt citation and the record surrounding this Court’s acceptance of his guilty plea. The Department urges this Court to ignore Elkins’ request.

2. Mere Knowledge of Terms and Conditions Sufficient for Acceleration

In his Motion to Dismiss, Elkins argues that he was only required to abide by a series of specific conditions listed in the *Summary of Facts upon Plea of Guilty to Indirect Contempt* (“Summary of Facts”), including that he not engage in the sale of securities and that he provide

the Department with certain documentation. Elkins argues that “[s]trict compliance with the terms and conditions of the settlement agreement was not a stated condition of the continuing validity of the sentencing deferral order.” However, even when terms and conditions are not expressly stated, courts have upheld the acceleration of deferred sentences. In *People v. Simone*, 771 N.Y.S. 2d 304 (N.Y. Slip Op. 2003), a stockbroker on probation for stealing client money, was provided with written conditions on the day of his sentencing, including that the defendant answer all reasonable inquiries of probation officers. No condition, written or oral, expressly required that he answer all reasonable inquiries by the court. Four years later, the defendant appeared in court on a question of a probation violation involving his failure to notify his probation officer of a change of address. The court inquired into his business activities and it was later determined that he lied to the court in that exchange. The *Simone* Court found as follows:

“A court may therefore find a defendant in violation of probation if the record establishes that the defendant had knowledge of the condition when the sentence was imposed, regardless of whether defendant received notice of the condition in writing[.]” (citing *People v. Nazarian*, 150 A.D. 923 (N.Y.A.D. 3d Dept. 1989).)

In *People v. Nazarian, supra*, oral conditions read to the defendant at sentencing were sufficient to revoke probation where it was clear the defendant had knowledge of the precise conditions imposed and the record established that the defendant had such knowledge. In *State v. Graham*, 769 A.2d 355 (NH 2001), the court held despite no specific notice or condition, defendant should have known that good behavior was a condition of a deferred sentence. Likewise, in *Brooks v. State*, 1971 Ok.Cr. 199, ¶3, 484 P.2d 1333 (1971), the Court found that some circumstances, here a felony committed while serving a suspended sentence, are “so basic and fundamental that any reasonable person would be aware of such condition. To allow a

defendant to escape revocation under such circumstances would be (sic) mockery of our whole system of criminal justice.”

The test, therefore, is whether Elkins knew the terms and conditions imposed by this Court. When Elkins walked out of the courtroom on August 3, 2007, there was no question from his representations to this Court that he knew that by August 10, 2007, he was obligated to disgorge his profits to all those specified in the Settlement Agreement. As he entered his guilty plea, Elkins clearly knew and stated to this Court his knowledge of the terms and conditions of the Settlement Agreement to resolve the securities enforcement cases and the indirect contempt action.

Elkins would like this Court to selectively recall his August 3, 2007 plea and to disregard his representations to this Court of his understanding of the terms and conditions on which his deferred sentence was based. He would also like this Court to disregard the Settlement Agreement as evidenced by his failure to attach a copy of the agreement to the Motion to Dismiss. The terms and consideration for the plea were specifically expressed as disgorgement, restitution, and a permanent injunction. In addition, conditions were imposed to monitor Elkins' future activities due to his access to the financial records and resources of the public.

3. Elkins Failed to Disgorge Profits and Pay Restitution

In the Motion to Dismiss, Elkins does not attempt to argue that he complied with the terms of his deferment by disgorging the profits from his sales of securities and paying restitution. Instead, Elkins argues that the express terms of the Settlement Agreement with which he “complied” were that he would “deliver” funds to the designated persons and “pay additional amounts” to certain persons. The Department strongly disagrees and objects to

Elkins' mischaracterization of his obligations. The language of the Settlement Agreement relating to disgorgement and restitution is:

2. *Investor Payments.* Elkins agrees to **disgorge all amounts of compensation** he received as a result of the sale of securities issued by Earthly Mineral Solutions, Inc. and Monarch Visual Solutions, Inc. Specifically, he shall deliver by U. S. mail the funds in the amounts and to the persons set forth on Exhibit 3 on or before August 10, 2007.

Elkins shall also, by December 31, 2007, **pay \$1,000.00 to each person** identified on the attached Exhibit 4; provided, there shall be no obligation that Elkins **pay** such additional amounts under this Agreement to persons listed on Exhibit 4, if Monarch Visual Solutions, Inc. completes and funds a rescission offer for sales of securities made to such persons by December 31, 2007. (Emphasis added.)

Elkins was required to actually disgorge his profits, not to "offer" disgorgement to his victims. The purpose of disgorgement is "to deprive the wrongdoer of his ill-gotten gain." *SEC v. AMX International, Inc.*, 7 F.3d 71, 75 (5th Cir.1993).

Elkins was also required to "pay" restitution by December 31, 2007. The term "payment" has legal significance beyond the mailing of a check. Payment involves intent, express or implied, to make payment on the one side and to receive or accept it on the other. *Luckenbach v. W.J. McCahan Sugar Refining Co.*, 248 U.S. 139 (1918).

By August 10, 2007, all of the disgorgement Elkins agreed to pay was not paid. Instead, Elkins began to effect "delivery" of checks to some investors and checks to other investors trickled out over the month or two following the August 10th deadline. Meanwhile, Elkins implemented his plan to prey on the trust his clients placed in him by weaving his story of the injustice done to him by the "government." The tale was so successful that checks accounting for approximately 73.5% of the proceeds of the checks disbursed to investors were ultimately returned to Elkins or were never negotiated.

By January 31, 2008, Elkins had made only three of the fifteen required payments for restitution. In instances where payments of restitution were offered to those identified in the Settlement Agreement, Elkins persuaded the investors to endorse the restitution checks and the funds were then redeposited in Elkins' bank account. Elkins never intended to permanently part with the disgorgement or the restitution, thus he did not intend to make payment to the investors. Most investors returned the funds and thus did not accept payment. The requisite intent for payment failed.

Even more disturbing than Elkins' failure to abide by the terms and conditions of his deferral relating to restitution, was his deceptive act of forwarding copies of checks dated December 31, 2007, for \$1,000 each, payable to those listed in the Settlement Agreement, in response to a request from the Department that he provide evidence of his restitution payments. In one curious instance, according to the check copies Elkins provided to the Department as proof of payment of restitution, Elkins wrote check number 8000 to Bobby Taylor. However, according to Elkins' bank records, the payee of check number 8000 that cleared his bank account was a different investor.

4. Elkins Again Received Income from the Offer and Sale of Securities

The Sentencing Order stated that Elkins would not, directly or indirectly, receive any income from the offer or sale of any security for the term of his deferred sentence. Elkins violated the terms and conditions of the Sentencing Order by receiving income back from investors after he sent them checks to disgorge his commissions. When Elkins succeeded in convincing investors to deposit the checks he sent to them and write checks back to him for the amount of his commissions, Elkins received income from the original sale of the Earthly Mineral

Solutions, Inc. and Monarch Visual Solutions, Inc. securities, in violation of the Sentencing Order.

**C. Elkins Irrationally Blames Investors and the Department
for Violations of Deferred Sentence**

Elkins characterizes his violations of his deferred sentence as a “misunderstanding of the underlying factual situation.” This “misunderstanding” on the part of Elkins is impossible. At the time this Court accepted his guilty plea, there would have been no need for Elkins to acknowledge his obligation to pay disgorgement and restitution or for the Court to ensure that Elkins understood this obligation, if the disgorgement and restitution were not critical conditions to his deferment.

Elkins now offers in the Motion to Dismiss to allow persons who rejected the acceptance of the funds to reconsider their decision after the Department explains the terms of the Settlement Agreement to them. He complains that none of the investors notified him of their objections to receiving the funds. However, Elkins was the only person obligated under the Settlement Agreement or the Sentencing Order to comply with the terms and conditions. He knew his liberty was at risk but chose to turn his semantic play into a personal financial windfall. Elkins has shown total disregard for the securities laws in his serial investment schemes and for this Court’s order enjoining him from selling securities or disposing of assets. The escalation of his disregard now jeopardizes the liberty so generously granted to him by this Court just seven months ago.

Conclusion

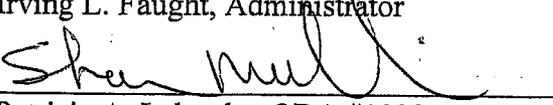
Footnote 1 to the Motion to Dismiss mocks the Department’s allegations regarding the loyalty and faith Elkins’ clients entrust to him by referring to the Department’s allegations of “Elkins’ Svengali-like effect” on investors. However, the use of the term in this manner is an

accurate portrayal of the influence Elkins wields over his clients. After pleading guilty to violations of the order of this Court, Elkins now asks this Court to ignore his verbal acknowledgements to this Court and all references to the Settlement Agreement contained in the Sentencing Order. To allow Elkins to execute a plan to relieve himself of the requirements of the deferred sentence of which he had notice, and acknowledged before the Court, and to which he had agreed prior to this Court's acceptance of his guilty plea, would advance his continuing disregard of the justice system. The Department urges this Court to deny the Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of March, 2008, a true and correct copy of the foregoing was mail by first class mail with postage prepaid thereon to:

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