

In the
Supreme Court of the United States



TIMOTHY O. MARKLAND,

Petitioner,

v.

ASSET ACCEPTANCE CORP.,

Respondent.

On Petition for a Writ of Certiorari to the
Oklahoma Court of Civil Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether rigid invocation of the non-extrinsic evidence rule denies due process when a debt collection company obtains a default judgment and then waits to act on that judgment until the alleged debtor is time-barred from challenging the service of process.
2. Whether due process requires courts to use discretion in determining the need for extrinsic evidence.

PARTIES TO THE PROCEEDINGS

Petitioner

- Timothy Markland, a private individual, is Petitioner here and was defendant/appellant below.

Respondent

- Asset Acceptance, LLC is a debt-collecting creditor is Respondent here and was plaintiff/appellee below.

LIST OF PROCEEDINGS

State of Oklahoma, District Court of Wagoner County
Case No. CS-2011-0168

Asset Acceptance *Plaintiff*, v.
Timothy Markland *Defendant*.

Date of Default Judgment: Sept 14, 2011

Date of Denial of Motion to Vacate: Sept 11, 2019

Oklahoma Court of Civil Appeals

Case No. 118,418

Timothy Markland, *Appellant* v.
Asset Acceptance, LLC, *Appellee*

Date of Final Opinion: Mar 24, 2021

Supreme Court of Oklahoma

No. 118,418

Asset Acceptance, LLC v. Timothy O. Markland

Date of Order Denying Petition for Review: Oct 4, 2021

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OPINIONS BELOW

The opinions issued by Judge Luton in Wagoner County, Oklahoma District Court, the Oklahoma Court of Civil Appeals are not published, but is included in the Appendix (“App.”) at App.9a and App.4a respectively. A Petition for Certiorari to the Oklahoma Supreme Court was denied and is attached to this document as App.1a. The Oklahoma Supreme Court issued a mandate to the Wagoner Trial Court and is attached to this document as App.2a.



JURISDICTION

This Court has jurisdiction of this appeal under 28 U.S.C. § 1257(a).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

This following Oklahoma statutes are reproduced in the Appendix at App.17a:

- Okla. Stat. tit. 12 § 1031
- Okla. Stat. tit. 12 § 1038
- Okla. Stat. tit. 12 § 2004



STATEMENT OF THE CASE

Petitioner Timothy Markland, Defendant/Appellant in the case below (“Petitioner”), asks this Court to issue a Writ of Certiorari to the Oklahoma Supreme Court.

Respondent Asset Acceptance, LLC, Plaintiff/Appellee in the Court below (“Respondent”), is a debt-collecting default judgment creditor who has never had to prove Petitioner owed it anything. Petitioner is presently a judgment debtor who was neither afforded due process through service nor aware of Respondent’s litigation against him until Respondent began garnishment collection proceedings eight years after obtaining judgment. The Oklahoma Court of Civil Appeals (OCCA) affirmed the Trial Court’s ruling which is abhorrent to Due Process. Specifically, there is no remedy for a Defendant against whom a default judgment has been taken, without his knowledge and without service of process, if there is a return of service on record and three years from the date of judgment have passed.

Respondent filed suit against Petitioner on March 14, 2011 App.86a alleging indebtedness on a

revolving credit account. A return of service filed in the case alleged personal service on Petitioner at his parents' home, where Petitioner did not reside. App.90a. The Trial Court granted default judgment in favor of Respondent on September 14, 2011. App. 15a.

Nearly five years later, Respondent renewed its judgment, allegedly sending notice to the address where process was allegedly served. App.88a. Respondent never made any effort to collect on its default judgment until eight years after it was rendered, allowing nearly four times the principal judgment amount to accrue in interest. The first time Petitioner had notice of the litigation against him or the default judgment from 2011 was when Respondent filed garnishment in January of 2019. App.93a.

On March 4, 2019, Petitioner filed a motion to vacate the default judgment. App.102a. An evidentiary hearing and additional briefs were filed in the matter. The transcript of the hearing is attached at App.24a.

Petitioner did not live at the residence where service allegedly occurred. Petitioner did not live at the home on 40th Street either at the time of the alleged service or at the time notice of renewal of the judgment was allegedly sent. App.102a (Aff. of C. Markland); App.24a, (Test. of Petitioner); App.24a (Test. of C. Markland); App.24a (Aff. of C. Markland).

Petitioner never received a summons and/or petition. Petitioner testified he never received a summons in this lawsuit. App.24a. Petitioner's mother testified she never received documents indicating Petitioner was being sued, either. App.24a. Although Petitioner's father is deceased, Petitioner's mother

testified if her husband had received documents communicating a lawsuit against Petitioner, he would have raised that issue with her, but he never mentioned anything. App.24a. Petitioner's father passed away in 2016, long after the alleged time of Service. App.86a (Return).

It was highly unlikely Petitioner would have been at the home on 40th Street on any Saturday in 2011: he was married and already spent Sundays with his mother. In 2011, it was Petitioner's regular pattern to meet with his parents on Sundays. App.24a (Test. of C. Markland); App.24a (direct of Petitioner), App.24a (cross). Petitioner's mother testified he was married and generally did not visit with her on Saturdays. *Id.* (direct of C. Markland), App.24a (cross); *accord* App.24a (Test. of Petitioner). Petitioner was not likely at the place where service was alleged because he did not generally visit his parents on Saturdays.

Not only was it unlikely Petitioner's would have been at the home on 40th Street on any Saturday, but his opportunity to have been there was highly limited by his work schedule. At the time Petitioner was allegedly served in 2011, he worked as a disc jockey for a company called DJ Connection. App.24a (Test. of Jason Bailey). DJ Connection's owner, Jason Bailey, testified Petitioner worked on the day in question. *Id.* Petitioner's gig began at 5:30 p.m., so he was required to be there by 3:30. App.24a (direct), App.24a. (cross). Moreover, Petitioner was required to obtain his equipment from Bailey no later than 11:00 a.m. on the same day. App.24a (Test. of Jason Bailey). Additionally, Petitioner had a history of picking up equipment as early as 8:00 a.m. App.24a (direct), App.24a (cross). The gig was scheduled until midnight. *Id.* Petitioner himself testified he was always early

to pick up equipment and to set up equipment; that he would have been at the gig no later than 1:00. App.24a (direct), Petitioner's mother testified it would be unusual for Petitioner to visit her on a day he had a DJ gig. *Id.* (Test. of C. Markland); App.24a (Redirect of Petitioner). Petitioner's opportunity to have been at the house on 40th Street was extremely limited by his work schedule.

The process server could not identify Petitioner at the evidentiary hearing and neither recorded on the return nor otherwise maintained any identifying information concerning the person allegedly served. App.24a; App.24a (Test. of Newman). Petitioner's father was White. Petitioner is Black. Had the process server recorded any information about the person served, it likely would have resolved this issue. The local rules in Wagoner County call for more detail in a return of service, but they did not enforce the local rule at that time even though it was promulgated. App.24a.

Further delaying Petitioner's notice of Respondent's claim and subsequent judgment, the judgment did not appear on Petitioner's credit reports or impact his credit score: he had no notice of the lawsuit until Respondent garnished his earnings, eight years after the judgment. App.91a, 93a, 97a (Garnishment Aff., Garnishment Summons, and Garnishee's Ans., respectively); App.24a (Test. of Petitioner); App.24a (Aff. verification by Petitioner).

Despite all the evidence indicating Petitioner had not received service of the petition, the Trial Court determined it could not hear extrinsic evidence on the matter of personal jurisdiction because three years had passed precluding an attack on a default judgment according to 12 Okl. St. § 1038. The Court

held that the judgment could only be vacated if there was an infirmity on the face of the judgment roll, meaning within the confines of documents one might see on the docket sheet.

Petitioner never received the summons and petition; it is unclear to whom they were served. At an evidentiary hearing, the process server could not identify Petitioner. Moreover, Petitioner's mother testified she did not receive service back in 2011, nor did she receive notice of the judgment's renewal. She also testified it was unlikely her husband, now deceased, would have received service because he would have mentioned it, but never did. It was impossible for Petitioner to file his Motion to Vacate the default judgment within the rigid three-year time frame.

Key to this request that this Court grant this Writ of Certiorari is the very specific nature of the issues. The questions presented relate to the Trial Court specifically ruling it had no discretion or authority with which to grant any of the relief Petitioner requested. After ruling that it had no jurisdiction to decide the Motion to Vacate with the aid of extrinsic evidence, the Trial Court inexplicably mentions that Petitioner did not demonstrate the quantum of evidence required. There is no reasoning by the Trial Court for such a statement. There was no full consideration of the extrinsic evidence because the court had already decided it was time-barred from considering such evidence. There is no explanation for the Trial Court's statement, there are no details of what the court did or did not consider. There was clearly not a thorough examination of the evidence. The evidence needs to be presented before a court that understands it does have discretion to consider such evidence.

Petitioner contends the Trial Court's rulings were in error as a matter of law because the Trial Court had the discretion and authority to grant Petitioner's requested relief and Petitioner met his evidentiary burden. Such a rigid application of the non-extrinsic evidence rule is unconstitutional as applied to Petitioner. Accordingly, Petitioner asks this Court to issue a Writ of Certiorari to the Oklahoma Supreme Court.



REASONS FOR GRANTING THE PETITION

I. PETITIONER MARKLAND WAS DENIED DUE PROCESS WHEN DEFAULT JUDGMENT WAS ENTERED AGAINST HIM WITHOUT BEING SERVED WITH THE PETITION OR SUMMONS.

A. Due Process Is the Cornerstone of Justice and Requires Adequate Service of Process.

The Fourteenth Amendment to the United States Constitution mandate that no one should be "deprived of life, liberty, or property without due process of law." U.S. Constitution amend. XIV, § 1. Oklahoma's Constitution, art. II, § 7 guarantees the same. Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to actors who manipulate procedural rules to eviscerate this fundamental right. At its core, due process requires adequate notice and a right to be heard. *See Mullane v. Cent. Hannover Bank & Tr. Co.*, 339 U.S. 306 (1950).

Individual circumstances and hardships must be evaluated when considering the risk of erroneous

deprivation of this fundamental right. Individual variances must be considered depending on the circumstances of each case. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). “Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. [D]ue process is flexible and calls for such procedural protections as the particular situation demands” *Id.* at 334 quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 895 (1961) and *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). “The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss,’ . . . and depends upon whether the recipient’s interest in avoiding that loss outweighs the governmental interest in summary adjudication.” *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970), (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Justice Frankfurter concurring)). “The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.” *Cafeteria & Rest Workers*, 367 U.S. at 894–95.

Due process requires adequate service of process. “[W]hen notice is a person’s due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” *Id.* at 315. Personal service guarantees actual notice, and individuals must be given wide latitude to challenge the lack of notice, especially when an unsophisticated individual, like the Petitioner, is fighting to prove lack of notice from a company like the Respondent, a company with the sole function to litigate, and where there is a rich history of Respondent

operating outside the bounds of due process. The interest in correct fact-finding must outweigh rigid procedural rules. At stake in this case is the fundamental right of Petitioner in protecting his Constitutional right to adequate notice and an opportunity to be heard. Petitioner has had neither.

B. Default Judgments Are Disfavored in the Law.

Default judgments are by their nature in conflict with due process because the defendant will not have had an opportunity to be heard. The problem lies with the fact that sometimes individuals, like the Petitioner, have default judgments entered against them when they had no notice there had been a lawsuit even filed. Because of this, notice must be carefully examined to ensure the due process rights of the individual are protected and that he has been properly served. For that reason, the law does not favor default judgments. *Girkin v. Cook*, 518 P.2d 45, 49 (Okla. 1973); *Singleton v. LePak*, 425 P.2d 974, 977 (Okla. 1967); *Cox v. Williams*, 275 P.2d 248-49 (Okla. 1954).

This Court realized the dangers inherent in default judgments in *Klapportt v. United States* when this Court set aside a default judgment four years after it was entered without deference to the one year limitation in Federal Rule of Civil Procedure Rule 60(b) because the defendant had not been afforded due process while he was in prison, “[a]nd all petitioner has asked is that the default judgment be set aside so that for the first time he may defend on the merits. Certainly, the undenied facts alleged justify setting aside the default judgment for that purpose. Petitioner is entitled to a fair trial. He has not had it. The Gov-

ernment makes no claim that he has.” *Klapportt v. United States*, 335 U.S. 601, 615 (1949).

Because default judgments deny individuals the opportunity to be heard, any denial of this fundamental right should be scrutinized. In Petitioner’s case, it was not.

C. Petitioner Was Not Served Notice of the Claim Against Him, and the Oklahoma Courts Analyzed Petitioner’s Case Incorrectly.

Generally, in Oklahoma, service of a civil Petition and Summons on a defendant in his personal capacity must be delivered to the defendant himself, unless such service is made to an eligible recipient at the place where the defendant resides. 12 Okl. St. § 2004. There was scant information on the Return of Service, and Petitioner denies what little does exist. App.86a. Petitioner never received a copy of the Petition and Summons. Petitioner never saw a process server. App.24a. There is no dispute Petitioner did not reside at his parents’ home where service allegedly occurred. App.24a. Petitioner’s father has since deceased, App. 24a; 102a, and Petitioner’s mother does not remember any process server delivering a Petition and Summons. App.24a. Testimony to these facts is crucial. However, the Trial Court’s ruling that under 12 Okl. St. § 1038, it could hear no extrinsic evidence essentially rendered moot the key question of who, if anyone, was served, even though that is the cornerstone of Petitioner’s Due Process rights. This left Petitioner without any recourse to challenge the violation of his due process rights.

No statute in Oklahoma permits service on Petitioner by delivering papers to an individual other

than Petitioner at a place where Petitioner does not reside. 12 Okl. St. § 2004. Because Petitioner was not the person allegedly served, and the place of service was not Petitioner's home, service on Petitioner was not in compliance with state statute. A judgment rendered after un-cured ineffective service is a judgment rendered without personal jurisdiction. *Graff v. Kelly*, 814 P.2d 489, 492-493 (Okla. 1991). Such a judgment is void. *Ferguson Enterprises, Inc., v. Webb Enterprises, Inc.*, 13 P.3d 480 (Okla. 2000). A void judgment may be vacated at any time and with the use of extrinsic evidence. 12 Okl. St. §§ 1031, 1038, 2012(B)(2).

The Oklahoma Court of Civil Appeals affirmed the Trial Court's use of an incorrect analysis in a narrow reading of Oklahoma law, and the underhand tactics employed by the Respondent are a prime example of why a narrow reading is wrong. Because a Return of Service was on file, the Trial Court declined to consider any extrinsic evidence, referencing a limitation period under 12 Okl. St. § 1031 and a restriction on information cognizable in ruling on a motion to vacate under § 1038. App.18a. Under the Trial Court's ruling, a plaintiff can extract money on a judgment from any un-served defendant, regardless of whether such defendant was liable on the underlying claim. The plaintiff need only ensure a Return of Service is filed and then wait until the defendant is time-barred from challenging the judgment, all without ever having to prove its claims. That is exactly what Respondent did in this case. This type of analysis could result in such absurd facts as a defendant being verifiably out of the country, incarcerated, or deceased, because, using the analysis if the Trial Court, such facts would be extrinsic to the record. This danger is

compounded when a company, like the Respondent, has made their fortune lying in wait under the protection of rigid procedural rules.

This type of analysis is ripe for abuse by parties like the Respondent, and strips individuals, like the Petitioner, of their constitutionally guaranteed due process rights. The Trial Court incorrectly analyzed Petitioner's Motion to Vacate under Oklahoma law.

D. Respondent's Continued Unethical Behavior Prevented Petitioner from Having Any Remedies for the Denial of Due Process.

Respondent is a multi-million-dollar company with the sole purpose of collecting debt. While businesses like the Respondent's often serve a necessary purpose, Respondent has chosen to skirt procedural rules to the extreme detriment of the rights of numerous alleged debtors. It is not surprising Respondent's underhanded behavior in the instant case purposely denied Petitioner Markland his due process rights. Petitioner Markland is one of many victims of this Respondent. A few of Respondent's antics are outlined here:

- (1) 1-30-2012 Asset Acceptance agrees to pay \$2.5 million in civil penalties to settle the FTC's nine-count complaint charging the company with:
 - misrepresenting consumers owed a debt when it could not substantiate its representations;
 - failing to disclose debts are too old to be legally enforceable or that a partial payment would extend the time a debt could be legally enforceable;

- providing information to credit reporting agencies, while knowing or having reasonable cause to believe the information was inaccurate;
- failing to notify consumers in writing it provided negative information to a credit reporting agency;
- failing to conduct a reasonable investigation when it received a notice of dispute from a credit reporting agency;
- repeatedly calling third parties who do not owe a debt;
- informing third parties about a debt;
- using illegal debt-collection practices, including misrepresenting the character, amount, or legal status of a debt; providing inaccurate information to credit reporting agencies; and making false representations to collect a debt; an
- failing to provide verification of the debt and continuing to attempt to collect a debt when it was disputed by the consumer.

The settlement required when Asset Acceptance knows or should know a debt may not be legally enforceable under state law—often referred to as “time-barred” debt—it must disclose to the consumer it will not sue on the debt and, if true, it may report nonpayment to the credit reporting agencies. Once it has made that disclosure, it may not sue the consumer, even if the consumer makes a partial payment that otherwise would make the debt no longer time-barred.

The order further prohibits the company from:

- Making any material misrepresentation to consumers and making any representation a consumer owes a particular debt, or as to the amount of the debt, unless it has a reasonable basis for the representation. To ensure it has such a basis, the order requires Asset Acceptance to investigate consumer disputes before continuing collection efforts;
- “Parking”—or placing—debt on a consumer’s credit report when it has failed to notify the consumer in writing about the negative report, and;
- Violating the Fair Credit Reporting Act and the Fair Debt Collection Practices Act, in the ways alleged in the complaint.

Under FTC Settlement, Debt Buyer Agrees to Pay \$2.5 Million for Alleged Consumer Deception, (FTC) (Jan. 30, 2012), <https://www.ftc.gov/news-events/press-releases/2012/01/under-ftc-settlement-debt-buyer-agrees-pay-25-million-alleged>

- (2) *Asset Acceptance v. Pham*, 415 P.3d 47 (Okla. Civ. App. 2018). The Court vacated a default judgment because Asset Acceptance failed to provide notice to the individual a petition had been filed.
- (3) *Bureau of Consumer Fin. Prot. v. Encore Cap. Grp., Midland Funding, Midland Credit Management, and Asset Acceptance*, Case No 20CV1750-GPC-KSC (S. D. Cal. 10-15-2020), https://files.consumerfinance.gov/f/documents/cfpb_encore-capital-group-et-al_proposed-stipulated-final-judgment-and-

order_2020-10.pdf. Asset Acceptance and the other companies were under a 2015 order of the Bureau to cease debt-collection practices for previous violations of the Consumer Financial Protection Act, Fair Dept Collection Practices Act, and the Fair Reporting Act. While under that order, Asset Acceptance violated the order by suing consumers without possessing required documentation, using law firms and an internal legal department to engage in collection efforts without providing required disclosures, and failing to provide consumers with required loan documentation after consumers requested it. The Bureau also alleged the order was violated when the companies sued consumers to collect debts even though the statutes of limitations had run on those debts. Asset Acceptance and the other companies stipulated to a final judgment and were ordered to pay \$79,308.81 in redress to consumers and \$15 million in civil money penalty.

- (4) *McDonald v. Asset Acceptance*, Case 2:11-cv-13080, 2013 WL 12305294 (E.D. Mich. 08-07-2013). In this case, various original creditors charged off or waived interest in each of the plaintiff's debts, and then sold the debt to Asset Acceptance who then "reinstated" the interest and began collecting it. The court granted class certification and the plaintiff's motion for summary judgment as to liability because "[A]sset's false statements regarding the total amount of the debt in the collection actions constitutes violations of

§ 1692e(2)(A) and § 1692f(1) of the Fair Debt Collection Practices Act.

- (5) *Wang v. Asset Acceptance* 681 F.Supp.2d 1143 (N.D. Cal. Jan. 27, 2011). The Court found Asset Acceptance was furnishing information to Consumer Reporting Agencies concerning no less than 177,023 California accounts where the limitations period relating to those accounts had expired. (Opinion at 3).
- (6) *Phillips v. Asset Acceptance* (No. 13-2251 7th Cir. 2013). The Seventh Circuit certified 342 Illinois residents as class members where plaintiffs contended Asset Acceptance sued to recover debt after the statute of limitations on the creditor's claim had run, in violation of the Fair Debt Collection Practices Act.
- (7) *Sturgis v. Asset Acceptance*, No. 3:15-cv-00122-AC, 2016 WL 3769750 (D. Or.). The parties reached a settlement agreement filed under seal in this case where the plaintiff alleges violations of three separate provisions of the Fair Debt Collection Practices Act. While the amount of the settlement is unknown, it is noteworthy the Court awarded Plaintiff over \$45,000.00 in attorney's fees.
- (8) The Department of Consumer Affairs for the City of New York filed a violation charging Respondent Asset Acceptance, LLC., with violating Section 20-490 of the Administrative Code of the City of New York "by acting as a debt collection agency in the City of New York without a license therefor." On July

24, 2006, Respondent Asset Acceptance, LLC., was found guilty of engaging in unlicensed activity from April 10, 2003, to May 11, 2006, and were ordered to discontinue its activity. Asset Acceptance appealed the decision which was subsequently affirmed on February 23, 2007. *Violation No.: PL1044927, Department of Consumer Affairs v. Asset Acceptance, LLC*, Dept. of Consumer Affairs for the City of New York (May 2006), https://www.nclc.org/images/pdf/unreported/Asset_Acceptance.pdf

(9) *Asset Acceptance v. Nguyen*, 198 Wash. App. 1026 (Wash. Ct. of App. 2017) (unpub.) Asset Acceptance waited three years to the day after obtaining a default judgment before beginning garnishing Nguyen's wages. The court held the judgment was void regardless of the lapse of time because Asset Acceptance failed to serve Nguyen at a location where he lived—a fact that was proven with extrinsic evidence despite what the judgment roll indicated.

Simply stated, Respondent Asset Acceptance acts in bad faith and resorts to continued unethical practices. “An elementary and fundamental requirement of due process . . . is notice reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane*, 339 U.S. 306, 314 (1950) (emphasis added).

Respondent's history alone warrants Petitioner should have his day in court to prove his Motion to Vacate by any means possible.

Respondent's history alone rebuts the presumption the judgment roll is valid.

Respondent must be held accountable for its actions in denying Petitioner an opportunity to be heard on the alleged debt. The incorrect narrowing of Oklahoma law by the Trial Court and affirmed by OCCA has aided Respondent in its quest to deny Petitioner due process.

II. PETITIONER MARKLAND WAS DENIED DUE PROCESS WHEN THE COURTS BELOW FAILED TO USE DISCRETION AND INSTEAD RELIED SOLELY ON THE TIME LIMITATIONS OF 12 OKL. ST. § 1038 WHICH LEFT PETITIONER WITHOUT ANY REMEDY TO CHALLENGE THE SERVICE OF PROCESS.

A. The Oklahoma Court of Civil Appeals Used the Incorrect Standard of Review.

The Trial Court denied Petitioner's Motion to Vacate on the basis it had no authority to grant his motion. App.12a. and OCCA reviewed the case on appeal using an abuse of discretion standard. App.4a. OCCA failed to notice the appeal was based on the Trial Court's decision to deny the motion to vacate based on the erroneous conclusions of law that the Trial Court was without authority to grant the relief Petitioner requested. All propositions asserted by Petitioner in his appeal concern the Trial Court's findings of law and should have been reviewed *de novo*.

Respondent treated another defendant in the same manner as Petitioner. Mr. Nguyen learned for the first time of the default judgment against him when his wages were garnished three years after the default judgment was entered. Although the service of process appeared to meet the *prima facie* burden

on its fact, the court allowed Mr. Nguyen to present evidence to the contrary. The court vacated the default judgment after a de novo review of the facts presented at the hearing. “A court must vacate a void judgment regardless of the lapse of time.” *Asset Acceptance LLC v. Nguyen*, 198 Wash. App. 1026.

The Trial Court was presented with questions regarding the interpretation and application of 12 Okl. St. §§ 1031, 1038, and of case law concerning both the Court’s own inherent authority to exercise discretion and the amount of evidence required to satisfy the applicable quantum of evidence. All of these are questions of law upon which the Trial Court ruled in error. Questions of law are reviewed de novo. *Oklahoma Tax Comm. v. Sun Co., Inc.*, 222 P.3d 1046 (Oklahoma 2009). Under de novo review, the Supreme Court has “plenary, independent and non-deferential authority to determine whether the trial court erred in its legal rulings.” *Id.*

The Trial Court denied Petitioner’s Motion to Vacate based on errors of law. The abuse of discretion standard used by OCCA and affirmed by the Oklahoma Supreme Court was improper. At the very least, Petitioner requests his motion to vacate be granted or the matter be remanded for further consideration. Even under an abuse of discretion standard, OCCA’s analysis falls short because the court failed to properly analyze the facts and law in this case.

B. Default Judgments Based on a Rigid No-Extrinsic Evidence Rule Denied Petitioner Due Process.

The Oklahoma Appellate Courts failed when affirming the Trial Court’s rigid reading of Oklahoma statutes in denying Petitioner’s Motion to Vacate the

default judgment. 12 Okl. St. § 1031 gives Oklahoma trial courts the power to vacate default judgments. 12 Okl. St. § 1038 provides a three-year limit on the length of time courts may hear motions to vacate based on evidence outside the judgment roll. There is no time limit on challenges to service by examining the judgment roll. The Trial Court, as affirmed by OCCA, incorrectly used the three-year limit to analyze Petitioner's case. For reasons explained in Proposition III below, Petitioner's case should have been analyzed as a void judgment with no time-limits on the presentation of extrinsic evidence. "A void judgment, decree or order may be vacated at any time, on motion of a party, or any person affected thereby." 12 Okl. St. § 1038.

However, even the analysis under the three-year limitation was incorrectly applied because the Court never used the discretion it clearly had to allow extrinsic evidence at any time. Even though motions to vacate are covered by statute, the Oklahoma Supreme Court gives trial judges the authority to vacate on grounds outside the statute if the merits of the case dictate their sound discretion to do so. In *Schepp v. Hess*, the Oklahoma Supreme Court overruled the Oklahoma Court of Civil Appeals in an analogous situation because the merits of the case allowed the trial court to vacate a judgment for reasons other than those found in § 1031. "The common law's test in force in this state for measuring the legal correctness of a trial court's response to a timely § 1031.1 plea is whether sound discretion was exercised upon sufficient cause shown to vacate, modify, open or correct the earlier decision, or to refuse the relief sought." *Schepp v. Hess*, 770 P.2d 34, 38 (Okla. 1989). (emphasis in original). "The test

for measuring such a determination is “whether sound discretion was exercised.” *Id.* In this case, Respondent gamed the system and lay behind the log, waiting until more than three years had lapsed before attempting to collect on the judgment. It was abuse of discretion for the Trial Court to fail to consider the disproportioned position of the parties. The predatory behavior of this Respondent is exactly why courts should use their discretion, and failure to do so furthers the abuse.

In a case almost identical to Petitioner’s, the Court of Appeals in Washington recognized the need to use extrinsic evidence to determine if service of process was valid. In *Allstate Ins., Co., v. Kahni*, a default judgment was set aside years later after extrinsic evidence was presented to prove Mr. Kahni did not live at the place where the process server left the Petition and Summons despite the face of the Return of Service claiming otherwise. Since the evidence presented indicated the service was inadequate, the default judgment was void. The court stated, “Void judgments may be vacated regardless of the lapse of time.” *Allstate Ins. Co., v. Khani*, 75 Wash. App. 317, 324 (Wash. Ct. App. 1994) (internal citations omitted). “[W]hen a default judgment is entered against a defendant and is void for lack of personal jurisdiction over him, he may challenge the void default judgment at any time. A party will not be deemed to have waived the right to challenge a default judgment void for lack of personal jurisdiction merely because time has passed since the judgment was entered. Under such circumstances, the trial court must vacate the judgment and has no discretion to do otherwise.” *Id.* at 326.

The Oklahoma Supreme Court utilized its discretion in a case very similar to Petitioner's. In *Vance v. Federal National Mortgage Association*, the Oklahoma Supreme Court reversed the Oklahoma Court of Civil Appeals and reversed the trial court's ruling extrinsic evidence could not be considered. *Vance v. Fed. Nat. Mortg. Ass'n*, 988 P.2d 1275 (Okla. 1999). In allowing extrinsic evidence outside the face of the judgment roll, the Oklahoma court's reasoning is instructive because they balanced "two legal interests—the judgment roll's reliability and a defendant's "due process" right to notice." *Id.* at 1279. After balancing those rights, the Oklahoma Supreme Court allowed evidence to be presented outside the face of the judgment roll. "Juxtaposed against the legal system's need for reliability in the judgment roll is a party's right to use extrinsic evidence to vacate a judgment when he/she is denied due process. Defendants have a right (under both federal and Oklahoma's regimens of due process) to receive meaningful and effective notice of legal actions which have potential for divesting them of property interests." *Id.* at 1279-80.

Finality of judgment is not a rigid policy. The policy underlying finality of judgment is based on quick litigation and allowing litigants with only one bite at the apple. This policy is in stark contrast to an individual's right to have knowledge of a claim against him so he can present his defense. This Court explained the rationale to favor finality of judgment. "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily

appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.” *Baldwin v. Iowa State Traveling Men’s Ass’n*, 283 U.S. 522, 525-26 (1931). This policy reason is not applicable because this is not the situation here. The merits of the case have never been tried; the Petitioner has never had an opportunity to voluntarily appear or present his case. There has not been *any* opportunity for the Petitioner to have his day in court.

Not only did the court have discretion to hear extrinsic evidence, the Restatement (Second) of Judgments favors collateral attack on default judgments. “The modern rule is that a judgment may be impeached by evidence that contradicts the record in the action. Concern for protecting judgments from contrived attacks is considered adequately served by requiring that an attack based on extrinsic evidence be brought in an appropriate forum and that it be sustained by more than ordinarily persuasive evidence.” REST 2D JUDG § 77 (1982) (Oct. 2021 Update). The Restatement explains that extrinsic evidence is allowed for the precise reason Petitioner is asking because ‘the opportunity to be heard is an interest generally paramount to that of insuring the finality of judgments. There is a comparably superior interest in protecting a person against judgment by a court lacking territorial jurisdiction over him or subject matter jurisdiction over the controversy.’ *Id.* This is all Petitioner asks—an opportunity to present evidence “even if the record of the action indicates otherwise. It is similarly admissible to show a fraudulently procured judgment.” *Id.*

The federal system also recognizes this latitude when ensuring due process rights are protected.

“Fair hearings are in accord with elemental concepts of justice . . .” *Klapportt v. United States*, 335 U.S. 601. This Court in *Klapportt* utilized the ‘any other reason’ clause in Fed. R. Civ. P. 60(b) which allows for a review of specific facts. The law in Oklahoma deprives individuals like the Petitioner of such leeway. Federal Rule of Civil Procedure 60(b) is a good procedural guide. Rule 60(b)(6) allows a court to vacate a default judgment for “any other reason that justifies relief.” And 60(c) allows a motion to vacate to be made “within a reasonable time.” This flexibility allows federal courts the ability to address situations just like Petitioner’s where the judgment works as an extreme and undue hardship. *See Matter of Emergency Beacon Corp.*, 666 F.2d 754, 759 (2d Cir. 1981) and *United States v. Karahalias*, 205 F.2d 331, 333 (2d Cir. 1953). This Court has suggested Rule 60(b) is inherently meant to allow courts to “accomplish justice.” *Klapportt*, 335 U.S. at 614-15.

Oklahoma statute cannot be read as so rigid as to deny basic due process. “The notice contemplated by the due process clauses of the U.S. Constitution amend. XIV, § 1 and Oklahoma’s Constitution, art. II, § 7 require more than mere compliance with procedural formalities, rather they guarantee that procedure be fair. The due process mandated by these basic-law provisions requires notice reasonably calculated *under all the circumstances* to inform the interested parties of the action’s pendency and to afford them an opportunity to present their objections.” *Vance*, 982 P.2 at 1280. The Oklahoma Supreme Court adopted a totality-of-circumstances test “to assay the probability that service actually imparts the degree of notice which is constitutionally prescribed. The adopted test requires that under *all the circumstances*

present in a case there be a reasonable probability the service of process employed apprizes its recipient of the plaintiff's pressed demands and the result attendant to default." *Id.* (emphasis in original).

In contrast to the policy interest in finality of judgment, the Oklahoma Supreme Court identified the policy considerations which factor into a decision to vacate a default judgment:

In previous cases reviewing a trial court's ruling either vacating or refusing to vacate a default judgment, we have considered the following: 1) default judgments are not favored; 2) vacation of a default judgment is different from vacation of a judgment where the parties have had at least an opportunity to be heard on the merits; 3) judicial **discretion to vacate a default judgment should always be exercised so as to promote the ends of justice;** 4) a much stronger showing of abuse of discretion must be made where a judgment has been set aside than where it has not. We also consider whether substantial hardship would result from granting or refusing to grant the motion to vacate.

Horowitz v. Alliance Home Health, Inc., 32 P.3d 825 (Oklahoma 2001) (quoting *Ferguson Enters. Inc. v. Webb Enters. Inc.*, 13 P.3d 480 (Oklahoma 2000)) (internal references omitted)(emphasis added).

The Trial Court failed to recognize and utilize its wide discretion to determine whether notice has been given. This abuse of discretion has deprived Petitioner of his day in court. Petitioner recognizes he is challenging the face of the judgment roll, but to

prove lack of due process and that he was never served, he must be able to prove his position. Proof of that position requires evidence collateral to the judgment roll because Petitioner was not aware of the judgment against him until the Respondent began garnishing his wages after the three-year limitation period had passed. All Petitioner asks is he be afforded his fundamental and constitutional right to be heard. That is all he asks.

The incorrect interpretation of Oklahoma law by the Trial Court and affirmed by OCCA does not provide a necessary safety valve, and thereby denies Petitioner due process guaranteed to him.

C. The Return of Service Was Incomplete and Collateral Proof Was Required.

Petitioner was not personally served with the Petition and Summons and did not live at the house where the service allegedly occurred. The information on the return affidavit is incomplete. App.86a. The only way for the Petitioner to challenge the default judgment was to file a Motion to Vacate as soon as he discovered the judgment. Respondent purposely waited until more than three years had lapsed before (1) documenting the judgment on Petitioner's credit report, (2) attempting to garnish Petitioner's wages, or (3) trying to contact Petitioner directly to collect on the allegedly debt. Respondent knew the Trial Court's analysis would begin with the presumption Petitioner was served because an Affidavit of Service was in the record. App.12a. Without the ability to prove the affidavit wrong, Respondent intentionally left Petitioner without recourse under the Trial Court's analysis.

This narrow analysis was affirmed by OCCA even though that very court stated, "The signature of a

process server on a return of service constitutes *prima facie*, but rebuttable, presumption of proper service. The party opposing the service must overcome that presumption of proper service by presentation of evidence.” *SMS Fin. LLC v. Ragland*, 918 P.2d 400, 403-404, (Okla. Civ. App. 1995) (citing generally, 12 Okl. St. § 2004, emphasis added). *Ragland* stands for the proposition a Court may look to extrinsic evidence to determine whether there was proper service of process and, if service is not shown, the judgment is void on its face. Even though a presumption exists, the presumption stated in *Ragland* is paper thin. In *Walker v. Telex Corp.*, the Oklahoma Supreme Court held: “Nor does a presumption shift the burden of proof, but rather has certain procedural consequences as to the duty of production of other evidence by the opponent. **The presumption disappears if evidence to the contrary is offered by the opponent.**” *Walker v. Telex Corp.*, 583 P.2d 482, 486 (Okla. 1978) (emphasis added). Thus, the reason for the presumption of regularity is simply the lack of any other information. Both *Ragland* and *Walker* obviously anticipate defendants will sometimes bring evidence to challenge personal jurisdiction. When they do, the presumption of regularity disappears, and the reason for restricting the scope of a court’s inquiry also disappears. OCCA failed to protect Petitioner’s due process rights when they used a rigid reading of Oklahoma law in denying Petitioner’s Motion to Vacate. Under the Trial Court’s analysis, companies like Respondent can hide in the shadows behind a flimsy Return of Service while the Petitioner, and others similarly situated, can never prove he was wronged. This simply cannot be the facts contemplated by the Oklahoma statute or the Due Process Clause of the United State Constitution.

III. PETITIONER MARKLAND WAS DENIED DUE PROCESS BECAUSE THE RETURN OF SERVICE WAS VOID BECAUSE IT VIOLATED THE STANDARDS FOR RETURN OF SERVICE, AND OCCA ERRED IN FAILING TO ANALYZE PETITIONER'S MOTION TO VACATE AS VOID

A. The Trial Court Did Not Have Jurisdiction Over Petitioner Because He Was Never Served.

Under Oklahoma law, a default judgment can be challenged as void at any time. 12 O.S. §§ 1031, 1038. This is consistent with this Court's rulings. “[A] judgment entered without notice or service is constitutionally infirm.” *Peralta v. Heights Med. Ctr, Inc.*, 485 U.S. 80, 84 (1988). Failure to give notice violates “the most rudimentary demands of due process of law.” *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). If a defendant is not properly served, any default judgment entered against them is void. If the judgment is void, the court should vacate the judgment without considering the merits of any defense.

The judgment entered against Petitioner is void because the trial court lacked personal jurisdiction because he was never validly served in accordance with Oklahoma Rule of Civil Procedure 12. Both Oklahoma law (12 Okl. St. § 1038) and federal law (Fed. R. Civ. P. 60(b)(4)) allow an exception to the general rule barring collateral attacks against final judgments. Since there is no time bar on void judgments, this exception is applicable to Petitioner.

A default judgment rendered without personal jurisdiction over the defendant is “void.” *Ferguson*, 13 P.3d at 481. This Court states unequivocally a judgment rendered in violation of Due Process is

void. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). The alleged service of process on Petitioner is void on its face because it violates standards required of return of service documents. A court lacks personal jurisdiction over a defendant who did not receive service of process. *Graff v. Kelly*, 814 P.2d at 492-493. Thus, a judgment against an un-served defendant is “void” and it may be vacated by motion at any time. This exception overcomes the policy justifications for finality of judgment. Even this Court has said “[a] void judgment is a legal nullity.” *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). Citing the Restatement (Second) of Judgments § 22 (1980), this Court continued “to say that a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final.” *Id.* at 270.

Unfortunately, the definition of “void” lacks a definite meaning, and the time is ripe for this Court to add clarity to its meaning. The Fifth and Sixth Circuits have adopted a narrow definition of void, *see Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 907 (6th Cir. 2006); *Carter v. Fenner*, 136 F.3d 1000, 1007 (5th Cir. 1998); while other courts have broadly construed the term void to effectuate justice. *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986) (“Properly applied Rule 60(b) strikes a balance between serving the ends of justice and preserving the finality of judgments); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. 1981) (“[I]t is often said that the rule should be liberally construed in order to do substantial justice. What is meant by this general statement is that, although the desideratum of finality is an important goal, the justice-function of the courts demands that it must yield, in appropriate circum-

stances, to the equities of the particular case in order that the judgment might reflect the true merits of the cause.”) (internal citations omitted); *TCI Group Life Ins. v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001) (“Rule 60(b) is ‘remedial in nature and . . . must be liberally applied.’”) (internal citations and quotations omitted). The Ninth Circuit Court of Appeal in discussing Rule 60 has stated this rule, like all the Federal Rules of Civil Procedure, “is to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits.” *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983) (internal citations omitted.) This liberal construction is also the position taken by Oklahoma throughout their pleading code. *Honeywell v. Gada Builders, Inc.*, 271 P.3d 88 (Ct. of Civ. Appeals Okla. 2011)(cert. denied).

The time is ripe for this Court to provide guidance to federal and state courts regarding the definition of when a judgment is “void.” By necessity, this definition must include the protection of due process.

B. Equity Demands Relief.

A court requires no specific statutory authority to proceed in equity. *Harding & Shelton, Inc. v. Prospective Inv. and Trading Co., Ltd.*, 123 P.3d 56, 64, (Okla. Civ. App. 2005) (quoting *Merritt v. Merritt*, 73 P.3d 878, (Okla. 2003)). The court may proceed in equity wherever the equities weigh in favor of doing so. *Id.* The purpose of equity is to “promote and achieve justice with some degree of flexibility” and, accordingly, the court may examine the particular circumstances of this case and exercise its discretion in shaping an appropriate remedy. *Id.*

Importantly, a court sitting in equity may ignore limitations periods where compelling equitable issues

demonstrate prejudice-dealing delay. Petitioner was denied relief under 12 Okl. St. § 1031 on the basis the limitations period had passed. Oklahoma law allows a court to sit in equity to abridge limitations periods where inequitable delay prevented a defendant from answering a petition. *Hedges v. Hedges*, 66 P.3d 364, 370 (Okla. 2002) (Equity may allow legal limitations to be abridged where there are equitable considerations of a compelling nature that demonstrate prejudice-dealing delay).

The Oklahoma Supreme Court held the limitations period imposed by 12 Okl. St. § 1038 (the exact limitations period at issue here) may be equitably tolled when a defendant has no notice of a pending lawsuit. *Caraway v. Overholser*, 77 P.2d 688, 692 (Okla. 1938). In *Caraway*, a judgment was obtained by fraud, which was not discovered by the defendant until well after the limitations period of 12 Okl. St. § 1038 had passed. *Id.* at 690-91. The Oklahoma Supreme Court permitted the use of extrinsic evidence of fraud to vacate the *Caraway* judgment, holding the limitations period and the prohibition of extrinsic evidence did not apply in fraudulent circumstances. *Id.* at 691. In this case, Appellant presented significant evidence the judgment was obtained after the filing of a false return of service—in other words, a fraudulent filing. The trial court explicitly held it had no power to consider any extrinsic evidence, including evidence the judgment was obtained by a fraudulent return of service. Equity demands a different result.

Here, Respondent intentionally did nothing to enforce its judgment for eight years. Thus, Petitioner had no idea he needed to act. Petitioner, being beyond the limitations period at issue, is thrust into this position by Respondent's laches. Respondent should

not now be able to benefit from its laches by saying Petitioner now has no defense.

On its face, the record shows service of Petitioner because the Respondent and Respondent alone created the record. However, the record is wrong. The record is a script written by the Respondent as a one-man play and Petitioner was given no lines. The script for Act I is simple, show a minimal service of process, get default judgment, then go to intermission. In this case, the intermission was the period of inactivity by Respondent, and it lasted eight years. Act II merely requires the intermission last three years or more, then Respondent has only to collect the default judgment obtained in Act I.

Following this script ensured Petitioner had little to no way to challenge the default judgment.

Equity is compelling here because the intermission, the inactivity between Act I and Act II, was eight years long. During this delay, memories of witness faded, one critical witness, his father, died. This delay prejudiced Petitioner by allowing the default judgment to be cemented, and severely limited Petitioner's right to flip the script.

Consider if Petitioner was part of the script from the beginning. Petitioner testified he was not served; both he and his mother testified to their ignorance of the case and the judgment until Petitioner's wages were garnished years after the default judgment was entered. App.24a (Test. of Markland; Test of C. Markland, App.24a). Petitioner did not even have notice through negative credit reporting. App.24a, (Test. of Markland); App.102a (aff. verification by Markland).

The limitations period may be tolled in ruling on the validity of a judgment where there was no notice

to the defendant. *See Caraway v. Overholser*, 77 P.2d 688 . Moreover, the limitations periods in 12 Okl. St. §§ 1031, 1038 do not prevent a defendant from seeking to cancel a judgment in equity. *Id.* (citing *Pettis v. Johnson*, 190 P. 681, 682 (Okla. 1920)).

Equity exists to right precisely these sorts of wrongs when they occur at law. Petitioner's Constitutional right to due process is an interest far greater than Respondent's procedural concerns. *See, e.g., Cap. Fed. Sav. Bank v. Bewley*, 795 P.2d 1051, 53 (Okla. 1990).

This case is deserving of the equity that can be afforded Petitioner. Respondent truly is a bad actor who purposely, inequitably, and extraordinarily delayed enforcement of its default judgment for eight years. The lack of notice and subsequent delay prejudiced Petitioner by depriving him of fundamental due process and an opportunity to bring a motion to vacate within three years.



CONCLUSION

Due Process and equity require the petition for writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 3, 2022