

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

MISTY ANN PARKER,)	
Plaintiff)	
v.)	Civil Action No. 7:03CV00742
)	
LETITIA MALONE, ET AL.)	
)	
Defendants.)	
CRYSTAL RENE BURCH,)	
by her next friend, Tami Shadeck,)	
Plaintiff,)	
)	
v.)	Civil Action No. 7:03CV00743
)	
LETITIA MALONE, ET AL.)	
)	
Defendants.)	
APRIL NICOLE CAMPBELL,)	
by her next friend, Wendy Campbell,)	
ET AL.,)	
Plaintiffs,)	
)	
v.)	Civil Action No. 7:03CV00744
)	
LETITIA MALONE, ET AL.,)	<u>MEMORANDUM OPINION</u>
)	
Defendants.)	By: Samuel G. Wilson
)	Chief United States District Judge

Plaintiffs move to remand this action to the Circuit Court for the City of Roanoke, arguing that defendant Letitia Malone failed to satisfy the statutory requirements for removal under 28 U.S.C. § 1446(d) by not promptly filing a copy of the notice of removal with the Clerk of the Circuit Court for

the City of Roanoke. The court finds that Malone did satisfy the statutory requirements for removal and denies the motion.

I.

Sanctuary is a detention home for troubled youths operated by the City of Roanoke, Virginia.¹ Crystal Rene Burch, April Nicole Campbell, and Misty Ann Parker are teenaged girls who were living at Sanctuary in March and April, 2002. Plaintiffs allege that while at Sanctuary, they were sexually assaulted by Jimmy Lee Jones, an employee of Sanctuary.

On October 27, 2003, plaintiffs filed this action in the Circuit Court for the City of Roanoke, alleging excessive force in violation of the Fourth and Fourteenth Amendment, denial of due process in violation of the Fourteenth Amendment, and various state torts. Plaintiffs served Malone, the Administrator of Sanctuary, with process on November 1, 2003, but have not yet served Jones. On November 12, 2003, Malone filed a notice of removal with this court. On November 14, 2003, this court entered and transmitted to the Clerk of the Circuit Court an order requesting transmittal of the original case file. This court received the records on December 1, 2003. On December 3, 2003, plaintiffs filed a motion to remand, citing Malone's failure to promptly file a copy of the notice of removal with the state clerk. On December 4, 2003, Malone filed a copy of the notice of removal with the Clerk of the Circuit Court for the City of Roanoke.

II.

¹In her answer, Malone denies that Sanctuary is a "detention home for troubled youths." At this point, Malone has not offered a description of Sanctuary, however, so for the purposes of this motion, the court will use plaintiff's description.

28 U.S.C. § 1446 provides the procedures for removal. First, pursuant to § 1446(a), if the United States District Courts have original jurisdiction over a civil action, a defendant may remove a the action by filing “in the district court of the United States for the district and division within which such action is pending a notice of removal . . .” Second, pursuant to § 1446(d), “[p]romptly after the filing of such notice of removal of a civil action, the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.”

III.

Plaintiffs argue that by waiting twenty-two days, Malone did not promptly file the copy of the notice of removal with the Clerk of the Circuit Court for the City of Roanoke. Plaintiffs thus contend that this court must remand the action. For the reasons that follow, this court disagrees and finds that Malone promptly filed a copy of the notice of removal with the state clerk.

Although 28 U.S.C. § 1446(d) does not define “promptly,” remand may be appropriate “when there is an undue delay” in filing the copy of the notice of removal. See 14C Wright, Miller & Cooper, Federal Practice & Procedure § 3736 (3d ed. 1998).² Furthermore, the courts have not developed a consistent definition of “promptly.” Compare Colettie v. Ovaltine Food Prods., 274 F. Supp. 719, 723 (D.P.R. 1967) (holding that a delay of five days was not prompt) with Calderon v. Pathmark Stores, Inc., 101 F. Supp.2d 246, 247-48 (S.D.N.Y. 2000) (holding that a delay of thirty-six days was

²Wright, Miller & Cooper differentiate between notice to adverse parties and notice to state courts and suggest that courts should remand if the defendant fails to promptly notify the adverse parties but retain jurisdiction if the defendant fails to notify the clerk of the state court. 14C Wright, Miller & Cooper, Federal Practice & Procedure § 3736 (1998).

prompt); see also Doherty v. Goslin, 2002 U.S. Dist. Lexis 15083 (E.D. Pa. 2002) (discussing case law and finding an eighteen day delay not prompt). In the absence of any bright line rule, this court finds the twenty-two day delay in the present case prompt for the following two reasons.

First, the twenty-two day delay in the present case did not upset any statutory purpose. The purpose of § 1446(d)'s requirement that defendants promptly file a copy of the notice of removal with the state clerk "is to give the court notice of the removal so that it can stay its proceedings and thereby avoid duplicitous and possible inconsistent results in the same case . . ." Delavigne v. Delavigne, 530 F.2d 598, 601 fn.5 (4th Cir. 1976). Although Malone did not file a copy of the notice of removal with the state clerk until December 4th, the state court received notice of the removal on November 14th when this court sent an order to the state court requesting transmittal of this action, a delay of only two days.³ Furthermore, the Circuit Court for the City of Roanoke took no action before transmitting the case to this court. Consequently, the twenty-two day delay did not thwart any statutory purpose.

Second, the delay did not deprive this court of jurisdiction over the matter. "In light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability." Somlyo v. J. Lu-rob Enterprises, Inc., 932 F.2d 1043, 1045-46 (2nd Cir. 1991) (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941)). However, federal jurisdiction commences when the defendant files the notice of removal with the district court,

³Indeed, several courts have held that constructive notice satisfies the requirements of § 1446(d). See Butler v. King, 781 F.2d 486, 488 (5th Cir. 1986); McCall v. Greyhound Lines, Inc., 1998 WL 865626 (S.D.N.Y. 1998).

and filing the notice with the state clerk affects the state's jurisdiction rather than federal jurisdiction. Peterson v. BMI Refractories, 124 F.3d 1386, 1395 (11th Cir. 1997) ("failure of notice to the state court is a procedural defect that does not defeat federal jurisdiction . . ."); Barrett v. Southern Railway Co., 68 F.R.D. 413, 420 (D.S.C. 1975); Hornung v. Master Tank & Welding Co., 151 F. Supp. 169 (D.N.D. 1957); see South Carolina v. Moore, 447 F.2d 1067, 1073 (4th Cir. 1971) ("Since the adoption of § 1446, it has been uniformly held that the state court loses all jurisdiction to proceed immediately upon the filing of the petition in the federal court and a copy in state court. Under these holdings, any proceedings in the state court after the filing of the petition and prior to a federal remand order are absolutely void . . ."). Consequently, because filing a copy of the notice of removal with the state clerk does not directly affect federal jurisdiction, the court is not obligated to narrowly construe § 1446(d)'s prompt filing requirements or to resolve any doubts against removability.

IV.

Malone's twenty-two day delay in notifying the Clerk of the Circuit Court for the City of Roanoke of the removal did not thwart the statutory purpose of 28 U.S.C. § 1446(d). Furthermore, because § 1446(d)'s filing requirement does not create federal jurisdiction, this court is not obligated to narrowly construe the definition of "promptly." Consequently, this court finds that Malone promptly, within the meaning of § 1446(d), filed a copy of the notice of removal with the Clerk of the Circuit Court for the City of Roanoke, and denies plaintiff's motion for remand.

ENTER: This _____ day of January, 2004

CHIEF UNITED STATES DISTRICT JUDGE

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Plaintiffs,)	Civil Action No. 7:03CV00744
)	
v.)	<u>ORDER</u>
)	
LETITIA MALONE, ET AL.,)	By: Samuel G. Wilson
)	Chief United States District Judge
Defendants.)	
)	

In accordance with the Memorandum Opinion entered this day, it is hereby **ORDERED** that the plaintiffs' motion to remand is **DENIED**.

ENTER: This _____ day of January, 2004.

CHIEF UNITED STATES DISTRICT JUDGE

