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UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT COURT

<p>UNITED STATES OF AMERICA,  Plaintiff/Appellee,  v.  HOLLIS WAYNE FINCHER,  Defendant/Appellant.</p>	<p>Appeal No. 07-2514  <u>APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE</u></p>
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COMES NOW, Appellant Hollis Wayne Fincher, by and through counsel of record, and responds to the Court of Appeal's July 31, 2007, Order to Show Cause as follows:

INTRODUCTION

The district court entered an Order on July 27, 2007, finding that Appellant Wayne Hollis Fincher made knowing "material misrepresentations of fact" with the

“intent of obtaining appointed counsel,”<sup>1</sup> and that he was not and had never been financially unable to obtain private counsel.<sup>2</sup> Based on this finding, the court below ordered Fincher to reimburse the U.S. Treasury for the \$8,357.55 (which sum the United States of America had already paid his appointed counsel), denied his request for a transcript paid at public expense, and submitted the matter to the 8<sup>th</sup> Circuit Court of Appeals to consider the issues of whether Fincher is eligible for appointed counsel on appeal — and whether it should remand the case for vacatur of Fincher’s current sentence and for re-sentencing prior to appeal. In response to the district court’s request, the Clerk entered an order on July 31, 2007, directing Fincher to show cause why his IFP status should not be revoked and why the Court’s June 28, 2007, order appointing counsel under the Criminal Justice Act should not be set aside. Fincher was also directed to address whether the case should be remanded for re-sentencing.

#### PROCEDURAL BACKGROUND

Fincher does not object to the record recited by the court below in its order of July 27, 2007, under the narrative entitled “background,” at least as far as it goes.<sup>3</sup> Fincher emphasizes, however, that all the facts and circumstances that led up to the trial court’s sua sponte investigation of Fincher’s financial affairs, as described in the first full paragraph of page 4 of its order, were known fully by the U.S.

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<sup>1</sup> Order, 7/27/2007, (Doc. 65) 10. The July 27, 2007, Order is cited hereafter as simply “Order.”

<sup>2</sup> Id., at 15, 21.

<sup>3</sup> Id., at 1-4.

Attorney's office who prosecuted the case. Yet, the U.S. Attorney never raised a single issue with Fincher's financial status. Likewise, the U.S. Attorney never raised an objection to the trial court's downward departure in the fine it imposed due to Fincher's penury. With respect to this fine, the prosecutor (a) raised no issues; (b) ordered no investigation; (c) issued no subpoenas; (d) retained no expert witnesses; (e) made no meaningful interrogation of percipient witnesses; and (f) did nothing either substantive or procedural to materially aid the trial judge's independent inquiry into Fincher's finances.

In his broad prosecutorial discretion, the U.S. Attorney had decided the issue was not appropriate to pursue. The district court judge, however, rejected the U.S. Attorney's professional judgment, and personally prosecuted this aspect of the litigation. Subsequently, Fincher began serving his sentence on July 26, 2007, one day before the district court entered its Order in this case seeking to vacate that very sentence.

## FACTS

Fincher does not dispute the vast majority of the facts set forth in the district court's section entitled "the evidence regarding Fincher's financial status."<sup>4</sup> Yet, both the material facts and the inferences drawn from those facts are either substantially inaccurate, grossly unfair – or both.

1.(a) The Court below found that with respect to his financial resources, Fincher is a liar and a perjurer. The Court based its finding on Fincher's Financial

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<sup>4</sup> Id., at 8-15.

Affidavit, which he signed early in the case. On his initial processing, Fincher filled-out a standard form Financial Affidavit used for determining IFP eligibility.<sup>5</sup> He “wanted an attorney and he had no money.”<sup>6</sup> Yet, Fincher and his wife jointly owned a “home and 120 acres,”<sup>7</sup> which Fincher disclosed under a listing in the form for “Property.” He listed the value as “unknown.”<sup>8</sup> The trial court, however, found the homestead was worth some half a million dollars,<sup>9</sup> and, contrary to the “unknown” representation, Fincher “actually had a very accurate notion of the value of the Property when he signed the Financial Affidavit” Thus, the district court found that Fincher lied when he signed the form listing the value of the family’s homestead as “unknown.”

This condemning conclusion was based on the value placed on Finchers’ homestead by an expert witness the trial court hired after its July 3, 2007, hearing on Fincher’s IFP status. Apparently unsatisfied with the evidence adduced at the hearing, Judge Hendren commissioned appraiser Tom Reed to prepare an estimate of value of the homestead property.<sup>10</sup> Reed subsequently “submitted” his appraisal

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<sup>5</sup> See copy of Financial Affidavit attached hereto as Exhibit A.

<sup>6</sup> Order, 8.

<sup>7</sup> See Quitclaim Deed referred to in Order, 7/27/2007, 4, fn. 2. A copy of the deed is attached hereto as Exhibit B.

<sup>8</sup> Exhibit A.

<sup>9</sup> Order, 10.

<sup>10</sup> Order, 5, and Order, 7/03/2007 (Doc. 61).

report to the court, at which point it deemed the IFP question “ripe for decision.”<sup>11</sup> Reed’s appraisal report was never filed of record, however, and neither Reed nor the court served it on the parties. Based on this undisclosed document, the trial court found the value of the Finchers’ homestead is worth “nearly half a million dollars.”<sup>12</sup> Thus, it was inferred that Fincher lied. Nothing in the record, however, much less evidence, actually supports this finding.

1.(b) Beyond the fundamental mistakes in procedure upon which the trial court considered the appraisal report is the fatally flawed substance – and therefore prejudicial effect – of Reed’s appraisal. The opinion of value was based in part on what the appraiser called his “extraordinary assumption” that legal access exists to the property for ingress and egress,<sup>13</sup> which is “an assumption, directly related to a specific assignment, which, if found to be false, will alter the appraiser’s opinions or conclusions.”<sup>14</sup> This “extraordinary assumption” is, in fact, false. Fincher stated he had legal access along a “jeep trail” that would need, according to the appraisal,

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<sup>11</sup> Id.

<sup>12</sup> Order, 10.

<sup>13</sup> See copy of appraisal report, p.6., attached hereto as Exhibit C, which undersigned obtained from Judge Hendren’s chambers on August 6, 2007. Fincher steadfastly objects to the appraisal report being considered as evidence. It was not served on Fincher, it lacks all foundation, and the appraiser has not been subject to ANY cross-examination regarding his opinion of value. But even if the report is considered, the “extraordinary assumption” of access for ingress and egress is false, and it therefore bears absolutely no factual merit in the circumstances.

<sup>14</sup> The Appraisal Foundation, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE DEFINITIONS, [http://commerce.appraisalfoundation.org/html/2006\\_USPAP/DEFINITIONS.htm](http://commerce.appraisalfoundation.org/html/2006_USPAP/DEFINITIONS.htm) (effective July 1, 2006), “extraordinary assumption.”

“substantial improvement” to be of any use.<sup>15</sup> More important, Reed found no evidence in the county land title records of legal access.<sup>16</sup> Indeed, a search of the land title records by a title company reveals access to be “uninsurable.”<sup>17</sup> It is clear, “without need for citation of authority on the proposition,” that landlocked property like the Finchers’ homestead is worth little compared to land with established legal access. Thus, the “limiting condition” which falsely assumes legal access to the property, makes it absolutely irrelevant under the actual facts of this case. Reasonable minds cannot differ. There is no proper basis for the factual finding in this case of the value of the interest Fincher owned in the homestead.

1.(c) The district court also found that Fincher owned his family’s homestead “free and clear.”<sup>18</sup> It relied in this finding on a quitclaim deed executed by Fincher and his spouse on January 28, 2007.<sup>19</sup> The deed, however, shows Fincher did not own the property “free and clear.” Instead it is entitled, “Quitclaim Deed (Husband and Wife),” and reads: “That we Hollis Wayne Fincher and Linda Fincher, husband and wife, hereinafter Grantors....”<sup>20</sup> Thus, Fincher owned his interest in joint-tenancy with his spouse, Linda. In other words, far from “free and

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<sup>15</sup> Order, 9.

<sup>16</sup> Id.

<sup>17</sup> Easement Report of Title Agent Christy May, dated August 9, 2007, attached hereto as Exhibit D.

<sup>18</sup> Id.

<sup>19</sup> Id., at 4, and fn. 2.

<sup>20</sup> Exhibit B, emphasis added.

clear,” Fincher’s interest was “subject-to” a joint-tenancy interest. The finding that Fincher’s interest in the family’s homestead was “free and clear” is flatly inaccurate. Yet, this inaccuracy was central to the trial court’s IFP findings, and to its proposed re-sentencing. In short, a necessary premise to the trial court’s reasoning in revoking IFP status and to its proposed re-sentencing – that Fincher owned the homestead “free and clear” is factually false.

2. The trial court also concluded Fincher had the financial ability to obtain a private lawyer to represent him “because he did so,” referring to his former trial counsel, Oscar Stilley.<sup>21</sup> Yet, according to the contract documents relied upon by the court, he did so for nothing.<sup>22</sup> Stilley promised to represent Fincher on the nominal payment of \$10.00 per year.<sup>23</sup> In other words, Stilley agreed to work for free. Thus, while the trial court was technically correct, Fincher was able to retain private counsel, it did not establish Fincher was financially able to obtain counsel. Rather, Fincher retained Stilley only on the promise that he work, in effect, pro bono. Far from indicating a financial ability to obtain counsel, the need for such a “no-charge” arrangement supports Fincher’s financial inability to obtain counsel.

3. The trial court also based its IFP decision on what it deemed a fraudulent post-conviction transfer from the Finchers to their children arranged for

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<sup>21</sup> Order, 12-13.

<sup>22</sup> Id.

<sup>23</sup> Id.

by their family attorney, Jack Butt.<sup>24</sup> Yet, this “fraudulent” transaction was never a secret. Butt sought – and actually got – the United States’ permission to make the transfer.<sup>25</sup> He explained to the U.S. Attorney the express object of executing the quitclaim deed: to transfer all but a life estate to the couples’ daughters to keep the family farm in ownership “by the family.” In response to this inquiry, the U.S. Attorney stated that “even though final sentencing has been passed on to Mr. Fincher, this contemplated transfer, so long as he honestly represents it to properly inquiring authorities, is not prohibited or illegal.”<sup>26</sup> In reliance thereon, Fincher delivered the quitclaim deed on February 12, 2007.<sup>27</sup> Despite the prior disclosure, however, the trial court nevertheless concluded Fincher made the transfer to prevent the homestead from being available “to pay any fine he might be sentenced to pay.”<sup>28</sup> Thus, despite Fincher’s open-handed and forthright approach, and despite the U.S. Attorneys’ express waiver of any objection, the trial court deemed the transaction “fraudulent.”<sup>29</sup> It therefore concluded Fincher lied with respect both to

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<sup>24</sup> Id., at 13.

<sup>25</sup> Id. (Unlike much of the other documentation upon which the trial court relied, the Butt letter was actually entered into the record pursuant to the rules of evidence.)

<sup>26</sup> Letter from Butt to Plumlee dated 2/08/2007, attached hereto as Exhibit E (emphasis added).

<sup>27</sup> A copy of the quitclaim deed is attached hereto as Exhibit B.

<sup>28</sup> Order, 14.

<sup>29</sup> Id., at fn. 6.

his IFP status, and to issues regarding his sentencing. This is an unfair inference that is not supported by any evidence in the record.

4. The trial court also found that when Fincher called himself “indigent,” both at a March 8, 2007, hearing on his motion to discharge his private counsel, and in a motion submitted to the court on May 9, 2007, he lied.<sup>30</sup> The trial court based this finding on the reasons already discussed. For example, in the July 27, 2007, order now at issue, it concluded Fincher was not “financially unable” to hire private counsel because he had succeeded in hiring Stilley. At the hearing to discharge Stilley, however, the fact he had been hired in the first place was not regarded by the court as evidence that Fincher was in fact financially able to hire private counsel – despite Fincher’s plea of indigence. Yet, now, the trial court infers from Fincher’s hiring of Stilley that he had financial means to retain counsel. If this in fact were a fair inference, however, the district court would never have allowed for subsequent appointed counsel, Shannon Blatt.

Fincher’s subjective belief in his own indigence was and is not only reasonable, but objectively true. His only asset on March 8, 2007, was a life estate in his and Linda Fincher’s homestead. It consists of only 120 acres of dry-land farm, with a house and shed that are in such an advanced state of decrepitude they “provide minimal, if any, contributory value to the land.”<sup>31</sup> The life estate, according to the appraiser Reed, is worth only \$39,000, and Fincher’s half of that is

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<sup>30</sup> Id., at 14-15.

<sup>31</sup> Exhibit C, Reed appraisal report, 12.

\$19,500. A life estate is not something that can be sold or hypothecated to raise funds for a defense. In addition, Fincher has not had employment since the 1980s.<sup>32</sup> Indigence is defined by Black's as "a poor person,"<sup>33</sup> and by Arkansas law as a person "who, at the time his or her need is determined, is without sufficient funds or assets to employ an attorney or afford other necessary expenses incidental thereto."<sup>34</sup> By these or any other reasonable measure, Fincher is indigent.

5. Equally important, this was true before Fincher and his spouse transferred the reversionary interest of the Finchers' homestead to their daughters. The land in question is without documentation of an easement for ingress and egress.<sup>35</sup> Anyone who buys it will need to win a quiet title action to establish access. No one will pay market value to "purchase a lawsuit," nor will a bank lend against such "unmarketable" title. The asset is not available for liquidation – even if Linda Fincher were to transfer her joint interest – which she has not done.

Moreover, even if access could be established, the homestead is only 120 acres. Fincher's half is but 60 acres assuming his joint tenancy could, as a practical matter, be severed, partitioned and liquidated in time to secure funds to pay private counsel. Yet, under Arkansas law, the homestead exemption for rural property is

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<sup>32</sup> Exhibit A.

<sup>33</sup> Black's Law Dictionary (8<sup>th</sup> ed. 2004), "indigent."

<sup>34</sup> Ark. Code Ann. § 16-87-201(3) (West 2007).

<sup>35</sup> Exhibit C, Reed appraisal report, 6, 10.

80 acres.<sup>36</sup> If this homestead-exempt property is excluded from the calculation, Fincher is utterly indigent. No reasonable person could conclude his unsevered, unsurveyed,<sup>37</sup> and landlocked portion of the joint-tenancy provides sufficient means to obtain the services of private trial counsel.

## ARGUMENT

1. Fincher's IFP status should not have been revoked, and it should be reinstated by the Court of Appeals.
  - A. In order to be eligible for appointed counsel, the accused need show only that he is financially unable to retain private counsel.

The statute governing appointment of counsel does not require that a defendant be "indigent" for counsel to be appointed. Instead, the accused need only be "financially unable to obtain adequate representation."<sup>38</sup> The "financial inability to obtain adequate representation" has held to be a less stringent standard than actual indigency or destitution.<sup>39</sup> The burden of demonstrating financial inability is on the defendant – but any doubts as to a defendant's financial eligibility for

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<sup>36</sup> Ark. Code Ann. § 16-66-210(c)(1) (West 2007).

<sup>37</sup> Exhibit C, Reed appraisal report, 10.

<sup>38</sup> 18 USCA § 3006A(a). See also, U.S. v. O'Neil, 118 F.3d 65, 74 (2<sup>nd</sup> Cir. 1997), cert. denied, 118 S. Ct. 728, 139 L. Ed. 2d 666 (1998); U.S. v. de Hernandez, 745 F.2d 1305, 1310 (10<sup>th</sup> Cir. 1984). See also, Perry v. Chief of Police of City of Marianna, Ark., 660 F.Supp. 1546, 1551 (E.D.Ark.,1987) (petitioner for habeas corpus whose only asset was his homestead found to be "indigent" for purposes of IFP).

<sup>39</sup> U.S. v. Harris, 707 F.2d 653 (2<sup>nd</sup> Cir. 1983); U. S. v. Martin-Trigona, 684 F.2d 485 (7<sup>th</sup> Cir. 1982); U.S. v. Simmers, 911 F. Supp. 483 (D. Kan. 1995); U. S. v. Gipson, 517 F. Supp. 230 (W.D. Mich. 1981).

appointment of counsel should be resolved in his favor; an erroneous determination of eligibility may be corrected at a later time.<sup>40</sup> Moreover, the burden is only by a preponderance of evidence.<sup>41</sup>

In determining whether an accused is entitled to appointed counsel, courts consider the costs in providing himself and his dependents with the necessities of life – including a home.<sup>42</sup> The court may consider whether the accused has available to him the income or assets of other persons, including his spouse – but determination of eligibility should be made without regard to the financial resources of his family or spouse unless such persons indicate their willingness to pay all or part of the cost of counsel.<sup>43</sup> The court should also consider whether a defendant with assets can liquidate such assets to retain counsel.<sup>44</sup> Finally, if the only asset available to a defendant for liquidation is homestead exempt property, a court should not consider it available to pay for private counsel.<sup>45</sup>

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<sup>40</sup> U.S. v. Salemme, 985 F. Supp. 197, 201 (D. Mass. 1997).

<sup>41</sup> U.S. v. Simmers, 911 F. Supp. 483, 486 (D. Kan. 1995).

<sup>42</sup> Id.

<sup>43</sup> Salemme, 985 F. Supp. at 201.

<sup>44</sup> Simmers, 911 F. Supp. at 486.

<sup>45</sup> Perry, 660 F.Supp. 1549, 1551; Newman v. State, 937 S.W.2d 1, 8 (Tex.Cr.App. 1996). See also, Harper v. State, 850 S.W.2d 736 (Tex.App.-Amarillo 1993); U.S. v. Trevino, 679 F.Supp. 636 (S.D.Tex.1987); Stephens v. State, 509 S.W.2d 363 (Tex.Cr.App.1974).

B. Fincher is financially unable to retain private counsel.

Fincher has succeeded in retaining private counsel or this brief would not have been written. Yet, he is “financially” unable to do so. Undersigned agreed to undertake this case as appellate counsel on referral from a colleague aware of the important Constitutional issues contested in Fincher’s case. Undersigned is not admitted in the Western District of Arkansas and therefore, for a variety of reasons, declines to serve as trial counsel. The terms of payment for undersigned’s fee on appeal are that undersigned will be paid only if appointed as appellate counsel. If undersigned is not appointed, then undersigned will serve pro bono. But this does not mean that Fincher is therefore “financially” able to obtain private counsel. His pro bono counsel can be compensated as appointed counsel if Fincher otherwise qualifies.<sup>46</sup>

Likewise, Fincher’s ownership interest in homestead property should not preclude his IFP status. An impecunious accused should not be expected to liquidate his homestead to defend himself in a criminal prosecution. For example, in Newman, it was held that property qualifying for the homestead exemption should not be considered in indigency determination.<sup>47</sup> “[H]omesteads are exempt from forced sale” and therefore “homesteads should be given special treatment in indigency determinations.” Such exemptions are “favorites of the law,” and statutes that protect the exemption deserve liberal construction to protect the

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<sup>46</sup> Wainwright v. Norris, 836 F.Supp. 619, 623 (E.D. Ark 1993).

<sup>47</sup> Newman v. State, 937 S.W.2d 1, 8 (Tex.Cr.App. 1996).

residence for the family and prevent homelessness. Thus, homesteads “may not be considered in indigency determinations.”<sup>48</sup>

A similar decision is reported in Stephens,<sup>49</sup> where a defendant challenged the trial judge’s denial of IFP status because of the value of his homestead. The appellate court reversed, excluding consideration of the homestead in its finding that the defendant had established a prima facie case of his status as indigent. In Harper, likewise, a court of appeals reversed a trial judge’s determination that a defendant was not indigent because he held equity in his homestead exempt property.<sup>50</sup> Finally, a U.S. District Court in Texas adopted the same standard in Trevino.<sup>51</sup> Despite the defendants’ spacious home in an exclusive community, a motor boat and four motor vehicles, the court awarded defendants a free appellate transcript, calling it “doubt[ful] that the law would require these Defendants to actually sell their homestead to perfect an appeal.”<sup>52</sup>

Fincher is aware of only one case where a defendant was required to mortgage or liquidate his home to obtain private counsel. In Simmers, the accused claimed he wanted to preserve his home, which was his principal asset, for his

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<sup>48</sup> Id.

<sup>49</sup> Stephens v. State, 509 S.W.2d 363, 364-365 (Tex.Cr.App.1974).

<sup>50</sup> Harper v. State, 850 S.W.2d 736, 739-740 (Tex.App.-Amarillo 1993).

<sup>51</sup> U.S. v. Trevino, 679 F.Supp. 636, 636 (S.D.Tex.1987).

<sup>52</sup> Id.

spouse in the event he was convicted.<sup>53</sup> Simmers, however, is distinguishable. First, there was no express claim, as here, of a homestead exemption, and the court never addressed it in the IFP context. Second, the home was not, as here, owned jointly by a non-accused spouse. This fundamental factor was recognized in a subsequent case, where the court declined to follow Simmers.<sup>54</sup> It stated: “if the asset is of the type, such as jointly held real property, where both spouses are obligated to consent to the encumbrance, disposition or transfer, and objection is timely interposed by one spouse, then that asset is likely not available to the defendant spouse for encumbrance or liquidation to satisfy attorney fees and costs.”<sup>55</sup> Thus, if, as here, the disposition of the asset requires the spouse’s express consent, then it is not to be considered in the IFP evaluation.<sup>56</sup> Under this analysis, Fincher is not financially able to retain private counsel.

2. Fincher should not be re-sentenced because the trial court had a true picture of his financial status at sentencing, and the trial court lost jurisdiction once Fincher began serving his sentence.
  - A. Once a convicted person begins serving his sentence, the court loses jurisdiction to re-sentence, absent fraud on the court.

A court may correct an illegal sentence at any time – but once the service of sentence in a criminal case begins, the power of the trial court to change a legal

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<sup>53</sup> Simmers, 911 F. Supp. at 486.

<sup>54</sup> U.S. v. Lexin, 434 F.Supp.2d 836, 842 (S.D.Cal. 2006).

<sup>55</sup> Id., at 843.

<sup>56</sup> Id.

sentence ends.<sup>57</sup> Even if a trial court changes its mind about a sentence, it retains no authority to impose a harsher sentence once the prisoner has commenced service of the sentence.<sup>58</sup> Once service of the sentence has begun, the court retains only the inherent power to change it if, but only if, it was obtained through fraud or intentional misrepresentation.<sup>59</sup> Only where a sentence is the result of a defendant's express, willful, and material misrepresentation of fact that causes the court to impose a sentence other than what would have been justified had the actual facts been known, can a sentence already being served be vacated and the fraudulent defendant re-sentenced. The type of conduct upon which the exception lies, however, is narrow. Absent either an actual "fraud upon the court" or an intentional misrepresentation, this exception does not apply.

B. Fincher did not misrepresent his financial status.

A fact effecting sentencing, if contested by a defendant, must be proven by a preponderance of the actual evidence.<sup>60</sup> Here, for reasons described, Fincher disputes the Reed report. Yet, Fincher was given neither an chance to review it, nor "an adequate opportunity to present information to the court" regarding its

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<sup>57</sup> Egan v. U.S., 268 F.2d 820, 823, (8<sup>th</sup> Cir. 1959), cert. denied 80 S.Ct. 130, 361 U.S. 868, 4 L.Ed.2d 108 (U.S. Oct. 19, 1959).

<sup>58</sup> Ward v. U. S., 508 F.2d 664, 665 (5<sup>th</sup> Cir. 1975).

<sup>59</sup> U.S. v. Bishop, 774 F.2d 771, 773-74 (7<sup>th</sup> Cir. 1985).

<sup>60</sup> U.S. v. Atkins, 250 F.3d 1203, 1211 (8<sup>th</sup> Cir. 2001).

content.<sup>61</sup> The appraisal report was never entered into the record, it was never even served on Fincher. Fincher was given no notice of the appraiser's findings, no copy of his report, no opportunity to respond to those findings, and no chance at cross-examination.<sup>62</sup> Still, the trial court relied on Reed's undisclosed, untested, and unsworn appraisal information to condemn Fincher as a perjurer. This mode of independent judicial prosecution was unfair, violated both the sentencing guidelines and Rule 706(a), Fed.R.Evi., and prejudiced Fincher's ability to defend himself against the court's allegations of fraud.<sup>63</sup>

In truth, Fincher made no misrepresentations whatsoever about the value of the homestead property. The conclusion that the Fincher's homestead land is worth nearly one-half million dollars is based on the "extraordinary" – and as it turns out false – assumption that it enjoys legal access. Yet, the appraiser admitted he could

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<sup>61</sup> U.S. Sentencing Guidelines § 6A1.3(a). See also Canon 3A(4), Fed. Code Jud.Cond. ("A judge may ... obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond." (Emphasis added.))

<sup>62</sup> Rule 706(a), F.R.Evi., states, with emphasis added:

The court ... may appoint expert witnesses of its own selection. .... A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

<sup>63</sup> C.f., U.S. v. Wise, 976 F.2d 393, 404-06 (8<sup>th</sup> Cir. 1992) (held: due process satisfied only because defendant was given an opportunity to voice his objections to the presentence report and to cross examine the probation officer who had prepared the report).

not document legal access either for ingress and egress – even though it was his task to do so. When he found he was unable to document access, however, he simply “assumed” it actually exists. This assumption is so doubtful and at the same time so significant he was required, by his own professional standards, to call it “extraordinary.”<sup>64</sup> If it turns out to be faulty, it will “alter the appraiser's opinions or conclusions.” Since Reed had the ability, opportunity, and incentive to examine the land title records of the county, the absence of all recorded evidence of any legal access raises the legal presumption that it does not exist.<sup>65</sup> The only evidence he did find of access was Fincher’s vague statement that he believed there to be some sort of access over a rarely used “jeep trail” to the back of the property.<sup>66</sup> Reed could not, however, corroborate it in writing. As a result, without documentation, Fincher’s subjective belief is irrelevant to the existence of actual legal access.<sup>67</sup> A buyer of the servient tenement would take it subject, at most, to a servitude in the nature of a “jeep trail.”<sup>68</sup> Under this very limited scope, it would be impossible to

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<sup>64</sup> The Appraisal Foundation, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE DEFINITIONS, [http://commerce.appraisalfoundation.org/html/2006\\_USPAP/DEFINITIONS.htm](http://commerce.appraisalfoundation.org/html/2006_USPAP/DEFINITIONS.htm) (effective July 1, 2006), “extraordinary assumption.”

<sup>65</sup> U.S. v. Hoelscher, 914 F.2d 1527, 1542 (8<sup>th</sup> Cir. 1990).

<sup>66</sup> Exhibit C, Reed appraisal report, 10.

<sup>67</sup> E.g., Dixie Furniture Co. v. Arkansas Power & Light Co., 718 S.W.2d 120, 121 (Ark.App. 1986).

<sup>68</sup> Id.

conduct the “substantial improvements” the appraiser stated would be required for normal ingress and egress, and impossible to provide for utilities.

Actual examination of title to the property, moreover, shows the appraiser’s “extraordinary assumption” to be false. There is no “insurable” access to the property.<sup>69</sup> As a result, Reed’s valuation lacks all credence. The actual value of the property remains, as Fincher put it in his Financial Affidavit, “unknown.” Fincher’s Financial Affidavit was and is, therefore, true. In fact, it is more accurate than Reed’s faulty estimate of value. No one (whether Reed, Judge Hendren, or Fincher) has any basis to find the Fincher’s homestead to be worth “nearly a half-million dollars”<sup>70</sup> – at least not without a quiet title action to settle the extent and scope of the legal access – or lack thereof.<sup>71</sup> As a result, Reed’s opinion of value is worthless as evidence that Fincher lied to the court. There is no evidence (on the record or otherwise) of any fraud or intentional misrepresentation by Fincher. The sentencing court therefore has no authority to change his sentence. Even if it did, moreover, the facts as understood by the court at sentencing were and remain substantially and objectively true. There is therefore no substantive ground for re-sentencing, even if the trial court had power to do so.

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<sup>69</sup> See Exhibit D, Easement Report.

<sup>70</sup> Order, 10.

<sup>71</sup> E.g., Bobo v. Jones, 222 S.W.3d 197 (Ark. 2006). See also, Proof of Extent of Easement of Way Created By Express Grant or Reservation, 81 Am. Jur. Proof of Facts 3d 199 (Cum supp. 2007).

## CONCLUSION

The finding that Fincher lied when he claimed the value of his property was “unknown” is based upon an appraisal report with a false assumption: that legal access can be documented to the Finchers’ homestead. Without access, there is no reason to believe the homestead property can be sold or hypothecated to provide money for a defense. Furthermore, even if it has substantial value, Fincher’s half of it, consisting of 60 acres, is homestead exempt and, therefore, not to be considered in an IFP evaluation. Consequently, Fincher is properly in forma pauperis, and the district court’s revocation of such status should be reversed.

As for the re-sentencing issue, Fincher has begun serving his sentence. The trial court therefore, as a general rule, has no power to resentence him. Such a remedy would be available only if he had committed fraud or made an intentional misrepresentation. Since he did not do so, the Court should not accede to the trial court’s request to remand the case for re-sentencing.

DATED this 10<sup>th</sup> day of August, 2007.

SULLIVAN, TABARACCI & RHOADES, P.C.

By: /s/ Quentin M. Rhoades  
Quentin M. Rhoades  
Attorneys for Appellant Fincher

CERTIFICATE OF SERVICE

I hereby certify that on the 10<sup>th</sup> day of August, 2007 a copy of the foregoing document was served on the following persons by the following means:

  1          CM/ECF  
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