UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONALD CHISOM, et al., Plaintiffs,	∞ ∞	CIVIL ACTION NO.: 86-4075
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	∞ ∞	
BERNETTE J. JOHNSON, Plaintiff-Intervenor	∞ ∞	SECTION E JUDGE SUSIE MORGAN
Versus	∞	
PIYUSH ("BOBBY") JINDAL, et al., Defendants	∞ ∞	MAGISTRATE SALLY SHUSHAN

MEMORANDUM IN SUPPORT OF PLAINTIFF-INTERVENOR BERNETTE JOHNSON and PLAINTIFFS' MARIE BOOKMAN, RONALD CHISOM, AND MARC MORIAL'S MOTION TO STAY PROCEEDINGS

MAY IT PLEASE THE COURT:

The sole issue before this Court is Plaintiff-Intervenor Bernette Joshua Johnson's (hereinafter "Justice Johnson") right to have her years of service on the Louisiana Supreme Court as the "Chisom judge," elected pursuant to the terms of the Consent Judgment in this matter, count toward that tally of service years used to determine which justice will succeed Chief Justice Katherine Kimball upon her retirement on January 31, 2013. In consideration of the years she spent as the Chisom judge, it is undisputed Justice Johnson will have the longest term of service on the Louisiana Supreme Court when Chief Justice Kimball retires. Notwithstanding,

and in contravention of the terms of the Consent Judgment, by its Order dated June 13, 2012, the Louisiana Supreme Court contemplates that it will in effect interpret the Consent Judgment's language – "*same compensation, benefits, expenses, and emoluments*" – in order to decide whether the Chisom judge's service years were real service years. The Louisiana Supreme Court's proceedings will begin July 31, 2012.

On July 5, 2012 Justice Johnson filed a Motion (1) to Reopen Case, (2) to Join as Defendants Justice Kimball, Victory, Knoll, Weimer, Guidry, and Clark, of the Louisiana Supreme Court; and (3) for Contempt against Justices Kimball, Weimer, Guidry, and Clark ("Motion to Reopen Case"). *See*, Record DN 137. Today, Justice Johnson and Plaintiffs filed a Motion to Stay Proceedings ("this Motion") as a companion motion to the Motion to Reopen Case, because the Louisiana Supreme Court proceedings are set to begin prior to the August 1st hearing date for Justice Johnson's and Plaintiffs' separate motions requesting this Court re-open this case.

This memorandum specifically includes the factual allegations set out in the pleadings, declarations, and exhibits already filed and the legal arguments advanced in the previously filed pleadings. We reiterate some of the components of the Consent Judgment relevant to the matter at hand. The Consent Judgment confers upon the Chisom judge the "*same compensation, benefits, expenses, and emoluments of the offices as now or hereafter are provided by law for a justice of the Louisiana Supreme Court*." *See*, 1992 Consent Judgment, C(3). The Chisom judge

is empowered under the Consent Judgment to "*participate and share equally in the cases duties and powers of the Louisiana Supreme Court*…" *See*, Id. at C(4). Further, the Consent Judgment was amended in 2000 to incorporate Louisiana Act No. 776, which provides "*[a]ny tenure on the supreme court gained by the [Chisom] judge while so assigned to the supreme court shall be credited to such judge*." Act 776, Section 2 (incorporated into the 2000 Consent Judgment).

Article V, Section 6 of the Louisiana Constitution is clear: "*The **judge** oldest in point of service on the supreme court shall be chief justice. He is the chief administrative officer of the judicial system of the state, subject to the rules adopted by the court.*"[1] [Emphasis added]. Chief Justice Catherine Kimball, and Justices Weimer, Guidry, and Clark refuse to acknowledge the strict provisions of the Consent Judgment resolving the determination of years of service on the Louisiana Supreme Court. Its June 13, 2012 Order purports to make the Louisiana Supreme Court the decision making body regarding whether the years Justice Johnson spent as the Chisom judge count as years of service on the Supreme Court in violation of federal law.

[1] The plain language of the Louisiana Constitution resolves this issue, and supports Justice Johnson's position that there is no controversy for the Louisiana Supreme Court to decide. While judges of the Louisiana Supreme Court are called "Justices," the constitutional provision applies to any judge serving on the Louisiana Supreme Court. Whether Justice Johnson was or was not a "Justice" beginning 1994 through 2000 was resolved by the Consent Judgment. ***There is no question, however, that Justice Johnson was a judge from the moment she first served on the Court in 1994, and has been in service since then.***

Justice Johnson has suffered and will continue to suffer hardship, actual and impending irreparable injury, and loss should the Louisiana Supreme Court be allowed to act in contravention of the rights she was awarded pursuant to the Consent Judgment. Further, the individual Chisom Plaintiffs will also suffer irreparable harm if the Louisiana Supreme Court is allowed to ignore the Consent Judgment, which concluded six years of litigation. In addition to frustrating the votes of the Plaintiffs and others in the majority African American district by ignoring the seniority of their elected representative, the voters will be further harmed by being excluded from having any representation at all in the new process.

As discussed in Plaintiff-Intervenor's Motion to Reopen Case, it is well settled that a federal district court's inherent powers enable it to enforce its own judgments and orders. See Motion to Reopen Case at Section III. The equitable relief requested by Plaintiffs and Plaintiff-Intervenor in this Motion is also authorized as an exercise of this Court's powers under the All Writs Act. 28 U.S.C.S. § 1651(a) (LEXIS through PL 112-139) ("*The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law*."). Similar to the exercise of its inherent powers, a district court may invoke the All Writs Act to issue an injunction to preserve and sustain its own jurisdiction. Such relief is also referred to as "*ancillary injunctive relief*," because it is "*ancillary*" to the court's original proceeding and "*supplementary to the decree rendered in that court*." 13 James Wm. Moore et al., Moore's

Federal Practice ¶ 65.04[3] (LEXIS current through 2012) (distinguishing ancillary relief from injunctions issued to preserve the status quo or subject matter, pending a final adjudication or a hearing on the merits).

An ancillary injunction under the All Writs Act is appropriately issued to enforce a court's previous order where, as here, the injunction will restrain conduct that has been shown to undermine the court's jurisdiction. Id.; United States v. New York Tel. Co., 98 S. Ct. 364, 372 (1977) ("*This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained* . . . ."); see also ITT v. Community Development Corp., 569 F.2d 1352, 1358-60 (1978).

Further, the Supreme Court of the United States has established that an ancillary injunction may also be issued to curb conduct by nonparties whose actions contravene a Court's prior order. New York Tel. Co., 98 S. Ct. at 373 ("*The power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, . . . and encompasses even those who have not taken any affirmative action to hinder justice*.") (citations omitted). In New York Tel. Co., the Court upheld a district court's order, under the All Writs Act, to compel a telephone company to assist the FBI's surveillance efforts at its facilities. The order to compel was used to enforce that

court's probable cause finding authorizing the surveillance activities after the telephone company refused to fully comply with the government's efforts.

In addition to the mechanisms provided under the inherent powers doctrine and the All Writs Act, the Federal Rules of Civil Procedure supply yet another tool through which federal courts may enforce their own orders and injunctions. Rule 65(d) makes clear that a district court's injunctions bind three groups: (i) the parties to the underlying action, (ii) the parties' "*officers, agents, servants, employees, and attorneys*," and (iii) "*other persons who are in active concert or participation*" with those described in (i) or (ii). Fed. R. Civ. P. 65(d)(2)(A)-(C). Under this Rule, both parties and those in privity to parties are bound by a court's injunctions and orders. 13 James Wm. Moore et al., Moore's Federal Practice ¶ _65.61 (2012); see also, United States v. Hall, 472 F.2d 261, 267 (5th Cir. 1972); City Cab Co. of Orlando v. All City Yellow Cab, Inc., 581 F. Supp. 2d 1197 (M.D. Fla. 2008).

The Fifth Circuit in United States v. Hall, 472 F.2d 261 (5th Cir. 1972), demonstrated the appropriate use of a court's powers to protect its judgments in a civil rights case involving the enforcement of a school desegregation order. The defendant in Hall was charged with criminal contempt for violating a district court order designed to protect that court's final judgment in a Florida school desegregation case (Mims v Duvall County School Board.). The defendant was not a party to the desegregation litigation. After entry of the order, there was an outbreak of racially-motivated violence and unrest at one of the schools impacted by the order. In response,

the school superintendent and sheriff (parties to the original order) petitioned the same court for injunctive relief. The court granted their requested order and "*enjoined and restrained*" all students and "*any other persons acting independently or in concert with them and having notice of [the] order*" from interfering with or disrupting the operation of the school and the county school system. Hall, 472 F.2d at 262-63. In determining that the district court's restraining order was properly issued and applied to the defendant, a nonparty, the Fifth Circuit confirmed that the order was a proper exercise of the district court's inherent powers and reflected proper application of Fed. R. Civ. P. 65(d)(2)'s "privity" prong.

With respect to the court's inherent power to enforce its own judgments, the Fifth Circuit indicated:

> *The activities of [defendant] Hall, however, threatened both the plaintiffs' right and the defendant's duty as adjudicated in the Mims litigation. In Mims, the plaintiffs were found to have a constitutional right to attend an integrated school. The defendant school board had a corresponding constitutional obligation to provide them with integrated schools and a right to be free from interference with the performance of that duty. Disruption of the orderly operation of the school system, in the form of a racial dispute, would thus negate the plaintiffs' constitutional right and the defendant's constitutional duty. In short, the activities of persons contributing to racial disorder at Ribault imperiled the court's fundamental power to make a binding adjudication between the parties properly before it . . .*
>
> . . . .

> *Here the conduct of Hall and others, if unrestrained, could have upset the court's ability to bind the parties in Mims, a case in which it unquestionably had jurisdiction.*

Hall, 472 F.2d at 265 (internal citations omitted).

In holding that defendant Hall was a person in privity with the parties in the underlying school desegregation case, the Fifth Circuit stated:

> *Similarly, we conclude that Rule 65(d), as a codification rather than a limitation of courts' common-law powers, cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment. We hold that Hall's relationship to the Mims case fell within that contemplated by Rule 65(d). By deciding Mims and retaining jurisdiction the district court had, in effect, adjudicated the rights of the entire community with respect to the racial controversy surrounding the school system. Moreover, as we have noted, in the circumstances of this case third parties such as Hall were in a position to upset the court's adjudication. This was not a situation, which could have been anticipated by the draftsmen of procedural rules. In meeting the situation as it did, the district court did not overstep its powers.*

Hall, 72 F.2d at 267 (internal citations omitted).

Finally, Hall indicates that a district court's power to issue orders to effectuate its own previously-entered judgments is particularly strong in civil rights cases, specifically those involving voting rights and school desegregation:

> *In such cases, as in voting rights cases, courts must have the power to issue orders similar to that issued in this case, tailored to the exigencies of the situation and directed to protecting the court's judgment. The peculiar problems posed by school cases*

> *have required courts to exercise broad and flexible remedial powers . . .*
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> . . . .
>
> *. . . Similarly broad applications of the power to punish for contempt may be necessary, as here, if courts are to protect their ability to design appropriate remedies and make their remedial orders effective.*

Hall, 472 F.2d at 266.

As applied to the instant case, the inherent powers doctrine, the All Writs Act and Rule 65(d)(2) provides ample support for the relief Plaintiffs and Plaintiff-Intervenor presently request from this Court. That relief is analogous to the ex parte order granted in Hall to restrain and enjoin conduct that undermined the operation of the district court's desegregation order and the court's ability to enforce its judgment against parties to the litigation, as well as the larger school community. Such relief is also authorized under the All Writs Act and was similarly upheld by the U.S. Supreme Court in New York Tel. Co. Further, the Chief Justice and Justices Victory, Knoll, Weimer, Guidry and Clark may be bound by any order or injunction issued by this Court that is designed to enforce and protect the Consent Judgment. They may be properly bound pursuant to Federal Rule of Civil Procedure 65(d)(2), as parties, or persons in privity with parties, to such an order. The Fifth Circuit held as much in Hall by upholding a criminal contempt finding against the nonparty in Hall who violated the district court's enforcement order. The sitting members of the Louisiana Supreme Court may also be properly bound when an enforcement order is issued under this Court's All Writs Act authority as "*necessary or*

appropriate in aid" of its jurisdiction. 28 U.S.C. § 1651(LEXIS through PL 112-139). Finally, the proceedings announced in the June 13, 2012 Order are impeding the ability of this Court to enforce and give full effect to the Consent Judgment. Conduct frustrating the enforcement of a district court order may be properly enjoined by this Court.

This Court may be inclined to consider the "Anti-Injunction Act," 28 U.S.C. § 2283, in deciding whether to stay the state court proceedings outlined in the June 13, 2012 Order. The Act provides "*A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments*." As this statutory language makes clear the Act provides three key exceptions to the broad prohibition preventing a federal court from enjoining state court proceedings: "*(1) as expressly authorized by Act of Congress, or (2) where necessary in aid of its jurisdiction, or (3) to protect or effectuate its judgments*." 28 U.S.C. §2283 (1994); see 17 Charles A. Wright et al., Federal Practice and Procedure §§ 4221-4226 (2d ed. 1988). The injunction sought in the case at bar falls squarely within the second and third exceptions outlined above. First, the "*necessary in aid of*" exception authorizes injunctions where "*necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case*." *See* Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970). Second, the relitigation exception permits a

federal court to enjoin state court proceedings "*where necessary…to protect or effectuate its judgment*." See 28 U.S.C §2283 (1994). The relitigation exception "*prevent[s] state litigation of an issue that was previously presented to and decided by the federal court. It is founded in the well-recognized concepts of res judicata and collateral estoppel.*" Harvey Specialty & Supply, Inc. v. Anson Flowline Equip. Inc., 434 F.3d 320, 323 (5th Cir. 2005). These exceptions are "*designed to ensure the effectiveness and supremacy of federal law*." Chick Kam Choo v. Exxon Corp., 486 U.S. at 146, 108 S.Ct. at 1689.

To the extent that this Court finds that the legal activities outlined in the June 13, 2012 Order constitute state court proceedings under the statute, this Court is empowered to grant a stay of those proceedings based upon the clearly delineated "*necessary in aid of*" and re-litigation exceptions to the "Anti Injunction Act." First, the Act empowers this Court to prevent the Louisiana Supreme Court from divesting it of its exclusive and continuing jurisdiction over the enforcement the federal Consent Judgment ordered by it on August 21, 1992 and January 3, 2000 in the Chisom case. Second, the District Court is further authorized under the Act to prevent the Louisiana Supreme Court from initiating ex post facto legal proceedings, which purport to answer a legal issue previously resolved by the federal court in consent judgment ordered in Chisom. In simpler terms, this Court may enjoin the state court proceedings outlined in the June 13, 2012 Order to aid in safeguarding this Court's exclusive jurisdiction over the Consent

Judgment reached in Chisom, and in order to protect and effectuate the provisions contained within the Consent Judgment.

In Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, the United States Supreme Court reasoned that because federal courts do not have inherent power to enjoin state court proceedings, "*any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld*." Woods Exploration & Pro. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1311 (5th Cir. 1971) (citing Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 286, 90 S.Ct 1734, 26 L.Ed.2d 234 (1970)).

The Second Circuit has articulated that the "*necessary in aid of jurisdiction*" exception applies in cases governed by a consent decree, like the Chisom case. This exception is frequently applied "*where the court has been heavily involved in settlement negotiations or the formulation of a consent decree*." Diabo v. Delisle, 500 F. Supp. 2d 159, 166 (N.D.N.Y. 2007) (quoting Olin Corp. v. Ins. Co. of No. America, 807 F.Supp. 1143, 1152 (S.D.N.Y.1992)). This exception may also be applied in cases "*where issues subsequently raised in state court cannot be separated from the relief previously ordered in federal court*." Id. "*Finally, an injunction in aid of jurisdiction is particularly appropriate where a district court retains jurisdiction over suits related to a consent judgment.*" Id. (citing United States v. American Soc'y of Composers, Authors, & Publishers, 32 F.3d 727, 731 (2d Cir.1994) and United States v. Int'l Bhd. of

Teamsters, 907 F.2d 277, 280-81 (2d Cir.1990), where the courts in both cases affirmed the injunctions under the second exception); United States v. Am. Soc'y of Composers, Authors, & Publishers, 442 F.2d 601, 603 (2d Cir.1971).

In the case *sub judice*, Section K of the Consent judgment reached in the Chisom case maintains that the United States District Court for the Eastern District of Louisiana "*shall retain jurisdiction over this case until the complete implementation of the final remedy has been accomplished.*" As discussed extensively in Plaintiffs' and Plaintiff-Intervenor's Motion to Re-Open Case, the Louisiana Supreme Court does not have jurisdiction to convene proceedings or rule upon any issue contained within the federal court's previous judgment in Chisom. Therefore, it should be enjoined from any attempt to divest the federal court of its exclusive jurisdiction in this matter.

The relitigation exception to the Anti-Injunction Act is also applicable in the case at bar and should be considered by this Court in granting the injunctive relief requested by Plaintiffs and Plaintiff-Intervenor. In Woods, the Fifth Circuit Court of Appeals interpreted the meaning of the relitigation exception, finding that a final judgment in a federal action was res judicata of the subsequent state court proceedings instituted by plaintiffs. The court reasoned:

> *the relitigation' principle retains its vitality and means simply that a federal court may enjoin a state proceeding which is precluded under the doctrine of res judicata. As one commentator has noted, 'this is a sensible solution to the problem of relitigation of federal decisions. It prevents multiple litigation of the same cause of action and it assures the winner in a federal court that he will not*

> *be deprived of the fruit of his victory by a later contrary state judgment which the Supreme Court may or may not decide to review*.'

Woods Exploration & Pro. Co. v. Aluminum Co. of America, 438 F.2d 1312 (5th Cir. 1971) (citing Note, Federal Power to Enjoin State Court Proceedings, 74 Harv. L. Rev. 734 (1961)).

Importantly, the Fifth Circuit, along with the Third, Ninth, and Eleventh Circuits support a broad reading the relitigaton exception "*to track the full scope of the modern doctrine of claim preclusion, allowing injunctions to issue for claims that could have been, but were not raised in the federal suit*." Note, Balancing Comity With The Protection of Preclusion: The Scope of the Relitigation Exception to the Anti-Injunction Act 97 Va. L. Rev. 1476 (2011); see Blanchard 1986, Ltd. v. Park Plantation, LLC., 533 F.3d 405, 408-09 n.12 (5th Cir. 2008); Assurance Co. of America v. Kirkland, 312 F.3d 186, 188 (5th Cir. 2002); New York Life Ins. Co. v. Gillispie, 203 F.3d 384 (5th Cir. 2000).

In Gillispie, the court outlined a four-part test to determine the application of the re-litigation exception. "*First, the parties in a later action must be identical to (or at least in privity with) the parties in a prior action. Second, the judgment in the prior action must have been rendered by a court of competent jurisdiction. Third, the prior action must have been concluded with a final judgment on the merits. Fourth, the same claim or cause of action must be involved in both suits*." Gillispie, 203 F.3d at 387 (quoting United States v. Shanbaum, 10 F.3d 305, 310 (5th Cir. 1994)). The Gillispie court outlined the prevailing view of the Fifth Circuit which

broadly construes the manner in which the relitigation exception can be applied. The court reasoned:

> *[W]e use a transactional test to determine whether two claims involve the same cause of action, under which the critical question is "not the relief requested or the theory asserted but whether the plaintiff bases the two actions on the same nucleus of operative facts." In evaluating the res judicata effect of a prior claim on a subsequent one, the transactional test does not inquire whether the same evidence has been presented in support of the two claims, but rather asks whether the same key facts are at issue in both of them.*

Gillispie, 203 F.3d 384, 387 (5th Cir. 2000).

In accordance with the broad transactional test followed by the Fifth Circuit, Plaintiffs and Plaintiff-Intervenor assert that the Consent Judgment reached in *Chisom* was a final, binding, and dispositive judgment of all issues raised in the case, including the determination of seniority of the *Chisom* judge. Moreover, Plaintiffs were declared the prevailing party in the federal litigation. The state court proceedings outlined in the June 13, 2012 Order seek to improperly relitigate the issues previously decided by the federal court. Specifically, the proceedings seek to decide whether Plaintiff-Intervenor's total years of service on the Louisiana Supreme Court should count toward her seniority. This key fact was addressed and resolved by the original Consent Judgment and its amendment codified in Act. No. 776. Therefore, the state Supreme Court should be enjoined from relitigating this issue.

Finally, the controversy between the parties is of such immediacy that Justice Johnson and Plaintiffs request this Court stay the proceedings before the Louisiana Supreme Court until

such time as this Court is able to hear this matter, in order that Justice Johnson is not deprived of her seniority and tenure on the Louisiana Supreme Court. The injuries Justice Johnson and Plaintiffs would suffer if this Motion to Stay Proceedings is not granted is greater than the injury the Louisiana Supreme Court would suffer if the stay is granted, and granting this requested stay is in the public interest.

Plaintiffs' and Plaintiff-Intervenor's requests for relief are supported by Federal Rule of Civil Procedure 71, which provides: "*When an order…may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party*." Fed. R. Civ. P. 71;[2] see 13 City Cab Co. of Orlando, Inc., 581 F. Supp. 2d at 1200 (holding nonparty not entitled to relief from civil contempt judgment for violating injunction in underlying action where service of notice to nonparty of contempt proceeding complied with FRCP 71 and 5(b), stating that under FRCP 71 "*personal jurisdiction over a nonparty contemnor is a given*.");James Wm. Moore et al., Moore's Federal Practice ¶ 71.02 (2012) ("*The purpose of Rule 71 is to insure that all court orders are fully enforceable in favor of and against all persons who are properly affected by a judgment, whether or not they are formally parties to the suit*.").

[2] Fed. R. Civ. Proc. was amended in 2007 and now makes clear that an applicable order is one that may be enforced *against* a nonparty, in addition to one that grants relief *in favor of* a nonparty.

Accordingly, Plaintiffs Bookman, Chisom, and Morial and Plaintiff-Intervenor Johnson respectfully request that this Court enforce the Consent Judgment by staying or enjoining the proceedings of the Louisiana Supreme Court announced in the June 13, 2012 Order. Plaintiffs and Plaintiff-Intervenor incorporate their requests for relief under the previously-filed Motion to Reopen Case and respectfully request that this Court issue any other relief it deems just and proper as a method to ensure that the Consent Judgment is enforced and given full effect.

Dated: July 18, 2012.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been sent via U.S. Mail postage prepaid to Chief Justice Catherine Kimball, Justice Jeffrey Victory, Justice Jeannette Knoll, Justice John Weimer, Justice Greg Guidry and Justice Marcus Clark at 410 Royal Street, New Orleans, Louisiana 70130; Governor Piyush("Bobby") Jindal at 900 N. 3rd Street, Baton Rouge, Louisiana 70802;; and all others via this Honorable Court's CM/ECF notification system, this 18th day of July, 2012.

s/James M. Williams
JAMES M. WILLIAMS