

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM D. HOPPER, JR.)

Plaintiff)

vs)

ST. LOUIS & SAN FRANCISCO)
RAILROAD CORPORATION, a)
Foreign Corporation)

Defendant)

NO. 73-C-254

E I L E D
DEC 31 1974
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

The parties hereto, having stipulated that this action has been fully compromised and settled and should be dismissed, Plaintiff's cause of action is hereby dismissed with prejudice to the filing of any further action, at the cost of Plaintiff.

IT IS SO ORDERED on this the 31 day of December,
1974.

Allen E. Barrow

Allen E. Barrow
United States District Judge

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MIKE R. ADAMS,)
)
 Plaintiff,)
)
 v.)
)
 DEREK WHITEHEAD, d/b/a)
 Santee Industries, and)
 JIM FISHER, d/b/a Custom)
 Manufacturing Products,)
)
 Defendants.)

FILED
DEC 27 1974
No. 74-C-242 ✓ Jack C. Silver, Clerk ^K
U. S. DISTRICT COURT

STIPULATION FOR PARTIAL DISMISSAL

The plaintiff, Mike R. Adams, through his attorneys of record, Robert E. Parker, Booth & Jay and Frank R. Hickman, by Frank R. Hickman, and the defendant, Derek Whitehead, d/b/a Santee Industries, by and through his attorneys of record, Grigg & Richards, by John R. Richards, stipulate and agree as follows:

1. The plaintiff and the defendant Derek Whitehead, d/b/a Santee Industries, have mutually agreed to settle the pending litigation as to the defendant Derek Whitehead, d/b/a Santee Industries, only, and without prejudice to the right of the plaintiff to continue his case, complaint and cause of action against the defendant, Jim Fisher, d/b/a Custom Manufacturing Products.

2. The stipulating parties have heretofore entered into a COVENANT AND INDEMNITY AGREEMENT, whereby the plaintiff for good and valuable consideration has covenanted not to sue Derek Whitehead, d/b/a Santee Industries, and to dismiss his complaint and cause of action against said defendant, Derek Whitehead, d/b/a Santee Industries, only, subject to the approval of the Court herein.

3. It is stipulated and agreed by and between the stipulating parties that the plaintiff's complaint against the defendant Derek Whitehead, d/b/a Santee Industries, may be dismissed by the Court with prejudice to the filing of a new action and without awarding costs.

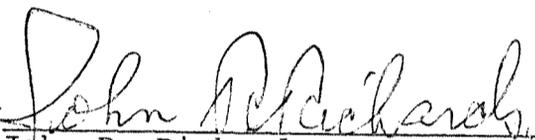
4. It is further stipulated and agreed by and between the stipulating parties, that the defendant Derek Whitehead, d/b/a

Santee Industries, hereby reserves any and all rights said defendant may have against the remaining defendant, Jim Fisher, d/b/a Custom Manufacturing Products.

ROBERT E. PARKER,
BOOTH & JAY,
FRANK R. HICKMAN

By 
Attorneys for the plaintiff
1419 South Denver
Tulsa, Oklahoma 74119
918-582-9773

GRIGG & RICHARDS

By 
John R. Richards
Attorneys for defendant Derek
Whitehead, d/b/a Santee
Industries
400 Thurston National Building
Tulsa, Oklahoma 74103
918-584-2583

ORDER FOR PARTIAL DISMISSAL

Pursuant to stipulation of the parties made and filed herein, IT IS HEREBY ORDERED that the plaintiff's cause of action and complaint against the defendant, Derek Whitehead, d/b/a Santee Industries, is hereby dismissed with prejudice and without an award of costs.

IT IS FURTHER ORDERED that such dismissal is with prejudice to the right of the plaintiff to continue his cause of action and complaint against the defendant, Derek Whitehead, d/b/a Santee Industries.

IT IS FURTHER ORDERED that such dismissal reserves however to the defendant, Derek Whitehead, d/b/a Santee Industries, any and all rights which said defendant, Derek Whitehead, d/b/a Santee Industries, may have against Jim Fisher, d/b/a Custom Manufacturing Products.


ALLEN E. BARROW
United States District Judge

bankrupt and Defendant took possession of the secured property and disposed of same.

The case was tried before the Court on August 26, 1974. The evidence shows the facts to exist as set out hereafter.

Plaintiff Zestee in 1968 operated a fleet of truck tractor-trailer units in its food processing business in Oklahoma City, Oklahoma. At such time its President was Travis Wilkes, and its Vice-President was Jerry L. Wilkes. Jerry Wilkes personally leased some equipment to Plaintiff to include some trailer units and some were apparently leased from an entity known as W-H Trucking Company, which was at that time a partnership between Jerry Wilkes and Wayne Henson, shown to be the truck dispatcher and an employee of Plaintiff. On August 12, 1968, Plaintiff entered into a Truck Lease Service Agreement with Mathews Truck Leasing, Inc. (Mathews Leasing). This agreement was negotiated by H. E. "Gene" Mathews, the President of Mathews Leasing. Mathews testified by deposition that he negotiated with Jerry Wilkes, Travis Wilkes, and their father prior to closing the deal. All of them approved of the agreement. The mechanics of the transaction were thereafter primarily handled with Jerry Wilkes, who was in charge of transportation for Plaintiff. It is noted that the agreement of August 12, 1968 was signed by Jerry Wilkes and was witnessed by Travis Wilkes.

As part of the truck leasing agreement, Mathews Leasing agreed it would purchase the old equipment Plaintiff had been using. This appears to be a common practice in the truck leasing business. Included in the old equipment were eleven trailers which Mathews Leasing agreed to purchase for a price purportedly representing the undepreciated book value of said trailers.

(Truck-tractor units were involved also, but same have been basically disregarded in this opinion because the issues herein relate to sales of trailers only.)

Mathews Leasing thereafter entered into an agreement with Defendant Fruehauf to purchase fifteen (15) new trailers for lease to Plaintiff. Included in the deal between Mathews Leasing and Defendant was an agreement that Defendant would purchase the eleven old trailers for the total sum of \$63,302.72. This figure included an "over allowance" in the total amount of \$37,636.80. An "over allowance" is an amount allowed on equipment which is accepted as a trade-in which is in excess of the appraised value of the equipment. The Defendant's Sales Order dated September 3, 1968 shows that the total selling price for the fifteen new units included the total amount paid as "over allowance".

Six of the new trailers were delivered to Mathews Leasing on November 1, 1968 and the Security Agreement covering same was executed by Mathews Leasing and guaranteed by Plaintiff. Nine more trailers were delivered to Mathews Leasing on December 1, 1968 and the Security Agreement and Guaranty executed. Five of the used trailers were delivered to Defendant on November 1, 1968 and its check payable to W. H. Trucking Company was issued on said date in the amount of \$31,120.64. The "over allowance" on this purchase was noted in Defendant's records to be \$15,054.72. This check was delivered to Jerry Wilkes by Mathews. The remaining six used trailers were received by Defendant about December 6, 1968 and its check in the amount of \$32,382.08 was issued to Zestee Foods, Inc. and Mathews

Leasing Co. The "over allowance" noted in Defendant's records from this purchase was \$22,582.08. The check payable to Plaintiff was endorsed "Zestee Foods Wayne Henson", and then deposited by Mathews Leasing Co. Mathews later paid this amount to Jerry Wilkes. Mathews Leasing did not take title to any of the used vehicles involved, but delivered them in blank to Defendant. It is noted that the titles to the eleven vehicles show that nine of them were in the name of Zestee Foods, Inc. and two were in the name of Leasing Associates, Inc., but had been assigned to W. H. Trucking, Co. The evidence indicates that none of the money paid by Defendant for the used trailers to include the "over allowance" included in such payments was received by Plaintiff. It appears that such money was received either directly or indirectly by Plaintiff's former Vice-President, Jerry Wilkes.

Plaintiff's theory for recovery is that the "over allowance" was a commercial bribe paid to Jerry Wilkes, its former Vice-President, and thus qualifies as an unlawful payment of other compensation under Section 2(c). Plaintiff contends it was damaged by the fact that the price of the trailers was inflated to include the amount of the over allowance paid and that this ultimately increased the costs made under the equipment lease.

The critical issue to be determined by the Court as to Plaintiff's action is whether the "over allowance" payment constitutes a violation of Section 2(c). 15 U.S.C. §13(c) provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

Von Kalinowski, Antitrust Laws and Trade Regulations:

§33.01[2] sets out the elements of a Section 2(c) violation as follows:

"There are seven (sic) elements which, when proven demonstrate that an illegal brokerage payment has been made. Section 2(c) is violated when

- (1) Any person
- (2) engaged in commerce, and in the course of commerce,
- (3) pays to or receives from,
- (4) the other party or his agent or representative,
- (5) anything of value, as a commission, brokerage or discount or allowance in lieu of brokerage,
- (6) in connection with a sale or purchase of goods, wares, or merchandise."

The complex fact situation involved herein does not indicate the presence or absence of all the elements designated by the textwriters, without an in depth study of at least two of the elements listed. It must be determined who were the parties ((4), supra) to the sales transaction involved, and whether the payment in question constituted "other compensation" ((5), supra) as covered by Section 2(c).

Defendant contends that it sold the new trailers to Mathews Leasing and bought the old trailers from Mathews Leasing and Plaintiff Zestee was not a party to the transaction. Thus (4), supra, would be missing under this contention of Defendant.

H. E. Mathews testified by deposition. On page 35 and 36 he stated:

"But I did not and I had no interest in finding out what I could buy this equipment for without a trade-in, because I had trade-ins. It become (sic) my responsibility to get Zestee Foods every nickel I could out of their used equipment. If I could have got him (sic) more than what he (sic) said his (sic) book value was, then I would have got him (sic) more money. This would have made me look a little bit better, so long as I was competitive in the initial cost.

* * * * *

"And I feel like from a leasing representative for Zestee Food, I did them a whale of a job. I kept their old used equipment. I think I did a good job on it."

The sales transaction involved both the sale of the new trailers and the purchase of the used units. The evidence indicates that Mathews was acting as agent for Zestee in the sale of the used units purchased by Defendant. Both Defendant's branch manager and its former salesman who handled the transaction testified that the sale of the new units and the purchase of the used units were all part of one transaction. The fact that Mathews Leasing never took title to the used vehicles in question further supports an inference that Mathews was acting as agent for Zestee (record title owner of most of the units) and/or Jerry Wilkes in the sale of the used trailers. The fact that Defendant required Zestee, as lessee of the new trailers to guarantee the Security Agreement on the new trailers further shows that Defendant considered Plaintiff to be involved as a party to the transaction. The fact that Defendant only dealt with Mathews is not enough to show that only Defendant Fruehauf and Mathews Leasing were parties to the transaction. The fact that Defendant issued its checks to purchase the used equipment to W. H. Trucking and Zestee Foods at the direction

of Mathews further supports the inference that Mathews was acting as agent for Zestee and/or Jerry Wilkes in the transaction. The Court finds that Plaintiff Zestee was sufficiently identified as a party involved in the sales transaction of September 3, 1968 in which Defendant sold 15 new trailers to Mathews Leasing and in which Defendant purchased the used trailers for which it paid the "over allowance" in question herein. Element (4), supra, is therefore satisfied.

Defendant further contends however that Section 2(c) relates only to payments classified as a commission or brokerage and that no commission or brokerage was paid in the transaction involved herein. Plaintiff responds that the "over allowance" was a "commercial bribe" included in the "other compensation" provision set out in Section 2(c), supra.

In the case of Federal Trade Com. v. Henry Broch & Co., 363 U.S. 166, 80 S.Ct. 1158, 4 L. Ed. 2d 1124 (1960), the Court considered the purpose and background of Section 2(c) and stated in footnote 6, 363 U.S. at 169 as follows:

"And although not mentioned in the Committee Reports, the debates on the bill show clearly that §2(c) was intended to proscribe other practices such as the 'bribing' of a seller's broker by the buyer. See 80 Cong Rec 7759-7760, 8111-8112."

In Rangen, Inc. v. Sterling Nelson & Sons, 351 F. 2d 851, (Ninth Cir. 1965), the Court considered whether the act by a competitor of Plaintiff's in bribing a State's purchasing agent was a violation of Section 2(c). The Court in its decision considered the Supreme Court's discussion in Broch, supra, and reached its conclusion as follows:

"We conclude that section 2(c) is not directed solely against price discrimination through rebates described as brokerage. Given fulfillment of the express requirements of subsection 2(c), that subsection also encompasses cases of commercial bribery tending to undermine the fiduciary relationship between a buyer and its agent, representative, or other intermediary in a transaction involving the sale or purchase of goods, wares or merchandise."

In Fitch v. Kentucky-Tennessee Light & Power Co., 136

F. 2d 12 (Sixth Cir. 1943) the Court considered the application of Section 2(c), supra, as follows:

"On the first question--whether the statute applies where an agent of the buyer accepts commissions from the seller on the purchase of goods, and retains them for his own benefit--the statute [Title 15, Sec. 13(c), U.S.C.A.] provides:"

The Court reached the following conclusion after an extended discussion:

"With regard to the acceptance of commissions by an agent of the buyer, it is not merely an acceptance of commissions by the agent on behalf of his principal, that is unlawful; it is the acceptance of commissions from a seller by an agent of the buyer in connection with the sale of merchandise in the course of interstate commerce, that is also envisaged by the statute. In this case, payment of commissions by the Coal Company to Fitch in connection with the sale of the coal was unlawful and in direct contravention of the Act."

The Plaintiff herein relies on the Fitch opinion contending that the "over allowance" payment in the instant case is a commercial bribe, and that its damages in the instant case are the same as those suffered by the Light & Power Company in Fitch wherein Plaintiff contends the price of the coal purchased was inflated to cover the amount of commissions paid. But Fitch clearly involved the payment of a commission and it was not necessary in that case to resort to the "other compensation" provision of the Act.

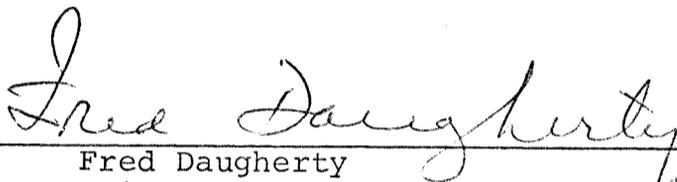
The rationale applied by this Court in finding that Zestee was sufficiently identified as a party involved in the transaction is that Mathews was acting as agent for Zestee in disposing of the old equipment and thus in obtaining payment therefor by Defendant including the "over allowance" related thereto which is involved herein. It is this agency relationship which identified Zestee as a party involved in the transaction. Not to buy new trailers. Mathews bought the new trailers. But to guarantee this purchase and to dispose of the old units. If the money for the old units had been received by Zestee, it could not complain of the "over allowance" paid by Defendant Fruehauf for it would have obtained the benefit of the "over allowance". The allegation by Plaintiff that the "over allowance" constituted payment of a "commercial bribe" is based on the proposition that such payment was received by its Vice-President, Jerry Wilkes. This payment ultimately received by Wilkes was not made by Defendant Fruehauf to Wilkes, but was made only by direction by Mathews, acting as agent for Zestee for the purpose of disposing of the old equipment. The ultimate situation could be in the nature of a conversion by Plaintiff's officer. But the evidence is not clear herein as to who actually had the ownership of the old units between Zestee and Jerry Wilkes (and possibly W. H. Trucking) and who would therefore be entitled to receive the proceeds from the sale of same. This Court takes judicial knowledge of the fact that in Case Number 73-C-15 of this Court Plaintiff has litigated this exact issue in an action on an employee's fidelity bond. The bonding company in such action joined Jerry Wilkes as a Third-Party Defendant. The Honorable Luther Bohanon rendered a decision and Judgment in such action finding that Plaintiff was entitled to recover for acts of conversion committed by Jerry Wilkes. The Fruehauf transaction was included in this litigation. Before the Judgment became final, the parties appear to have reached some sort of a settlement

agreement which agreement included the setting aside of the Court's findings. Plaintiff has had its day in Court as to the diversion of these funds alleged to have been effected by its Vice President Jerry Wilkes. Thus, Plaintiff seeks recovery for the same loss from both Wilkes and Fruehauf.

In the instant case, the payment of the "over allowance" by Defendant is not in the nature of a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof as prohibited by Section 2(c). It was not intended to be a "bribe" paid to Jerry Wilkes. Fruehauf simply allowed its buyer more for the old traded-in units than they were worth on the open market and actually bought the same rather than effecting a credit for the same at the request of Mathews, Plaintiff's agent regarding the old units. It is not believed that section 2(c) was intended to prevent a seller from allowing a buyer more for a trade-in than it may be worth. There is no evidence to show that payment of the "over allowance" induced Mathews to purchase Fruehauf trailers. He states he gave the business to Fruehauf because he (Mathews) preferred their products. As Mathews has to be Zestee's agent to make a Section 2(c) case for Plaintiff, this Court will not be concerned with where the money for the trade-ins ultimately went. Fruehauf had no interest here. Where the money went was arranged by Zestee's agent Mathews. If the money went to the wrong recipient this is a defalcation matter between Zestee and its agents or officers which was the subject matter of Judge Bohanon's case. It is the finding of the Court that a Section 2(c) violation has not occurred as the transaction involved herein did not include the payment or receipt of a commission, brokerage or other compensation as proscribed by the Act. Thus Plaintiff is not entitled to recover on its claim asserted herein against Defendant.

The parties agreed at the time of trial that the amount claimed by Defendant in its Counterclaim in the amount of \$25,601.24 is reasonable and that Defendant is entitled to recover such amount from Plaintiff. The Court thus finds that Defendant should have judgment for \$25,601.24. Counsel for Defendant will prepare an appropriate Judgment based on the foregoing and submit the same to Plaintiff's counsel for approval and then to the Court for signature and entry herein.

It is so ordered this 27th day of December, 1974.



Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

URBIE PENNINGTON RODGERS,)
)
Petitioner,)
)
vs.)
)
STATE OF OKLAHOMA and)
HARRELL WILSON, Warden,)
)
Respondents.)

74-C-290 ✓

FILED

DEC 27 1974 K

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

This is a proceeding brought pursuant to the provisions of Title 28 U.S.C. §2254 by a state prisoner confined in the Vocational Training Center of the State of Oklahoma, Stringtown, Oklahoma.

Petitioner attacks the validity of the judgment and sentence rendered by the District Court of Tulsa County, Oklahoma in Case No. CRF-72-719. After a plea of not guilty, petitioner waived his right to a trial by jury. At the conclusion of the testimony, the Court found petitioner guilty of the crime of feloniously carrying a firearm after former conviction of a felony in violation of 21 O.S. §1283. Petitioner was sentenced to a term of 10 years imprisonment on November 1, 1972. The file reflects and petitioner states that all the state remedies available to him have been exhausted.

In this proceeding petitioner alleges that the judgment and sentence are void for the following reasons:

- 1) That he was denied a fair and impartial trial.
- 2) The trial court erred in not granting his motion for a new trial.

In his first allegation, petitioner alleges that he was denied a fair and impartial trial for the following reasons:

- a) He was denied the right to invoke the Fifth Amendment privilege against self-incrimination.

This allegation is without merit and should be denied. At the time of trial petitioner was represented by court appointed

counsel and the record discloses that the trial judge fully protected petitioner's rights by his rulings on objections made by petitioner's counsel. See trial transcript P. 149 et seq.

- b) The evidence was insufficient to warrant a finding of guilty.

The sufficiency of the evidence to support a state conviction is not a subject cognizable under federal habeas corpus unless the record is so totally devoid of evidentiary support as to deny due process under the Fourteenth Amendment. The test is whether the conviction rests "upon any evidence at all". Martinez vs. Patterson, 371 F.2d 815 (10th Cir. 1966). Although the evidence in this case might well be held not to meet the standard of quality and quantity sufficient to sustain a federal conviction it cannot be said as a matter of law or fact that the record in this case contains no evidence of guilt. Due process is denied when conviction results without any evidence of guilt but not otherwise. Garner vs. State of Louisiana, 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207. Casias vs. Patterson, 398 F.2d 486, (10th Cir. 1968).

- c) The evidence was illegally seized without a search warrant and was therefore inadmissible.

Evidence discovered and seized pursuant to a cursory search incident to an arrest was competent and a motion to suppress on Fourth and Fourteenth Amendments grounds was properly denied by the Court. United States vs. Robinowitz, 399 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653. Harris vs. U. S., 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (10th Cir. 1968). Chapman vs. U.S., 443 F.2d 917 (10th Cir. 1971).

Petitioner's allegation that the weapon in question "was not on his person" is without merit. As previously stated, the petitioner was charged, tried and convicted of violation of 21 O.S. §1283. This statute reads as follows:

"It shall be unlawful for any person having previously been convicted of any felony in any court of the State or the United States to carry on his person, or in any vehicle which he is operating, or in which he is riding as a passenger, any pistol, imitation or homemade pistol, machine gun, sawed off shotgun or any rifle, or any other dangerous or deadly firearm which could be as easily concealed on the person in personal effects or in an automobile, as a sawed off shotgun." (Emphasis added)

- d) That the district attorney was allowed to ask incriminating, harassing and embarrassing questions.

This allegation is without merit. In Alexander vs. Daugherty, 286 F.2d 647 (10th Cir. 1961), the Court stated:

"The conduct of a prosecuting attorney can only be reviewed upon direct appeal."

In Browning vs. Hand, 284 F.2d 346, 348 (10th Cir. 1960), the Court stated:

"The due process clause of the Fourteenth Amendment does not guarantee that the decision of the state court shall be free from error nor impair the right of the states to establish judicial procedures. The federal courts will intervene only when fundamental constitutional guarantees have been transgressed."

The Court further stated (P. 647):

"To authorize relief to a state prisoner under §2241 U.S.C., the deprivation of constitutional rights must be such as to render the judgment void. Mere errors in proceedings by a state court in the exercise of its jurisdiction over a case properly before it, however serious, cannot be reviewed by habeas corpus."

- e) Evidence of other crimes was improperly admitted, because they were not proven to be related.

This allegation is without merit. The rule relating to the admissibility of other offenses in the trial of a criminal case has often been considered by the courts. It is elementary that evidence of other offenses of an accused is not admissible in the trial of a criminal offense, however, the exception of this rule is equally well established that to be admissible, evidence of other criminal acts must tend to prove the accused guilty of the crime charged, or to

prove some particular element or material facts of the crime. Evidence of other offenses is admissible if it tends to show guilty motive, intent, knowledge, identity, plan, scheme, or course of conduct on the part of the accused. Moran vs. U. S., 404 F.2d 663 (10th Cir. 1968); United States vs. Coleman, 410 F.2d 1133 (10th Cir. 1969).

Petitioner's second allegation "that the court erred in overruling his motion for a new trial" is without merit. Petition by a state prisoner for habeas corpus based upon alleged errors occurring at time of trial raises no valid constitutional question. Shaw vs. Pitchess, 324 F. Supp. 781 (D. C. Cal. 1969) affirmed 440 F.2d 412, Cert. Den. 404 U. S. 1037, 92 S. Ct. 702, 30 L. Ed. 2d 729.

The file in this case, including the transcript of the proceedings in Case No. CRF-72-719 in the District Court of Tulsa County, Oklahoma, examined by the court, conclusively show that petitioner is not entitled to relief. Therefore, there is no necessity for this Court to conduct an evidentiary hearing. Ortiz vs. Baker, 411 F.2d 9 (10th Cir. 1969).

IT IS, THEREFORE, ORDERED that the petition be denied and the case dismissed.

Dated this 27th day of December, 1974.



CHIEF JUDGE, UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LOY S. FOSTER,

Plaintiff,

vs.

AERO-MAYFLOWER COMPANY,
GILBERT B. YATES, and
GEORGE DAVID DUKE,

Defendants.

FILED

DEC 26 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

NO. 74-C-240

ORDER OF DISMISSAL

For good cause shown, this cause ^{of action & Complaint} is dismissed
with prejudice.

L. S. Luther Bohanon
LUTHER BOHANON
JUDGE OF THE UNITED STATES
DISTRICT COURT

IN THE DISTRICT COURT IN AND FOR THE NORTHERN
DISTRICT OF OKLAHOMA

MILTON RIDDLE,)
)
 Plaintiff,)
)
 -vs-) 72-C-109
)
 PROFESSIONAL INVESTORS LIFE)
 INSURANCE COMPANY,)
)
 Defendant.)

FILED

DEC 26 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

On this, the 16th day of December, 1974, came the plaintiff in person and by his attorney, Paul D. Brunton, and also came the defendant by its attorney Roger Scott and this cause came on for trial in its regular order before a jury of six good men who being duly impanelled and sworn to well and truly try the issues joined between the parties and a true verdict render according to the evidence; and having heard the evidence from time to time, the charges of the Court and the arguments of counsel, did on the 17th day of December, 1974, upon their oath say:

"We the jury, find for the plaintiff and against the defendant on the plaintiff's cause of action and fix his damages in the amount of \$2,851.25.

We, the jury, find for the defendant and against the plaintiff on the defendant's cross-complaint and fix its damages in the amount of \$None."

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court that said defendant have and recover nothing from the plaintiff.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court that the plaintiff have and recover from the said defendant the sum of \$2,851.25 for actual damages for which LET EXECUTION ISSUE.

*It is ordered that the Defendant
Pay the Cost of this action.*
St. Luther Bohannon
FEDERAL DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BRENT V. FIELDS,)
)
) Petitioner,)
vs.)
)
) STATE OF OKLAHOMA, COUNTY)
) OF TULSA,)
) Respondents.)

NO. 74-C-13 ✓

FILED

DEC 24 1974 *lum*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

The Court has for consideration an instrument entitled "Petition for a rehearing on Case No. 74-C-13" filed September 24, 1974. The Judgment complained of was entered May 23, 1974. Said Order denied and dismissed the habeas corpus petition of Brent V. Fields, Petitioner did not appeal, and time for appeal has expired. If the present instrument is treated as a motion under F.R.C.P. 59, it is out of time and should be overruled; and, if it is treated as a motion under F.R.C.P. 60(b), petitioner asserts no adequate reason for granting the motion as provided by the Rule. Further, the decision cited by petitioner, Stringfield v. Grider, Case No. 72-C-236 from this Northern District of Oklahoma, is presently before the Tenth Circuit Court of Appeals, No. 73-1550, for rehearing on the issue of the retroactive application of Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972), and the request for rehearing on such ground prior to decision by the appellate Court is premature. The Court finds that the instrument requesting rehearing herein should be overruled.

IT IS, THEREFORE, ORDERED that the instrument filed by Brent V. Fields requesting rehearing herein be and it is hereby overruled.

Dated this 24th day of December, 1974, at Tulsa, Oklahoma.

Allen E. Barrett
CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

if it is supported by substantial evidence. Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn is one of fact for the jury. Rivas v. Weinberger, 475 F. 2d 255 (Fifth Cir. 1973); Consolidated Edison Co. v. National L.R.Bd., 305 U.S. 197, 83 L.Ed. 126, 59 S.Ct. 206 (1938). A Social Security disability benefits' claimant has the burden of proving that he is disabled. Trujillo v. Richardson, 429 F. 2d 1149 (Tenth Cir. 1970). However, if a claimant shows that he is unable to perform his past occupation due to a medically determinable physical or mental impairment, the burden of proof shifts to the Secretary to come forward with credible evidence which shows that the Claimant is, considering his age, education, and past work history, able to perform some other type of substantial gainful work. Kirby v. Gardner, 369 F. 2d 302 (Tenth Cir. 1966); Keating v. Secretary of Health, Ed. And Welf. of U. S., 468 F. 2d 788 (Tenth Cir. 1972); 22 ALR 3d 440 §3.

It is the uncontroverted testimony of Plaintiff herein that she injured her back on three occasions. She testified that on December 2, 1971 she injured her back when she slipped and fell on ice (Tr. 45). Plaintiff testified that she injured her back while employed in a manufacturing operation on February 8, 1972 (Tr. 33, 47). Finally, Plaintiff testified that she injured her back when she was struck from the rear while driving her automobile on July 16, 1972 (Tr. 47).

Plaintiff's work history reveals that she has assisted her husband who was a pumper on an oil lease (Tr. 29), has worked as a laborer in a frozen food locker (Tr. 30), has also worked as a waitress (Tr. 30-32), and as a laborer in a manufacturing operation (Tr. 32). Plaintiff has an eighth grade education (Tr. 26).

The decision of the Administrative Law Judge which has become the final decision of the Defendant is difficult to understand. His decision is that Plaintiff's impairments have not prevented her from engaging in substantial gainful activity for a continuous period of not less than twelve months (Tr. 12). However, at the same time, he seems to say that she is unable to return to any of her previous occupations. He first states that Plaintiff might not be expected to return to her most recently held job in manufacturing (Tr. 8), then he states that she could return to manufacturing (Tr. 11). He states that Plaintiff might be able to return to her previous occupation of being a waitress (Tr. 8), then he states that she could not be expected to carry trays of food from the kitchen to the tables (Tr. 11). The decision is unclear as to whether it is the Administrative Law Judge's determination that Plaintiff is not disabled because she can return to her previous occupation or that she is not disabled because, although she cannot return to her previous occupation, she can perform other types of work which exist in the national economy.

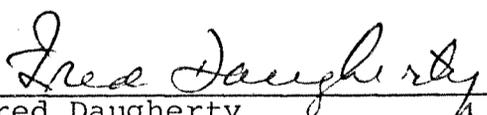
42 U.S.C. §405(g) reads in part as follows:

"...The court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the case for rehearing."

The power to remand granted by 42 U.S.C. §405(g) has frequently been exercised by Courts to remand cases to the Secretary for the purpose of clarifying the findings upon which his decision rests. See e.g., Santagate v. Gardner, 293 F. Supp. 1284 (D. Mass. 1968); Morse v. Celebrezze, 235 F. Supp. 810 (E.D. La. 1964). Accordingly, this case should be remanded to the Secretary for clarification of the findings upon which his decision rests. The Secretary should specify in further administrative proceedings whether (1) it is his decision that Plaintiff is not disabled because she is able to return to her former work, or (2) Plaintiff is not disabled because she is able to do some type of work which exists in the national economy although she is not able to return to her former work or, (3) Plaintiff is disabled because she is neither able to return to her former occupation nor able to do any other work which exists in the national economy. As has been previously stated, if it is the Secretary's decision that Plaintiff is unable to return to her former work but is able to do some other available work, there must be substantial evidence in support thereof contained in the record.

This cause should be remanded to the Defendant for further administrative proceedings consistent with this Order.

It is so ordered this 23^d day of December, 1974.



Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KENNETH ZACHER,

Plaintiff,

-vs-

BOARD OF EDUCATION OF INDEPENDENT
SCHOOL DISTRICT NUMBER I-40, Nowata
County, Oklahoma; GLENN C. MOORE,
Superintendent of Schools for the
City of Nowata; JEROME ZUMWALT,
former principal of Nowata High
School; LON SHULTS, W. E. MADDUX,
GAYLE STRATTON, WAYNE FRY, SAM
MILLER, constituting the Board of
Education of said District,

Defendants.

Case No. 72-C-447

FILED

DEC 23 1974

**Jack C. Silver, Clerk
U. S. DISTRICT COURT**

O R D E R

Plaintiff, former basketball coach at Nowata High School, Nowata, Oklahoma, has brought this civil rights action under 42 U.S.C. §1983 for actual and punitive damages against the Superintendent of Schools, the High School principal and the five members of the Board of Education of the Nowata, Oklahoma School District. Plaintiff claims that his contract was not renewed because he exercised his First Amendment rights in protesting the manner in which the school basketball queen coronation was handled.^{1/}

Defendants claim that Plaintiff's contract was not renewed for other reasons, notably his failure to accept administrative directives and his threats to resign at critical times unless

1/

Essentially this involved whether the black basketball captain should kiss the white basketball queen during the coronation ceremony which had been traditionally done in previous basketball coronation ceremonies. Officials thought the two should work it out between themselves. Plaintiff thought the previous practice should be followed.

his policies were followed by school authorities. Defendants assert that this conduct and these reasons were of duration over a considerable period of time and that the coronation problem was not the reason for non-renewal. Defendants also claim they are not liable to Plaintiff for damages because their actions were taken in their official capacities.

Plaintiff demanded a jury trial. The demand was granted. The jury awarded actual damages in the amount of \$2,143.00 against each of the seven Defendants for a total award for actual damages in the sum of \$15,001.00. The jury did not award punitive damages as requested by Plaintiff and as submitted by the Court under proper instructions.^{2/} The matter of attorney fees was by agreement reserved to the Court. Judgment on the verdicts was withheld pending submission of this issue to the Court. While this issue was pending Defendants have filed Motions for Judgment Notwithstanding the Verdicts or in the Alternative for a New Trial. Plaintiff opposes the Motions. It is these Motions and the opposition thereto together with the Briefs which are now under consideration and the subject of this Order.

Relying on the Case of Smith v. Losee, 485 F. 2d 334 (Tenth Cir. 1973) the Defendants assert they have a qualified govern-

2/

This instruction read in part:

"You are instructed that in addition to any actual damages found for the Plaintiff, the jury may award punitive damages by way of punishment if the Defendants have acted wilfully and in gross disregard for the rights of the Plaintiff in a constant pattern or practice of behavior."

mental privilege or immunity because they acted throughout in their official capacities as aforesaid. They also assert the jury specifically found them not guilty of malice toward Plaintiff by not awarding the requested punitive damages which would be based thereon.^{3/} Plaintiff responds that this defense was not raised at the trial, now comes too late and that the verdicts are supported by the evidence and law and should not be disturbed. Defendants reply that their pleadings in substance raised this defense,^{4/} that their evidence supported the same and by virtue of the jury declining to award punitive damages based on malice on the part of the Defendants, the matter of their qualified governmental privilege or immunity has been established in the case as a matter of law and dictates judgment based thereon in favor of the Defendants notwithstanding the verdicts.

3/ 23 Oklahoma Statutes §9 regarding punitive damages provides:

"§9. Jury may give exemplary damages, when

In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant."

4/ Defendants plead herein as follows:

"The individual defendants Lon Shults, W. E. Maddux, Gayle Stratton, Wayne Fry and Sam Miller, deny that they are individually liable to the plaintiff by reason of the fact that all actions described by the plaintiff were actions involving the said defendants in their capacity as members of the Board of Education of the School District."

* * * *

"That the defendants Glenn C. Moore and Jerome Zumwalt are administrative officers employed by the Board of Education and at all times complained of in plaintiff's complaint were acting in their capacity as agents, servants and employees of the Board of Education of the School District as administrative officers."

Smith v. Losee, supra, provides at p. 344:

"We thus hold that the defendant board members are entitled to a qualified privilege as a defense in this damage action. This defense may be established, and was here so done, by an affirmative showing that the decision not to renew or to discharge was board action representing an exercise of its discretion vested in it by state law, made in good faith, and without malice, when the official facts before them showed a good and valid reason for the decision although another reason or reasons advanced for nonrenewal or discharge may have been constitutionally impermissible. Under this test no damages are here recoverable against the defendant members of the school board."

In Smith v. Losee, supra, the appellate court reversed the damage awards against the board members under the doctrine of qualified governmental immunity but upheld the award against the President and two Deans individually. The Defendants School Superintendent and High School Principal urge that like the board members they also have a qualified governmental privilege or immunity and distinguish the outcome in Smith v. Losee, supra, on the basis that in that case punitive damages were specifically awarded against the non-board members (but not against the board members), whereas, here the Jury under the evidence and instructions declined to assess punitive damages against them. The Defendants rely on the concurring opinion of Judge Barrett in Smith v. Losee, supra, which pointedly supports their position of having immunity absent malice while the majority opinion does not treat directly with this proposition, no doubt because of the specific finding by the trier of the facts that punitive damages were recoverable against those individuals, the non-board members.

There was much evidence presented at the trial of insubordination and threats to resign at critical times on the part of the Plaintiff. This conduct covered a span of some

time and involved other situations unconnected with the coronation problem. The coronation problem was more recent in point of time and did represent a clash between the Plaintiff and the Defendants. Though the Defendants deny that the refusal to renew Plaintiff's contract was based on the coronation problem or Plaintiff's exercise of his First Amendment rights and assert that non-renewal was based wholly on Plaintiff's course of conduct over a considerable period of time amounting to insubordination and threats which were unrelated to the coronation problem, it is anyone's guess as to which of the urged causes of non-renewal is the true fact and is the true fact as to each Defendant. Suffice it to say that under the evidence it is clear beyond dispute the Defendants had several good and valid reasons for not renewing the Plaintiff's contract which were completely unrelated to the coronation problem and Plaintiff's assertion that his First Amendment rights had been violated.

As to Defendants' Motions for Judgment Notwithstanding the Verdicts, the Defendants did move for directed verdicts at the close of the evidence. These Motions were overruled and the case was sent to the Jury. The standard for granting Judgment Notwithstanding the Verdict is precisely the same as directing a verdict. In other words, before a Judgment Notwithstanding the Verdict can be entered the Court should have been able to have granted an earlier Motion for a directed verdict. Wright & Miller, Federal Practice & Procedure, Civil §2537 (1971); Brown v. Alkire, 295 F. 2d 411 (Tenth Cir. 1961); Taylor v. National Trailer Convoy, Inc., 433 F. 2d 569 (Tenth Cir. 1970). Also a Judgment Notwithstanding the Verdict may be granted only when the evidence is all one way or so

overwhelmingly in favor of the Movant that the trial court in the exercise of its sound discretion would be required to set the jury verdict aside. New Mexico Sav. & L. Ass'n. v. United States Fidelity & G. Co., 454 F. 2d 328 (Tenth Cir. 1972).

The Court should not grant the Defendants' Motions for Judgment Notwithstanding the Verdicts for at the time their Motions for directed verdicts were made the factual issue of malice had not been determined in the case. There was evidence to support malice (or else the punitive damage instruction would not have been given) and there was evidence that Defendants were not guilty of malice as they have contended throughout. It was not until the jury failed to award punitive damages as requested by Plaintiff that Defendants could and did assert that this issue had been decided in their favor. This being after their Motions for Directed Verdicts, it occurred too late to permit the use of a Judgment Notwithstanding the Verdict as the Court understands the office of such motion and its dependence on the status of the case at the time earlier motions for directed verdicts were made.

Moreover, it is questionable that it can be said with absolute certainty that the jury found malice wanting on the part of the Defendants and found that they acted in good faith toward the Plaintiff. First, the punitive damage instruction did not mention malice or lack of good faith. See note 2, supra. This instruction was couched in the language of Plaintiff's claim to such damages as contained in Plaintiff's Complaint. No one objected to the form of this instruction.

Though wilful conduct and gross disregard for the rights of another may be tantamount to malice, the fact remains that the issue of lack of good faith and the presence of malice on the part of the Defendants and against the Plaintiff was not squarely presented to the jury. Next, as punitive damages are not recoverable as a right and rest in the discretion of the jury, Stoddy Company v. Royer, 374 F. 2d 672 (Tenth Cir. 1967); 25 CJS, Damages, §117(2), the basis therefor could exist without an award of punitive damages necessarily following. Thus, it cannot be said that in the instant case the failure of the jury to award Plaintiff punitive damages establishes conclusively that Defendants acted in good faith and without malice to the Plaintiff which is an essential to be established for the application of the doctrine of qualified governmental privilege or immunity. Defendants' Motions for Judgments Notwithstanding the Verdicts should be overruled for either of the above reasons.

As to Defendants' Motions for a New Trial, the standards for considering these Motions are not the same as those to be considered in a Motion for Judgment Notwithstanding the Verdict and a new trial may be granted in the exercise of the Court's discretion for reasons which do not support the granting of a Motion for Judgment Notwithstanding the Verdict. O'Neil v. W. R. Grace & Company, 410 F. 2d 908 (Fifth Cir. 1969). In Holmes v. Wack, 464 F. 2d 86 (Tenth Cir. 1972) the Court stated:

"...The scope and extent of this power to grant a new trial is well described in the oft-cited opinion of the Fourth Circuit (opinion by Judge Parker) in Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2d 350 (4th Cir. 1941), wherein the late Judge Parker pointed out that a federal trial judge has ample power to see that justice is done, and where the ends of justice require it he has the authority to set aside the jury's verdict."

Improper instructions to the jury are recognized as the basis for the granting of a new trial. Adamson v. Midland Valley Railroad Company, 384 F. 2d 341 (Tenth Cir. 1967). The provisions of Rule 51, Federal Rules of Civil Procedure, relating to objections to instructions should be considered. But the rule is that fundamental errors not saved may be considered in the interest of justice. Allen v. Nelson Dodd Produce Co., 207 F. 2d 296 (Tenth Cir. 1953).^{5/}

The Court's instruction on the essential elements of Plaintiff's case which he was required to prove by a preponderance of the evidence provided as follows:

"In order for Plaintiff to establish his case herein, the burden is upon the Plaintiff to prove by a preponderance of the evidence the following facts:

'1. That the Defendants acting under color of State Law deprived the Plaintiff of his constitutional right of free speech as alleged and claimed by Plaintiff, and,

'2. That Plaintiff suffered damages or losses as a direct result thereof."

It must be recognized by all that this case was not tried with Smith v. Losee, supra, in mind or discussed or cited by anyone by any means with the Court throughout the litigation up to and including the jury trial. This may appear strange in view of the Defendants asserting in their initial pleadings that they were not liable in damages to the Plaintiff because their acts were accomplished in their legal capacities and certain Defendants filing a motion to dismiss Plaintiff's Complaint on such grounds (which Motion was overruled by the Court on the basis that Plaintiff's Complaint stated a claim

5/

Arteiro v. Coca Cola Bottling, Midwest, Inc., 47 FRD 186 (D. Minn. 1969) states:

"...The federal rule is that errors in instructions which are fundamental and highly prejudicial will justify a new trial or reversal despite the lack of timely objection thereto."

upon which relief could be granted if supported by the evidence)^{6/} and mention being made of this defense in some of Defendants' requested instructions with reference to the statement of the case. But the fact is that the case of Smith v. Losee, supra, was not brought to the Court's attention by either side nor considered by the Court in the trial of the case. Also, though there is some language variance between the qualified governmental privilege doctrine as stated in Smith v. Losee, supra, and the wording employed by Defendants in asserting the defense of non-liability for damages due to their acts being official acts, the two are indeed the same in substance. The Court should have properly instructed on this defense.

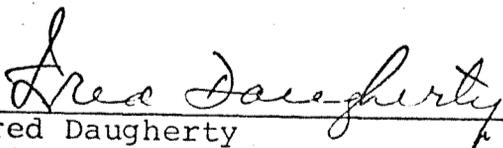
In this case the instructions of the Court as set out above allowed Plaintiff to recover on a mere finding by the jury that his constitutional right of free speech had been violated. The evidence without dispute affirmatively established that Defendants' acts in not renewing Plaintiff's contract were within their discretionary authority vested by State law and were performed in their official status. Defendants had plead non-liability by reason thereof and presented evidence to support their good faith and lack of malice toward Plaintiff and that other good and valid reasons existed for non-renewal of Plaintiff's contract. Yet the Court failed to instruct on this defense. It is the Court's opinion that under the evidence and law this case was submitted to the jury under improper instructions. The Court is further of the opinion that the manner in which the case was submitted to the jury under the evidence and the law constituted fundamental error which must be considered in the interest of justice in ruling on Defendants' Motions for New Trial.

^{6/} At this point in the history of this case Smith v. Losee, supra, had not been decided.

Plaintiff's contention in reply to Defendants' Motions that Defendants are attempting to proceed under a new theory in seeking a new trial herein, the new theory being the doctrine of immunity, is not correct. As mentioned before, Defendants raised specifically in their Answers that they were acting at all times in their official capacities which rendered them non-labile to Plaintiff for damages. Also, as mentioned before, some of the Defendants moved to dismiss on this ground and requested such a statement as part of their requested instructions. The situation at hand simply involves improper instructions to the Jury by the Court failing to instruct on the defense of immunity in view of Defendants' assertions and proof.

Thus, as the Court was remiss in failing to recognize and instruct on the doctrine of immunity based on the pleadings, evidence and the applicable law, the interest of justice requires that the Defendants' Motions for a New Trial should be granted. In view of the foregoing it is unnecessary for the Court to treat with the matter of attorney fees.

It is so ordered this 23^d day of December, 1974.



Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 THE LANDSCAPERS, INC.,)
 CARL R. MILLER and MAE MARIE)
 MILLER, husband and wife;)
 HAROLD O. SCOTT and SUE ELLEN)
 SCOTT, husband and wife; and)
 HAROLD D. STEPHENS and SADIE A.)
 STEPHENS, husband and wife,)
)
 Defendants.)

CIVIL ACTION NO. 74-C-2 ✓

FILED

DEC 23 1974 *km*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

DEFICIENCY JUDGMENT

NOW on this 21st day of December, 1974,
there came on for consideration the Motion of the Plaintiff,
United States of America, for leave to enter a Deficiency
Judgment, which Motion was filed herein on November 5, 1974,
and copies of such Motion were mailed to the defendants, The
Landscapers, Inc., Carl R. Miller and Mae Marie Miller, husband
and wife; Harold O. Scott and Sue Ellen Scott, husband and wife;
and Harold D. Stephens and Sadie A. Stephens, husband and wife.

The Court finds that by legal process the mortgaged
real property of these defendants was sold at Marshal's Sale and,
as a result thereof, this Plaintiff received the sum of \$8,500.00
which sum being credited towards the payment of the judgment
against the defendants.

The Court further finds that after credit of the proceeds
of the Marshal's Sale aforesaid, there remains a deficiency of
\$28,319.73 as unpaid principal, plus interest accrued thereon in
the sum of \$352.86 through September 13, 1973, plus interest
accruing thereafter at the rate of \$7.0571 per day until paid,
plus \$67.04 as the cost of this action.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED THAT
the Plaintiff, United States of America, have and recover of and
from the defendants herein a Deficiency Judgment in the amount of

\$28,319.73 as unpaid principal, plus interest accrued thereon in the sum of \$352.86 through September 13, 1973, plus interest accruing thereafter at the rate of \$7.0571 per day until paid, plus \$67.04 as the cost of this action.


UNITED STATES DISTRICT JUDGE

APPROVED *in Form*


ROBERT P. SANTEE
Assistant United States Attorney


ROGER R. SCOTT
Attorney for Defendants,
Harold D. Stephens and
Sadie A. Stephens

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SUMMIT INSURANCE COMPANY
OF NEW YORK,

Plaintiff,

--vs--

O'NEAL CONSTRUCTION, INC.;
LELAND EQUIPMENT COMPANY;
ALAMO EXPLOSIVES COMPANY, INC.;
and WILBUR A. DICUS, an individual
doing business as WADCO
INTERNATIONAL,

Defendants.

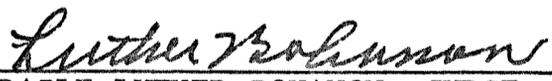
NO. 74-C-315

E I L E D
DEC 23 1974
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OVERRULING MOTION

On this 16th day of December, 1974, said matter came on for Hearing upon O'Neal Construction Inc.'s Motion for Summary Judgment, the parties being present by their respective counsel of record, and after hearing arguments and presentation of counsel, the Court finds that said Motion should be overruled.

IT IS THEREFORE ORDERED AND DECREED that the Motion for Summary Judgment filed by O'Neal Construction, Inc., be and the same is hereby overruled, and said cause is ordered set on the next pre-trial docket.



HONORABLE LUTHER BOHANON, JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
) Plaintiff,)
)
 vs.)
)
 JOHN IRA PARKS, NANCY DELORES)
 PARKS, COUNTY TREASURER, TULSA)
 COUNTY, BOARD OF COUNTY COMMIS-)
 SIONERS, TULSA COUNTY,)
)
) Defendants.)

CIVIL ACTION NO. 74-C-383

FILED
DEC 20 1974
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 19th day
of December, 1974, the plaintiff appearing by Robert P.
Santee, Assistant United States Attorney, and the defendants,
County Treasurer, Tulsa County, and Board of County Commissioners,
Tulsa County, appearing by Gary J. Summerfield, Assistant District
Attorney, Tulsa County; and the defendants, John Ira Parks and
Nancy Delores Parks, appearing not.

The Court being fully advised and having examined
the file herein finds that John Ira Parks and Nancy Delores Parks
were served on September 30, 1974, and the County Treasurer, Tulsa
County, and the Board of County Commissioners, Tulsa County, were
served on September 26, 1974, all as appears from the Marshals
Return of Service herein.

It appearing that the defendants, County Treasurer,
Tulsa County, and Board of County Commissioners, Tulsa County,
have duly filed their answers herein on October 4, 1974; that
defendants John Ira Parks and Nancy Delores Parks have failed
to answer herein; and that default has been entered by the
Clerk of this Court.

The Court further finds that this is a suit based
upon a mortgage note and foreclosure on a real property
mortgage securing said mortgage note and that the following

described real property is located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Four (4), Block Twelve (12), Rolling Hills Third Addition, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.

THAT the defendants, John Ira Parks and Nancy Delores Parks, did, on the 24th day of April, 1970, execute and deliver to Lomas & Nettleton West, Inc., their mortgage and mortgage note in the sum of \$15,700.00 with 8 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

That by Assignment of Mortgage of Real Estate dated May 18, 1970, Lomas & Nettleton West, Inc., assigned said Note and Mortgage to the Federal National Mortgage Association, a corporation; and by Assignment dated April 4, 1973, Federal National Mortgage Association, a corporation, assigned said Note and Mortgage to the Secretary of Housing and Urban Development of Washington, D.C.

The Court further finds that the defendants, John Ira Parks and Nancy Delores Parks, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon for more than 12 months last past, which default has continued and that by reason thereof the above-named defendants are now indebted to the plaintiff in the sum of \$15,371.21 as unpaid principal, with interest thereon at the rate of 8 1/2 percent interest per annum from June 1, 1973, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from John Ira Parks and Nancy Delores Parks, the sum of \$301.73, plus interest and \$273.37 for according to law, for ad valorem taxes for the year 1973/and 1974 taxes that Tulsa County should have judgment in rem for said amount.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against defendants, John Ira Parks and Nancy Delores Parks, in personam, for the sum of \$15,371.21 with interest thereon at the rate of 8 1/2 percent per annum from June 1, 1973, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment in rem against the defendants, John Ira Parks and Nancy Delores Parks, for the sum of \$575.10 as of the date of this judgment plus interest thereafter according to law, and that such judgment is superior to the first mortgage lien of the plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said defendants to satisfy plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisal the real property and apply the proceeds thereof in satisfaction of plaintiff's judgment, which sale shall be subject to the tax judgment of Tulsa County, supra. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

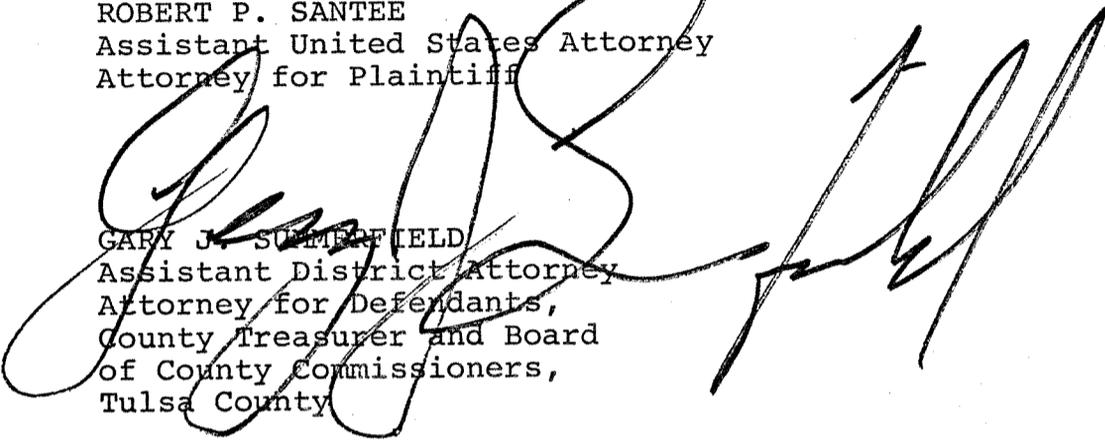
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

Allen E. Barrow
United States District Judge

APPROVED.



ROBERT P. SANTEE
Assistant United States Attorney
Attorney for Plaintiff



GARY J. SUMMERFIELD
Assistant District Attorney
Attorney for Defendants,
County Treasurer and Board
of County Commissioners,
Tulsa County

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 20 1974

DM

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
 -v-)
)
 BILLY L. WILLIAMS, ET AL,)
)
 Defendant.)

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Civil Action No. 74-C-337 ✓

JUDGMENT OF FORECLOSURE

THIS MATTER comes on for consideration this 20th
day of December, 1974, the plaintiff appearing
by Robert P. Santee, Assistant United States Attorney;
the defendants County Treasurer, Washington County, Oklahoma,
and Board of County Commissioners of Washington County, Okla-
homa, appearing by Willard Boone, District Attorney, Washington
County; and the defendants Billy L. Williams and Carol A.
Williams appearing not.

The Court, being fully advised and having examined
the file herein, finds that County Treasurer, Washington County,
Oklahoma, and Board of County Commissioners of Washington County,
Oklahoma, were served with Summons and Complaint on August 21,
1974, as appears from the Marshal's Returns of Service filed
herein; and that Billy L. Williams and Carol A. Williams were
served by publication, as appears from Proof of Publication filed
herein.

It appears that County Treasurer, Washington County,
Oklahoma, and Board of County Commissioners of Washington County,
Oklahoma, have duly filed their Answers on September 9, 1974,
and that Billy L. Williams and Carol A. Williams have failed to
answer herein and that default has been entered by the Clerk of
this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note, covering the following-described real property located in Washington County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Four (4), Block One (1), Seybert Addition, an Addition to the City of Bartlesville, Washington County, Oklahoma.

That the defendants Billy L. Williams and Carol A. Williams did, on the 15th day of December, 1970, execute and deliver to the IDS Mortgage Corporation their mortgage and mortgage note in the sum of \$18,050.00, with 8-1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

That by Assignment of Mortgage of Real Estate dated November 11, 1971, the IDS Mortgage Corporation assigned said note and mortgage to the Secretary of Housing and Urban Development, Washington, D.C.

The Court further finds that the defendants Billy L. Williams and Carol A. Williams made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon for more than 12 months last past, which default has continued, and that by reason thereof, the above-named defendants are now indebted to the plaintiff in the sum of \$18,016.91, with interest thereon from April 1, 1971, at the rate of 8-1/2 percent per annum, until paid, plus the cost of this action, accrued and accruing.

The Court further finds that there is due and owing to the County of Washington, State of Oklahoma, from Billy L. Williams and Carol A. Williams, the sum of \$60.00, plus interest and costs, for personal property taxes for the year 1971, and that Washington County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against the defendants Billy L. Williams and Carol A. Williams, in rem, for the sum of \$18,016.91, with interest thereon at the rate of 8-1/2 percent per annum from April 1, 1971, plus the cost of this action, accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by plaintiff for taxes, insurance or abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Washington have and recover judgment, in rem, against the defendants Billy L. Williams and Carol A. Williams for the sum of \$60.00 as of the date of this judgment, plus interest thereafter according to law, but that such judgment is inferior to the first mortgage lien of the plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said defendants to satisfy plaintiff's money judgment herein, an Order of Sale shall be issued to the United

States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of plaintiff's judgment, which sale shall be subject to the tax judgment of Washington County, supra. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the defendants, and each of them, and all persons claiming under them since the filing of the complaint herein, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

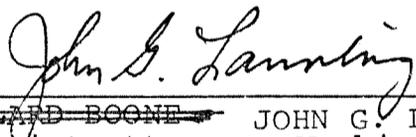


United States District Judge

APPROVED:



ROBERT P. SANTEE
Asst. U. S. Attorney
Attorney for Plaintiff,
United States of America



~~WILLARD BOONE~~ JOHN G. LANNING
District Attorney, Washington
County, Oklahoma
Attorney for Defendants,
County Treasurer, Washington County,
Board of County Commissioners,
Washington County

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

E I L E D

DEC 20 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

United States of America,)
)
 Plaintiff,)
)
 vs.) CIVIL ACTION NO. 70-C-61
)
 144.73 Acres of Land, More or) Tract No. 5021
 Less, Situate in Tulsa County,)
 State of Oklahoma, and The)
 Sand Springs Home, et al.,)
 and Unknown Owners,)
)
 Defendants.)

J U D G M E N T

1.

NOW, on this 19th day of December, 1974, this matter comes on for disposition on application of Plaintiff, United States of America, for entry of judgment on a stipulation agreeing upon just compensation, and upon a report filed by the Commissioners, and the Court, after having examined the files in this action and being advised by counsel for Plaintiff, finds:

2.

This judgment applies to the entire estate condemned in Tract No. 5021, as such estate and tract are described in the Complaint filed in this civil action.

3.

The Court has jurisdiction of the parties and the subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause who are interested in subject tract.

5.

The Acts of Congress set out in paragraph 2 of the Complaint herein give the United States of America the right, power and authority to condemn for public use the estate described in such Complaint. Pursuant thereto, on February 26, 1970, the United

States of America filed its Declaration of Taking of such described property and title to the described estate in such property should be vested in the United States of America as of the date of filing the Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court as estimated compensation for the taking of a certain estate in subject tract a certain sum of money and none of this deposit has been disbursed, as set out in paragraph 15 below.

7.

The defendants named in paragraph 15 as owners of the estate taken in subject tract are the only defendants asserting any claim to such estate. All other defendants having either disclaimed or defaulted, the named defendants, as of the date of taking were the owners of the estate condemned herein, and, as such, are entitled to receive the just compensation awarded by this judgment.

8.

On September 6, 1974, a stipulation, executed by the owner of all interests in subject property except the oil and gas leasehold interest, and the United States of America, was filed herein, whereby title to the sand and gravel in or on approximately 6.20 acres of the subject tract were excluded from the taking in this case and title thereto was revested in the former owner. Such stipulation should be approved by the Court.

9.

The stipulation described in paragraph 8 above also contained an agreement by the parties thereto that as to all interests in the subject property except the oil and gas leasehold interest, just compensation for the estate taken in the subject tract, and retained by the Government, is in the sum of \$3,925.00, and such agreement should be approved by the Court.

10.

The Report of Commissioners filed herein on Dec. 18, 1974, is hereby accepted and adopted as a finding of fact as to the oil

and gas leasehold interest in the subject property. The amount of just compensation as to the said interest, as fixed by the Commission, is set out below in paragraph 15.

11.

This judgment will create a surplus in the deposit of estimated compensation for the estate taken in the subject tract, as shown below in paragraph 15. Such surplus should be refunded to the Plaintiff.

12.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use the tract designated as Tract No. 5021, as such tract is particularly described in the Complaint filed herein; and such tract, to the extent of the estate described in such Complaint was condemned, and title thereto vested in the United States of America as of February 26, 1970, and, subject to the exclusion provided below in paragraph 14, all defendants herein and all other persons interested in such estate are forever barred from asserting any claim to such estate.

13.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking, the owners of the estate condemned herein in subject tract were the parties whose names appear below in paragraph 15, and the right to receive the just compensation awarded by this judgment is vested in the parties so named.

14.

It Is Further ORDERED, ADJUDGED AND DECREED that the stipulation of the parties, filed herein on September 6, 1974, regarding the exclusion of certain property from the taking in this case is hereby confirmed by the Court. As a result thereof, all right, title, and interest in the sand and gravel only which is and may be located in and on the following described area:

INDIAN MERIDIAN
T. 19 N., R. 11 E.

SECTION 15, A tract of land in Lot 5, together with all accretions thereto and riparian rights in and

to the existing bed of the Arkansas River, said tract, more particularly described as: Commencing at the intersection of the center line of the Saint Louis and San Francisco Railroad and the axis of the re-regulating dam; thence S 70° 04' 40" E, along the center line of said railroad 808.00 feet; thence N 27° 51' 25" E, parallel to said axis of the dam, 275.00 feet to a point, said point being the point of beginning; thence N 70° 04' 40" W, 420.00 feet, more or less, to a point on a line, bearing N 27° 51' 25" E, from the Northwest corner of said Lot 5; thence N 27° 51' 25" E, 650.00 feet, more or less, to the center line of the Arkansas River; thence Southeasterly along said center line, 420.00 feet, more or less, to a point on a line which bears N 27° 51' 25" E from said point of beginning; thence S 27° 51' 25" W, 650.00 feet, more or less, to the point of beginning, the area described is intended to reflect the Northerly 650.00 feet of Tract 5021, Keystone Lake as acquired by Civil Action 70-C-61, containing 6.20 Acres, more or less, in Tulsa County, Oklahoma,

together with the right of ingress and egress thereto across Government-owned land immediately adjacent thereto, is excluded from the taking in this case and is re-vested in William J. Doyle, Jr.

15.

It Is Further ORDERED, ADJUDGED and DECREED that the agreement as to just compensation, included in the stipulation mentioned in paragraph 8 above, and the Report of Commissioners described in paragraph 10 above, hereby are confirmed; and the sums therein fixed are adopted as the awards of just compensation for the respective interests in the estate condemned herein in subject tract, as follows:

TRACT NO. 5021

I. All interests taken except the oil and gas leasehold interest:

Owner: William J. Doyle, Jr.

Award of just compensation pursuant to stipulation -----	\$3,925.00
Disbursed to owner -----	<u>None</u>
Balance due to owner -----	\$3,925.00

II. Oil and gas leasehold interest only:

Owner: Charles J. Richard

Award of just compensation pursuant to Commissioners' Report -----	\$35.00
Disbursed to owner -----	<u>None</u>
Balance due to owner -----	\$35.00

III. Deposit accounting:

Deposited as estimated compensation for all interests -----	\$5,775.00
Total of awards for all interests -----	<u>3,960.00</u>
Deposit surplus -----	\$1,815.00

16.

It Is Further ORDERED, ADJUDGED and DECREED that the Clerk of this Court now shall disburse the deposit for the subject tract as follows:

To: Treasurer, United States of America -----	\$1,815.00
William J. Doyle, Jr. -----	\$3,925.00
Charles J. Richard -----	<u>\$35.00</u>
	\$5,775.00.

/s/ Allen E. Barrow

UNITED STATES DISTRICT JUDGE

APPROVED:

/s/ Hubert A. Marlow

HUBERT A. MARLOW
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 20 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

OKLAHOMA CORPORATION COMMISSION,)
LIBERTY GLASS COMPANY, KERR GLASS)
MFG. CORPORATION, BARTLETT-COLLINS)
COMPANY, ASG INDUSTRIES, INC., BALL)
CORPORATION, and BROCKWAY GLASS)
COMPANY, INC., et al.,)

Plaintiffs,)

v.)

NO. 73-C-163

UNITED STATES OF AMERICA, et al,)
1)
Defendants,)

Steve A. Collinson, Attorney, Oklahoma Corporation Commission, for Plaintiff
Oklahoma Corporation Commission

R. L. Davidson, Jr. and John Robertson (Houston, Davidson, Jacoby, Main &
Nelson on the brief), for Plaintiffs Liberty Glass Co., Kerr Glass Mfg., Corp.,
Bartlett-Collins Co., ASG Industries; Ball Corp. and Brockway Glass Co.

Richard H. Streeter, Attorney, Interstate Commerce Commission (Thomas
E. Kauper, Assistant Attorney General; Fritz R. Kahn, General Counsel,
Interstate Commerce Commission; Nathan G. Graham, United States
Attorney; and John H. D. Wigger, Attorney, Department of Justice, on the
brief), for Defendants United States of America and the Interstate Commerce
Commission

Grey W. Satterfield and Dickson M. Saunders (Donal L. Turkal, St. Louis,
Missouri; and William C. Anderson of Doerner, Stuart, Saunders, Daniel &
Langenkamp, Tulsa, Oklahoma; and Franklin, Harmon & Satterfield, Okla-
homa City, Oklahoma, on the brief), for Intervenor Defendant Railroads

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The Interstate Commerce Commission intervened
as a defendant, as did the affected railroads. The inter-
vening defendant railroads are the Arkansas Western
Railway Co.; The Atchison, Topeka and Santa Fe, Railway Co.; Beaver,
Meade and Englewood Railroad Company; Chicago, Rock Island and Pacific
Railroad Co.; Fort Smith and Van Buren Railway Co.; Hollis & Eastern Rail-
road Co.; The Kansas City Southern Railway Co.; Missouri-Kansas-Texas
Railroad Co.; Missouri Pacific Railroad Co.; St. Louis-San Francisco Rail-
way Co.; Sand Springs Railway Co.; Texas, Oklahoma & Eastern Railroad
Co.; The Texas and Pacific Railway Co.; and Tulsa-Sapulpa Union Railway
Co.

Before HOLLOWAY, Circuit Judge, BARROW, Chief
Judge of the Northern District of Oklahoma, and
Bohanon, District Judge

H O L L O W A Y, C i r c u i t J u d g e

This action seeking review of an order of the Interstate Commerce Commission (the ICC) invokes the jurisdiction of this three-judge court in accord with 49 U.S.C.A. § 17(9); 28 U.S.C.A. §§ 1336, 1398, 2284 and 2321-2325. The order sought to be reviewed is one of the ICC finding existing intrastate rates and charges in the State of Oklahoma to constitute an undue discrimination and undue burden on interstate commerce, and increasing the intrastate rates and charges to the level of interstate rates and charges pursuant to 49 U.S.C.A. § 13(4).

The suit was brought by the Oklahoma Corporation Commission and several companies which will be collectively referred to as the Oklahoma Glass Industry or the Glass Industry. The later group of plaintiffs are all shippers of silica sand, sometimes referred to as "industrial" sand, and were all parties to the proceedings before the ICC.

The ICC proceedings were initiated by the principal railroads serving Oklahoma, which are also intervening defendants in this suit. The proceedings were held before an Administrative Law Judge and subsequently an Examiner's Recommended Report and Order was issued by him. Exceptions to the report and order

were taken by the plaintiffs as protestants and were denied by Review Board Number 4 of the ICC. Having denied petitions for reconsideration and a request for oral argument by the protestants, the ICC, by Division 2 acting as an Appellate Division, entered an order in April, 1973, which essentially adopted the report of the Examiner.

In May, 1973, this suit was filed and a temporary restraining order was granted. On June 13 a hearing was held before the three-judge court on the application for an interlocutory injunction and the defendants' motion to vacate the restraining order. After the intervening railroads filed undertakings to keep separate accounts of the funds derived from the higher rates and charges and to make refund if the increased rates were determined to be unlawful, the court vacated the temporary restraining order and denied the application for an interlocutory injunction.

The plaintiffs allege in their amended complaint that the ICC order is invalid in sum because it is not supported by substantial evidence, is contrary to the evidence, and ignores competent, uncontradicted and unrebutted evidence; because there was no need for increased revenue shown by the defendant railroads; and because the increased rates will diminish rather than strengthen the viability of rail transportation by causing a loss of revenue through diversion to other modes of transportation.

It is also alleged that the order will create an undue and unreasonable advantage, preference or prejudice between persons or locations in intrastate commerce and those in interstate commerce, and that the order is an invasion of the sovereign powers of the State of Oklahoma.

Additional grounds for relief are set forth in a supplemental amendment. It is based on a motion by the St. Louis-San Francisco Railway Co. (Frisco) to the ICC for authority to vary its rates to avoid diversion of traffic to motor carriers and the August 1, 1973, modification of the previous order by the ICC. It is alleged that granting of authority to the railroads to reduce rates is repugnant to the Interstate Commerce Act; is not founded on any evidence before the hearing officer or the ICC and is unsupported by substantial evidence; is an acknowledgment of the erroneousness of the findings by the administrative law judge; is an acknowledgment that the level of rates for the transportation of silica sand is not necessary to achieve compliance with the finding that, "The unlawfulness . . . found to exist should be removed by applying to the Oklahoma intrastate rates and charges the increases which are maintained by [the railroads] on like interstate traffic between points in Oklahoma and points in adjoining states, as authorized by [previous proceedings]"; converts the general revenue order to a specific commodity order; is an unlawful invasion, interference with, and preemption of the inherent powers of the Oklahoma Corporation Commission; and is an unlawful delegation of authority to the carriers.

In their joint answer to the amended complaint, the United States and the ICC assert that the orders of the ICC are not reviewable because they are permissive in nature and do not approve the justness or reasonableness of any particular rate, and that the plaintiffs have failed to "exhaust administrative remedies under 49 U.S.C.A. §§ 13 and 15" by attacking the justness and reasonableness of the rates on the particular commodities named in the amended complaint, along with general denials. The same defenses are raised in the intervening railroads' answer.

On these issues the case was heard by this three-judge court in February, 1974, and we have considered a supplemental brief filed and the briefs, arguments and the administrative record offered. This opinion will constitute our findings and conclusions concerning the record before us. The court concludes that the following issues merit discussion:

- 1) Whether the proceeding before the ICC was a general revenue proceeding and, if so, what effect that determination has upon consideration of other issues;
- 2) Whether the findings and order of the ICC are supported by substantial evidence; and
- 3) Whether the ICC's modification, on August 1, 1973, of the previous order was valid and whether the modification converted the original order from a general revenue order to a specific commodity order.

We will treat some related contentions in discussing these issues to which we now turn.

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Cf. *Nickol v. United States*, 501 F.2d 1389, 1391-92 (10th Cir.); *Heber Valley Milk Company v. Butz*, 503 F.2d 96, 97 (10th Cir.).

1. Was the ICC proceeding a general revenue proceeding?

As we have noted, the United States and the ICC and intervening railroads contend that plaintiffs have failed to exhaust their administrative remedies and that relief from individual rates, such as for silica sand and limestone, must first be sought by a proceeding for reparations before the ICC, pursuant to 49 U. S. C. A. §§ 13(1) and 15(1). The plaintiffs respond to this by saying that they have exhausted administrative remedies since they filed a petition and an amended petition with the ICC for modification of the order, and these petitions have now been rejected by the ICC. They further contend that because the order required the establishment of particular rates, rather than merely setting ones which were permissive, the rates are now final, in full force and effect and subject to review in this proceeding. They contend that they would be unable to obtain reparations in a separate proceeding because of the holding in *Arizona Grocery Co. v. Atchison, T. & S. F. Ry Co.*, 284 U. S. 370, due to the fact that these rates have been approved as reasonable by the ICC.

The cases cited by plaintiffs do distinguish general revenue proceedings by stating that the rates set in such proceedings are permissive rather than prescribed. ³ And it is true that in our case the effect of

³ See, e.g., *National Small Shipments Traffic Conference, Inc. v. United States*, 321 F. Supp. 500, 505-06 (S. D. N. Y.); *Alabama Power Co. v. United States*, 316 F. Supp. 337, 338 (D. D. C.), aff'd by an equally divided Court, 400 U. S. 73; *Florida Citrus Commission v. United States*, 144 F. Supp. 517, 523 (N. D. Fla.), aff'd, 352 U. S. 1021; *Algoma Coke & Coal Co. v. United States*, 11 F. Supp. 487, 495 (E. D. Va.); cf., *Electronic Industries Ass'n v. United States*, 310 F. Supp. 1286 (D. D. C.), aff'd, 401 U. S. 967; *Aberdeen & Rockfish R. Co. v. SCRAP*, 409 U. S. 1207, 1213 (Opinion of the Chief Justice in chambers).

the order was to require the carriers to bring intrastate rates up to interstate rate levels in effect. See Finding 5, Examiner's Report and Order.⁴ However, the use of mandatory language in such an order does not alter the fundamental nature of a general revenue proceeding pursuant to 49 U.S.C.A. §13(4). See, e.g., King v. United States, 344 U.S. 254, 259, 275-76. Nor does it open to attack through court review the reasonableness of individual rates increased pursuant to the general revenue order. See United States v. Louisiana, 290 U.S. 70, 78-79; State of North Carolina v. ICC, 347 F. Supp. 103, 111-12 (E.D.N.C.), aff'd, 410 U.S. 919; State Corporation Commission of Kansas v. United States, 216 F. Supp. 376, 384 (D.Kan.), aff'd, 375 U.S. 15.

In other findings adopted by the ICC, the Administrative Law Judge did address the reasonableness of rates. See Examiner's report p.15,16. Also the order's provision preserving to parties the right to seek modification of individual rates is couched in somewhat more restrictive language than is often the case in such orders. See Examiner's Report, 16; and see, e.g., Atlantic City Electric Co. v. United States, 306 F. Supp. 338, 340 (S.D.N.Y.), aff'd by an equally divided Court, 400 U.S. 73; but see Florida Citrus Commission v. United States, 144 F. Supp. 517, 524 (N.D. Fla.), aff'd, 352 U.S. 1021. We do not feel, however, that the intent or effect of the

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By the ICC order the carriers were "...notified and required to establish:.", for intrastate traffic, rates and charges not to exceed rates found reasonable by the ICC for interstate traffic in several earlier orders. These orders in Ex parte Nos. 256, 262, 265 and 267 authorized several general interstate rate increases, and a selective increase was authorized for interstate movement of various commodities in Ex parte No. 259.

order was to prescribe or fix reasonable rates within the meaning of *Arizona Grocery Co. v. Atchison, T&S.F. Ry. Co.*, 284 U.S. 370, 387.⁵ The general findings of reasonableness seem appropriate, if not essential, for compliance with *North Carolina v. United States*, 325 U.S. 507, 516-20, in § 13(4) general revenue proceedings. See *King v. United States*, 344 U.S. 254, 270-75; *Illinois Commerce Commission v. United States*, 292 U.S. 474, 483-84; *Florida Citrus Commission v. United States*, supra. Such general findings of reasonableness do not preclude an application to the ICC on a claim that a particular rate is unjust or unreasonable. *Id.* at 524.

We conclude, therefore, that this was a general revenue proceeding and that the plaintiffs may not challenge the reasonableness of rates on individual commodities in this suit seeking review of an order resulting from such a proceeding. *King v. United States*, 344 U.S. 254, 275; *United States v. Louisiana*, 290 U.S. 70, 75-77; *State Corporation Commission of Kansas v. United States*, 216 F.Supp. 376, 384 (D.Kan.), aff'd, 375 U.S. 15; *State of North Carolina v. ICC*, supra, 347 F.Supp. at 111. Such questions must first be presented to the ICC through the initiation of proceedings for

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In *Arizona Grocery* the Court stated that the first order there considered had "declared in terms that 96.5 cents [per hundred pounds for shipment of sugar from California to Phoenix, Arizona] was, and for the future would be, a reasonable rate." 284 U.S. at 381, 387. This order had "ordered the establishment of a rate not exceeding that figure." *Id.* at 381-82. The railroads promulgated a 96 cent rate and later voluntarily reduced it to 86.5 cents. *Id.* at 382.

individual relief and for reparations pursuant to 49
U.S.C.A. §§ 13(1), 15(1) and 16(1).⁶ Koppers Co. v. United
States, 132 F. Supp. 159, 163 (W.D. Pa.); National
Small Shipment Traffic Conference, Inc. v. United
States, supra, 321 F. Supp. at 506; Atlantic City
Electric Co. v. United States, supra, 306 F. Supp. at
342-43; Florida Citrus Commission v. United States,
supra, 144 F. Supp. at 524-27. We feel this was not
accomplished here by the petitions for reversal or
modification of the ICC order, since the petitions merely argued
the inadequacy of the general revenue proceeding
record to support increased rates on silica sand and
limestone. See Koppers Co. v. United States, supra,
132 F. Supp. at 161-63.⁷

However, although plaintiffs may not challenge
individual rates, such as those for silica sand and lime-
stone, they nevertheless may attack the sufficiency of
evidence and findings to support the general revenue
order. We feel we have jurisdiction to consider such

⁶
The railroad carriers and the ICC both state
that reparations procedures are available and are the
proper remedy for the plaintiff shippers to pursue.

⁷
We note that the Commission declined to con-
sider the petitions to reverse or modify, as successive
by Rule 101 of the Commission's General Rules of Practice. We do not
feel this was an abuse of discretion, see National Trailer Convoy,
Inc., v. United States, 381 F. Supp. 878, 881, aff'd sub nom.
Morgan Drive Away, Inc. v. United States, _____ U.S. _____.
Of course, the plaintiff companies cannot be denied consideration of
petitions which are properly directed to a modification of individual rates,
based on adequate proof for such relief, and our disposition is without
prejudice to such proceedings.

an attack. See *Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487, 494-95 (E.D. Va.); *Florida Citrus Commission v. United States*, 144 F. Supp. 517, 524-27 (N.D. Fla.), aff'd, 352 U.S. 1021; *SCRAP v. United States*, 371 F. Supp. 1291, 1296 (D.D.C.), appeal docketed 43 U.S.L.W. 3014 (U.S. July 2, 1974) (No. 73-1971); see also *North Carolina v. United States*, 325 U.S. 507; but see *Alabama Power Co. v. United States*, 316 F. Supp. 337 (D.D.C.), and *Atlantic City Electric Co. v. United States*, 306 F. Supp. 338 (S.D.N.Y.), both affirmed by an equally divided Court, 400 U.S. 73. While the real concern here may be with rates on individual commodities, we feel the attacks made on the general revenue order are broad enough to challenge its validity as such. Therefore we turn now to the question of the sufficiency of the record to support the general revenue order.

2. Whether the findings and order of the ICC are supported by substantial evidence.

The plaintiffs contend that the findings and conclusions of the ICC are not supported by substantial evidence, are in disregard of competent, uncontradicted and unrebutted evidence, and that no increased revenue need on intrastate freight rates was shown by respondent railroads.

In order for the ICC to supplant a state-prescribed intrastate rate there must be clear findings, supported by evidence, of each element essential to the exercise

of that power by the Commission. *North Carolina v. United States*, 325 U.S. 507, 511; see also *Chicago, M., St. P. & P.R. Co. v. Illinois*, 355 U.S. 300, 305-06. Those findings which are supported by substantial evidence must be affirmed. *Florida v. United States*, 292 U.S. 1, 12; *Arkansas Grain Company v. United States*, 263 F. Supp. 480, 484 (E.D. Ark.), aff'd, 387 U.S. 573; *State Corp. Commission of Kansas v. United States*, 216 F. Supp. 376, 384 (D. Kan.), aff'd., 375 U.S. 15. We conclude that here the findings are supported by the evidence and are sufficient to support the order.

The first significant finding by the ICC is that the transportation conditions incident to the intrastate transportation of commodities within Oklahoma are not more favorable than those incident to interstate transportation to, from, and through points in Oklahoma. See *King v. United States*, supra, 344 U.S. at 264-65; *Illinois Commerce Commission v. United States*, 292 U.S. 474, 483-84. Support for this finding is primarily found in the verified statements of two witnesses, R. S. Fuller of the St. Louis - San Francisco Railway Co. (Exhibit 2) and B. A. Miller of the Missouri-Kansas-Texas Railroad Co. (Exhibit 3). Both affiants stated that they were familiar with the relevant operations, described the procedures for handling traffic on interstate and intrastate shipments, asserted that there were essentially no differences in handling between the two, and affirmatively stated that operating conditions incident to intrastate traffic were no more favorable

than those incident to interstate transportation to, from and through certain states, including Oklahoma. Thus the finding is amply supported.

The testimony of these two witnesses, in a conclusory fashion, also supported the findings of the railroads' need for an increase in revenue. In fact, Miller indicated that his employer-railroad was operating at a deficit (Tr. 72-73). The main support for the finding of a need for increased revenues, however, came from the testimony (Tr. 13), and verified statement (Exhibit 1) of Thomas J. Halpin, Assistant Director of the Western Railroad Association, Cost and Economics Division. See *State Corp. Commission of Kansas v. United States*, supra, 216 F.Supp. 376, 380-81 (D.Kan.), aff'd., 375 U.S. 15. His testimony essentially assumed that the current rates of charges by the railroads were compensatory. His figures and proof were mainly directed towards showing that the current rates of return on investment and equity were not competitive in the current economic market. His figures showed that, for the railroads in question, increases in costs had greatly exceeded increases in revenues. Furthermore, he was able to show that, over the period 1960-1970, the railroads had actually shown a decrease in net operating income (See table 2 attached to Exhibit 1). In addition, he was able to testify that at least two of the railroads had been shown to have a deficit rate of return and that the previous increases in interstate rates on the same commodities have had the effect of increasing revenues.

Joseph Hyzny, Manager of Cost Development of the Chicago, Rock Island and Pacific Railroad Co. testified that his company had operated at a deficit income from 1967 through 1970. Further, by the end of 1970, the company had reached a \$15,396,283 deficit in working capital and the stockholders had not received a dividend for 5 years. Similar evidence was introduced through the affidavit of John Taylor (Exhibit 7), who held the position of "Manager-Costs" of the Missouri-Kansas-Texas Railroad Company. His company had shown no rate of return on investment for the past 5 years and had a deficit in net operating income. He described the company's need for revenues to cover the costs of deferred maintenance and operating expenses.

William W. Knibb, Senior Cost Analyst of the Frisco, indicated that for his company the increased revenue over the past 5 years had not matched increased expenses. He testified that his company's rate of return on net investment for 1970 was 4.48%.

In assailing the findings and order of the ICC, the Glass Industry points mainly to parts of the record dealing with silica sand and limestone, and also to the size of the increases in revenue which the new rates will produce. We are not persuaded that the parts of the record relied on, or the record as a whole, show that the findings are not supported. While we have considered the data relating to individual commodities in the overall assessment made, as stated we cannot review individual commodity rates as such in this suit.

We are satisfied the proof was sufficient to support findings that the railroads, due to lack of revenues, were suffering an unjust discrimination and an undue burden on interstate commerce as a result of the unreasonably low intrastate rates and charges; that the interstate rates were reasonable; and that conditions favoring intrastate transportation as contrasted to interstate transportation of the same commodities within the State of Oklahoma did not exist. We conclude that the findings are supported by the evidence and are sufficient to sustain the order. *Arkansas Public Service Commission v. United States*, 147 F. Supp. 454, 464 (E.D. Ark.), aff'd., 355 U.S. 4.

3. Whether the ICC's modification in August, 1973, of its previous order was valid and whether it converted the general revenue order into a specific commodity order

We turn now to plaintiffs' contentions with respect to the Frisco petition for authority to vary its rates, filed with the ICC after entry of the ICC order. The ICC rejected the petition but did, however, modify the order to permit

reductions in individual rates and charges for intrastate transportation between points in Oklahoma, without further order or proceeding, provided that published reductions shall not become effective except upon 30 days notice to [the] Commission and to the general public (Notice to the Commission to be accompanied by justification for the proposed rates), and provided that no protest is received by the Commission on or before 12 days prior to the expiration of the 30-day notice date, unless otherwise ordered by the Commission.

It is claimed by plaintiffs that the granting of this authority to the railroads is not founded upon any evidence before the Administrative Law Judge or the ICC and is not supported by substantial evidence; that the granting of this authority to the carrier is unauthorized by the Interstate Commerce Act; and that such an order constitutes an unlawful delegation of authority to the intervening defendant carriers, in disregard of the authority of the Oklahoma Corporation Commission. Plaintiffs also claim that the motion and modification acknowledge the error of the findings of the Hearing Examiner that the intrastate rates should be raised to the level of interstate rates on like commodities. Furthermore, it is claimed that the modification, "by its very nature converted the order from a general revenue order to a specific commodity order."

The Frisco petition stated, as its reason for seeking permission to vary the rates, that a lower tariff on motor carriers for silica sand had become effective in February, 1973. It was claimed that these lower rates would result in a diversion of traffic from rail carriers. This admission by the railroad, however, cannot be used to impeach the findings of the Administrative Law Judge since the motor carrier rates had not become effective at the date the findings were made. Furthermore, the petition was denied by the ICC and it therefore cannot be charged with accepting the petition's allegations. Finally, it was recognized by the railroads' witness at the hearings that some downward adjustment might be

necessary to meet the competition, and this possibility was acknowledged in the report of the Administrative Law Judge.

We are also unpersuaded by the claim that the ICC was without power to issue the modification allowing the railroads to reduce rates. In considering the authority of the ICC to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question is one of the relation of rates to income; and the raising of rates may in particular localities reduce revenue by discouraging patronage. See *Florida v. United States*, 282 U.S. 194, 214. It follows that it is reasonably within the power of the ICC in dealing with intrastate rates to allow a flexibility that would prevent the carriers from suffering such loss in revenues. Furthermore, the Act itself authorizes the setting by the ICC of intrastate rates in terms of a maximum or minimum, or both. See 49 U.S.C.A. §13(4). In allowing the carrier to reduce rates below those previously authorized the Commission delegates no more authority than when it prescribes a maximum lawful rate for the carriers. Thus the argument that the order made an unlawful delegation of authority to the carriers is without merit.

The constitutional power of Congress to legislate and of the Commission to regulate in the area of intrastate rates where appropriate to remove unjust discrimination against and undue burdens on interstate commerce is well

settled. *Florida v. United States*, 282 U.S. 194, 210-11; *State of North Carolina v. ICC*, 347 F. Supp. 103, 109 (E.D.N.C.), *aff'd*, 410 U.S. 919. We think the power of the ICC to raise intrastate rates in appropriate cases, while at the same time leaving it open to the railroads, as to individual rates, to meet competition from other modes of transportation is equally clear as a necessary corollary to the general power. We therefore conclude that the modification of August 1, 1973, did not constitute an unconstitutional or unlawful invasion of the powers of the State of Oklahoma.

Nor are we persuaded that the modification converted the general revenue order to a specific commodity order. There is nothing in the order that is directed to or purports to consider the reasonableness of any individual rate. Instead, it seeks to further the purposes of the revenue order by leaving it open to the railroads to avoid loss of revenue through the diversion of traffic.

We have considered the additional arguments made against the orders and find them without merit. It is not the function of this court to weigh the evidence submitted to the Administrative Law Judge, which amply supports the orders of the ICC. And it is well-settled that such exercise of power by Congress and the Commission is not an unconstitutional invasion of state sovereignty.

For these reasons we conclude that the orders of the Commission should be sustained and this action should be dismissed, without prejudice to further proceedings for reparations, modification of rates or otherwise, as may be available.

DATED this 10 day of December, 1974.

William J. Holloway, Jr.
WILLIAM J. HOLLOWAY, JR.
Circuit Judge

Allen E. Barrow
ALLEN E. BARROW, Chief Judge
Northern District of Oklahoma

Luther Bohanon
LUTHER L. BOHANON
District Judge

original

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 20 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

OKLAHOMA CORPORATION COMMISSION,)
LIBERTY GLASS COMPANY, KERR GLASS)
MFG. CORPORATION, BARTLETT-COLLINS)
COMPANY, ASG INDUSTRIES, INC., BALL)
CORPORATION, and BROCKWAY GLASS)
COMPANY, INC., et al.,)

Plaintiffs,)

v.)

UNITED STATES OF AMERICA, et al,)
1)

Defendants,)

NO. 73-C-163

Steve A. Collinson, Attorney, Oklahoma Corporation Commission, for Plaintiff
Oklahoma Corporation Commission

R. L. Davidson, Jr. and John Robertson (Houston, Davidson, Jacoby, Main &
Nelson on the brief), for Plaintiffs Liberty Glass Co., Kerr Glass Mfg., Corp.,
Bartlett-Collins Co., ASG Industries; Ball Corp. and Brockway Glass Co.

Richard H. Streeter, Attorney, Interstate Commerce Commission (Thomas
E. Kauper, Assistant Attorney General; Fritz R. Kahn, General Counsel,
Interstate Commerce Commission; Nathan G. Graham, United States
Attorney; and John H. D. Wigger, Attorney, Department of Justice, on the
brief), for Defendants United States of America and the Interstate Commerce
Commission

Grey W. Satterfield and Dickson M. Saunders (Donal L. Turkal, St. Louis,
Missouri; and William C. Anderson of Doerner, Stuart, Saunders, Daniel &
Langenkamp, Tulsa, Oklahoma; and Franklin, Harmon & Satterfield, Okla-
homa City, Oklahoma, on the brief), for Intervenor Defendant Railroads

1

The Interstate Commerce Commission intervened
as a defendant, as did the affected railroads. The inter-
vening defendant railroads are the Arkansas Western
Railway Co.; The Atchison, Topeka and Santa Fe, Railway Co.; Beaver,
Meade and Englewood Railroad Company; Chicago, Rock Island and Pacific
Railroad Co.; Fort Smith and Van Buren Railway Co.; Hollis & Eastern Rail-
road Co.; The Kansas City Southern Railway Co.; Missouri-Kansas-Texas
Railroad Co.; Missouri Pacific Railroad Co.; St. Louis-San Francisco Rail-
way Co.; Sand Springs Railway Co.; Texas, Oklahoma & Eastern Railroad
Co.; The Texas and Pacific Railway Co.; and Tulsa-Sapulpa Union Railway
Co.

J U D G M E N T

The court having rendered its opinion, with its findings and conclusions stated therein, it is ORDERED that all relief sought herein is denied and that this action is dismissed, without prejudice to further proceedings for reparations, modification of rates or otherwise, as may be available.

It is further ORDERED that if timely proceedings are not commenced for appeal of this judgment to the Supreme Court of the United States, then the provisions of the order herein requiring undertakings for refund, and the duties and obligations of said order and undertakings, shall be of no further force or effect; otherwise, if such timely appeal proceedings are commenced, then the provisions, duties and obligations of said order and said undertakings, shall remain in full force and effect, subject to the decrees and orders of the Supreme Court and the final disposition of the cause.

William J. Holloway, Jr.

WILLIAM J. HOLLOWAY, JR.
Circuit Judge

Allen E. Barrow

ALLEN E. BARROW, Chief Judge
Northern District of Oklahoma

Luther L. Bohanon

LUTHER L. BOHANON
District Judge

R. Brown

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
 vs.)
)
 JAMES G. STOLBA, MARGARET J.)
 STOLBA, and SHARP FINANCE,)
)
 Defendants.)

CIVIL ACTION NO. 74-C-403 ✓

FILED
DEC 20 1974 *g*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

Now on this 20th day of December, 1974, there came on for consideration the Joint Application of the United States of America, Plaintiff, and Sharp Finance Corporation, Defendant, to dismiss this action without prejudice. The Court finds said Application is well taken.

NOW IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that this action be and it is hereby dismissed without prejudice.

Allen E. Brown

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CYNTHIA L. VESTREM,
Patient.

FILED

DEC 19 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Civil No. 74-C-281

ORDER OF DISMISSAL

The Court, being advised that the above named patient has eloped from the North Mountain NARA Project, Phoenix, Arizona, on November 7, 1974, after having been accepted for treatment and finding that no further treatment can be afforded the patient due to her voluntary withdrawal from treatment under the Narcotics Addiction Rehabilitation Act of 1966, and that this proceeding should be dismissed.

IT IS THEREFORE ORDERED that the above styled and numbered cause be dismissed.

15/ Fred Daugherty
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RONNIE LEE WARRIOR,)
)
) Petitioner,)
)
 vs.)
)
) STATE OF OKLAHOMA,)
)
) Respondent.)

74-C-490

FILED

DEC 18 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

This is a proceeding brought pursuant to the provisions of Title 28 USC, §2254 by a state prisoner confined in the Oklahoma State Reformatory at Granite, Oklahoma. Petitioner attacks the validity of the sentence imposed on the sole grounds of its severity. Petitioner states that the sentence was imposed by the District Court of Tulsa County, Oklahoma on May 16, 1973. After a plea of guilty to the crime of first degree robbery, the trial court found petitioner guilty and punishment was fixed at confinement for an indeterminate term of 15 to 40 years.

Petitioner's application for leave to file his petition for writ of habeas corpus in forma pauperis was granted by Order of this Court made and entered on the 10th day of December, 1974.

The petitioner alleges that he has exhausted those remedies available to him in the courts of the State of Oklahoma.

Petitioner's allegations are without merit and should be denied. Petitioner alleges that the sentence imposed was excessive and requests modification thereof. The petition filed states that petitioner was found guilty of armed robbery in violation of Title 21 O.S.A. §797 which reads as follows:

"Robbery, when accompanied by the use of force, or of putting the person robbed in fear of some immediate injury to his person, is robbery in the first degree. . . ."

The punishment for first degree robbery as provided by Title 21 O.S.A. §798 is as follows:

"Every person guilty of robbery in the first degree is punishable by imprisonment in the state penitentiary for not less than 10 years."

Severity of sentence alone constitutes no grounds for habeas corpus relief. U. S. ex rel Jackson vs. Myers, 374 F.2d 707 (Third Cir. 1970).

Where sentence is within the limits set by law, its severity would not be grounds for relief on habeas corpus. Marcial vs. Fay, 267 F.2d 507 (Second Cir. 1959).

The file and records in this case examined by the court conclusively show that petitioner is not entitled to relief. Therefore, there is no necessity for this court to hold an evidentiary hearing. Ortiz vs. Baker, 411 F.2d 90 (Tenth Cir. 1969).

IT IS, THEREFORE, ORDERED that the petition herein is denied and this case dismissed.

Dated this 18th day of December, 1974.

Luther Bohannon
UNITED STATES DISTRICT JUDGE

FILED
IN OPEN COURT

DEC 17 1974

Jack C. Silver
Clerk, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

AKZONA, INC., d/b/a)
AMERICA ENKA CO.,)
)
Plaintiff,)
)
vs.)
)
OZARK INDUSTRIES, INC.,)
et al.,)
)
Defendants.)

NO. 74-C-369 ✓

J U D G M E N T

This action came on for hearing on the plaintiff's Motion for Default Judgment, and the issues having been duly heard and a decision having been duly rendered,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the plaintiff, Akzona, Inc., d/b/a America Enka Co., recover of the defendant, Ozark Industries, Inc., the sum of \$35,000 with interest thereon at the rate of 10% per annum until paid, an attorneys fee in the amount of \$ 1000⁰⁰ and for the costs of this action.

Dated this 17th day of December, 1974.


United States District Court Judge

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WELDON REYNOLDS,)
)
 Plaintiff,)
)
 vs.) No. 73-C-194
)
 MISSOURI-KANSAS-TEXAS)
 RAILROAD COMPANY,)
)
 Defendant.)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

FILED

DEC 16 1974

**Jack C. Silver, Clerk
U. S. DISTRICT COURT**

This Court, upon hearing the Motion for Summary Judgment presented by the Defendant Missouri-Kansas-Texas Railroad Company pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, and after considering the deposition on file and the briefs and affidavits of the parties, makes the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

1. The Plaintiff Weldon Reynolds, an individual residing in Tulsa County, State of Oklahoma, was engaged in the business of unloading railroad boxcars for hire. The Plaintiff was retained by a lumber consignee to unload Canadian National Railways boxcar no. CN477311 loaded with lumber and located at the Alsuma team track in Tulsa County. This boxcar had originated in Prince George, British Columbia, Canada, and had been picked up by the Defendant Missouri-Kansas-Texas Railroad Company on January 18, 1972 in Kansas City, Missouri and had been delivered to the Alsuma team track at 8:00 P.M. on January 20, 1972. The boxcar at this time was locked and sealed and the Plaintiff, as an agent of the consignee, broke the seal and his unloading crews commenced to remove the lumber from the boxcar. When the unloading process was virtually complete, the Plaintiff, on January 24, 1972, desiring to relieve

one of the unloading crew by means of personally aiding in concluding the unloading process, attempted to get into the boxcar by grabbing a boxcar door latch. As the Plaintiff, a man weighing 230 pounds, attempted to pull himself up to the level of the floor of the boxcar, the latch gave way, causing the Plaintiff to fall to the ground at which time he incurred the injuries which are the subject of this suit.

2. The railroad car in question, after having been spotted at the Alsuma team track, remained sealed at that location from the time it was spotted until Plaintiff's crew broke the seal and commenced to unload the car and was not moved by the Defendant railway until January 25, 1972, when the Defendant was notified that the car had been unloaded. No employees or agents of the Defendant were involved in the unloading process and none were present at the time of the accident.

3. The boxcar was owned by Canadian National Railways. The Defendant was a connecting carrier which was paid for delivering the boxcar from Kansas City, Missouri to its destination in Tulsa County.

4. The object to which the Plaintiff was holding at the time of his fall was designed as a door latch and not as a handle. The latch was used as a handle by Plaintiff and said latch gave way in Plaintiff's hand which caused his fall. The latch, insofar as Defendant Missouri-Kansas-Texas Railroad Company is concerned was not patently defective but if defective, such defect was latent.

II.

CONCLUSIONS OF LAW

1. There is no evidence of a patent defect here. A patent defect cannot be proved by reliance upon Res Ipsa Loquitur in this case for several reasons. The accident must be caused by a failure

of the instrumentality to properly function. In this case there is no evidence that the door latch did not function properly, only that it failed to serve a purpose for which it was not intended. Secondly, for res ipsa loquitur to apply, the cause of a failure must be wholly within the power of the Defendant to prove and wholly outside the power of the Plaintiff to prove. In the case at hand, the situation is quite reversed; the Plaintiff was present and no representative of the Defendant was present or able, absent the testimony of the Plaintiff, to even understand the way in which the accident occurred.

2. Even if the door latch was deemed, by virtue of its breaking off, to be defective, the defect was latent. A connecting carrier has no duty to inspect for latent defects. Defects which cannot be observed are not chargeable to the connecting carrier.

". . . connecting carrier has only the duty to make a reasonable external inspection for patent defects of the cars received from another carrier, Smith v. Louisville & Nashville R. Co., 267 F.Supp. 716, 718 (S.D. Ohio 1966). . ." Griffin v. Missouri-Pacific R.R. Co., 413 F.2d 9 (5th Cir. 1969). "The inspection need only be made to discover patent defects." (Spears v. New York Central R.R., 61 Ohio App. 404, 22 N.E.2d 634 (1939). "The Company is not liable for injuries from defects which it has had no opportunity to discover, from defects which no reasonably careful inspection would have uncovered. . ." C.J.S. "Railroad" §924.

3. An ultimate delivering carrier of a defective railroad car can be held liable to an employee of an unloading consignee if a patent defect in the boxcar causes injury to the employee. See Hunter v. Missouri-Kansas-Texas Railroad Co., 276 F.Supp. 936 (N.D. Okla. 1967); see also Ruiz v. Midland Valley RR, 158 Kan 524, 148 P.2d 734 (1944). A carrier who receives a car into its systems is required to give it a reasonable external inspection which does not include breaking the seal. See Smith v. Louisville & Nashville R.R. Co., 267 F.Supp. 716 (1966).

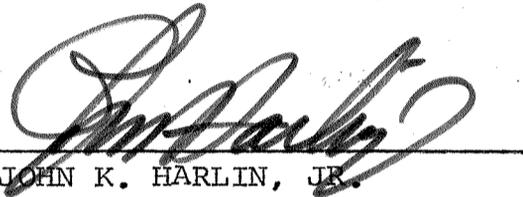
IT IS SO ORDERED, and counsel for Defendant will submit an appropriate judgment in accordance herewith, *within 5 days.*

DATED this 16 day of December, 1974.



UNITED STATES DISTRICT COURT JUDGE

APPROVED AS TO FORM:



JOHN K. HARLIN, JR.
Attorney for Plaintiff



R. DOBIE LANGENKAMP
Attorney for Defendant

E I L E D

DEC 16 1974 *J.*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WELDON REYNOLDS,

Plaintiff,

vs.

MISSOURI-KANSAS-TEXAS
RAILROAD COMPANY,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

73-C-194 ✓

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law
filed this date,

IT IS ORDERED that judgment be entered in favor of de-
fendant and against the plaintiff.

ENTED this 16th day of December, 1974.

Allen E. Baran

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN
DISTRICT OF OKLAHOMA

COMMODITY CLEARING HOUSE, INC.)
An Oklahoma Corporation)
)
Plaintiff,)
)
-vs-)
)
UNITED STATES OF AMERICA, Securities)
and Exchange Commission, et al.)
)
Defendants,)

No. 74-C-420

E I L E D

DEC 10 1974

ORDER OF DISMISSAL

Jack C. Silver, Clerk
U. S. DISTRICT COURT

There being filed herein on December 12, 1974, a dismissal by the plaintiff of its complaint and cause of action.

IT IS THEREFORE ordered by the Court that the cause of action and complaint of the plaintiff, Commodity Clearing House, Inc. be and the same is hereby dismissed at the cost of the plaintiff.

LA Luther Bohannon
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALBERT ROBBINS; MID-WESTERN)
NURSERIES, INC., an Oklahoma)
corporation,)
)
Plaintiffs,)
)
vs.)
)
PAULA DAWN CARTER,)
)
Defendant,)
)
and)
)
TRI-STATE INSURANCE COMPANY,)
)
Intervenor.)

No. 73-C-37

FILED

DEC 16 1974

**Jack C. Silver, Clerk
U. S. DISTRICT COURT**

JUDGMENT BY DEFAULT

NOW this 10th day of December, 1974, this cause comes on for hearing pursuant to the order of this Court of October 15, 1974, setting this matter for hearing on default judgment. The Plaintiffs appeared by counsel, James C. Lang, of Sneed, Lang, Trotter & Adams, and the Intervenor appeared by counsel, Joseph R. Roberts, of Rhodes, Hieronymus, Holloway & Wilson. Paula Dawn Carter was not present nor represented.

The Court finds that on the 6th day of December, 1974, Paula Dawn Carter was advised by the Clerk of the Court at her last known address, that the above styled matter was set for hearing on default judgment before the Honorable Allen E. Barrow on December 10, 1974, at 10:30 a.m.

The Court finds that the Complaint in the above cause was filed in the cause on the 26th day of January, 1973, and that the summons and Complaint were duly served upon the Defendant on the 28th day of March, 1974.

The Court further finds that the Defendant was given three (3) days notice of the setting of the hearing on default judgment and that the Defendant did not appear at the hearing on December 10, 1974.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Defendant, Paula Dawn Carter, is in default and that a judgment should be entered against her accordingly.

2. That Plaintiff, Albert Robbins, recover from the Defendant, Paula Dawn Carter, actual damages in the amount of \$22,575.00 and exemplary or punitive damages in the amount of \$25,000.00.

3. That Plaintiff, Mid-Western Nurseries, Inc., an Oklahoma corporation, recover from the Defendant the sum of \$4,800.00, together with costs of \$35.00.

4. That the Intervenor, Tri-State Insurance Company, recover from the Defendant the sum of \$2,241.14.

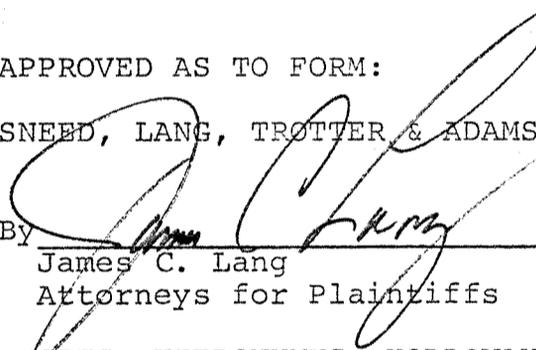
5. The above judgments are hereby rendered.

DATED this 10th day of December, 1974.


Allen E. Barrow,
Judge of the District Court

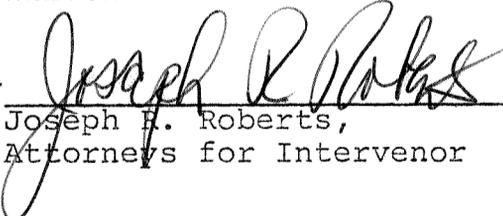
APPROVED AS TO FORM:

SNEED, LANG, TROTTER & ADAMS

By 

James C. Lang
Attorneys for Plaintiffs

RHODES, HIERONYMUS, HOLLOWAY
& WILSON

By 

Joseph R. Roberts,
Attorneys for Intervenor

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JACK VICKERS,

Plaintiff,

vs.

POWER CHEMICAL COMPANY, INC.,
GEORGIA AGENCY CO., MR. H. E.
CALDWELL, an individual, MR.
ED SALEKER, an individual, and
MR. RAY POWELL, an individual,

Defendants.

CIVIL ACTION
FILE NO. 73-C-413

FILED

DEC 16 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

DEFAULT JUDGMENT

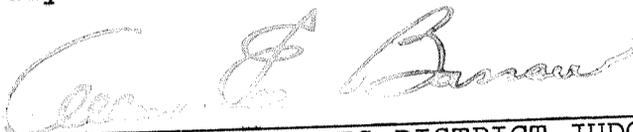
NOW on this 10th day of December, 1974, the above captioned matter comes on for a hearing for default judgment against the Defendants, Power Chemical Company, Inc., Georgia Agency Co., and Ed Saleker, before the Honorable Judge Barrow. The Plaintiff appearing by and through his attorney of record, John W. Klenda, and the Defendants, although duly notified by registered mail through the office of the Court Clerk appeareth not.

The Court finds that the Defendants were duly served with service of process and since that time have failed to plea or answer the complaint filed herein and are now in default.

The Court further finds that the Plaintiff is entitled to a judgment in the amount of \$64,716.60 against the Defendants as prayed for in his complaint.

IT IS THEREFORE THE ORDER OF THE COURT that the Plaintiff Jack Vickers is entitled to a money judgment against the Defendants, Power Chemical Company, Inc., Georgia Agency Co., and Ed Saleker, in the amount of \$64,716.60, together with interest at ten percent (10%).

ENTERED this 16th day of December, 1974.



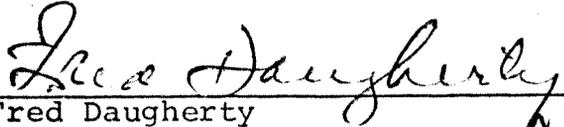
CHIEF UNITED STATES DISTRICT JUDGE

This Court during the trial determined that Defendant Brown's Motion for Judgment of Acquittal should be denied after considering the evidence in the light most favorable to the Government and concluding that there was substantial evidence from which a jury might reasonably find the accused to be guilty as charged beyond a reasonable doubt. Wall v. United States, 384 F. 2d 758 (Tenth Cir. 1967).

The Court is still of the opinion that the evidence introduced in the trial measured up to the required standard. An alleged co-conspirator implicated Defendant Brown in the alleged conspiracy. Other witnesses put Defendant Brown at the arranged place of distribution or sale. The testimony of the alleged conspirator was enough standing alone to find Defendant Brown guilty as charged beyond a reasonable doubt. Moreover, this testimony was corroborated in certain important respects. The order of proof in a conspiracy case is discretionary. United States v. Acuff, 410 F. 2d 463 (Sixth Cir. 1969) Cert. den. 396 U.S. 830. Defendant Brown's conviction was not wholly based on hearsay testimony as he claims. Everything said by a co-conspirator during the course of the conspiracy is admissible in evidence against another conspirator. Lowther v. United States, 455 F. 2d 657 (Tenth Cir. 1972). No fatal variance is shown by Defendant Brown or is believed to exist in the case. The evidence supported the conclusion that Defendant Brown was a willful and knowing participant in the alleged conspiracy and that the statements in evidence were made in furtherance of the alleged conspiracy.

Defendant Brown's Motion for Judgment of Acquittal is denied.

It is so ordered this 16th day of December, 1974.


Fred Daugherty
United States District Judge

As to Ground 4 the Defendant's attorney states that new evidence has been discovered in that after the evidence in the case was closed and while the jury was deliberating a witness for the prosecution, a local narcotics enforcement officer, advised Defendant's counsel that the co-defendant, Bobby Jordon, who testified for the prosecution, had made statements to the officer to the effect that he never intended to sell any drugs, but that he intended the whole transaction involved in the conspiracy to be a "rip off" or a theft of the purchaser's money. He contends that such statements allegedly made to the local officer by Jordon are inconsistent with said witness's testimony at the time of the trial. The Government's Response to the proposition raised as to this "newly discovered evidence" is that the purported evidence is merely cumulative or impeaching. It also urges that newly discovered evidence must be such that it would probably produce an acquittal in a new trial and that the evidence involved herein would not produce such result. The standards for considering a Motion for a New Trial based on newly discovered evidence are set out in Wright, Federal Practice & Procedure: §557, p. 515 as follows:

"Accordingly rather exacting standards have been developed by the courts for motions of this kind. A motion based on newly discovered evidence must disclose (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant."

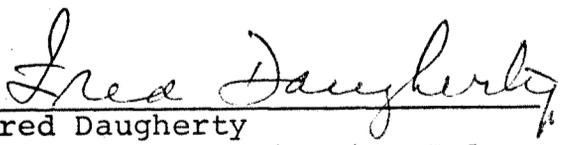
In considering such standards in the case at bar, it appears that the evidence purportedly newly discovered would be merely impeaching. It would be for the purpose of impeaching the testimony of the co-defendant by tending to show that he had

previously made statements to a local narcotics enforcement officer which were inconsistent with the witness's testimony at the time of the trial. At the trial such witness said he arranged a sale of amphetamines and a sale was to be effected; that Defendant Brown was his supplier for the sale; that he and Defendant Brown drove to the place where the sale was arranged for the purpose of consummating the same; that Defendant Brown left when he said the buyers were "narcs"; that some time thereafter and at a different location the witness testified he decided for the first time to get the officers' money but not before. Thus, the purported newly discovered evidence would be impeaching of this witness' testimony at the trial. Further, the Court finds that the purported evidence will not probably produce an acquittal of Defendant Brown.

Ground 5 appears to be the same as set out in Ground 1, supra, and for the same reason set out above regarding Ground 1, supra, is without merit.

Defendant Brown's Motion For A New Trial is denied in all respects.

It is so ordered this 16 day of December, 1974.


Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY C. PROCK,)
)
 Petitioner,)
)
 v.)
)
 RICHARD A. CRISP, Warden,)
 Oklahoma State Penitentiary,)
)
 Respondent.)

No. 74-C-486

E I L E D

DEC 13 1974 *rm*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

The above named petitioner, a prisoner of the State of Oklahoma proceeds herein under 28 U.S.C.A. § 2254. The case was filed in the Eastern Judicial District of Oklahoma and by that court transferred to this district pursuant to 28 U.S.C.A. § 2241(d). In his Petition he sets forth the following Statement of Facts:

"1). Petitioner was incarcerated for a twelve (12) year sentence from Tulsa County, On December 1, 1966, in Case Numbers 22, 159 thru 22,170; and was billed into the Oklahoma State Penitentiary under prison number 74692.

2). He was paroled on November 18, 1970, and remained at liberty on said parole until October 19, 1972.

3). On April 17, 1973, petitioner signed a voluntary parole revocation in Tulsa County, Oklahoma (prison number 74692).

4). Later, on the same date (April 17, 1973), petitioner was sentenced to an additional thirty (30) month sentence, Tulsa County Case Number CRF-72-2416.

5). Petitioner had 171 days jail-time credit.

6). Petitioner was returned to the Oklahoma State Penitentiary and billed in under prison number 86242, on the thirty (30) month sentence.

7). On August 8, 1973, petitioner allegedly escaped from custody.

8). On October 1, 1973, petitioner was arrested in Tulsa County and placed in the County Jail.

9). Subsequently, on March 29, 1974, petitioner was sentenced from Tulsa County, (Case Number CRF-73-1876) to a five (5) year prison sentence.

10). Petitioner had 189 days jail-time credit.

11). Petitioner was returned to the Oklahoma State Penitentiary on April 8, 1974, and billed in under prison number 87920, on the five (5) year sentence.

12). On April 10, 1974, petitioner was rebilled at the Oklahoma State Penitentiary to the thirty (30) month sentence under prison number 86242.

He further alleges that he has exhausted the remedies available to him in the courts of the State of Oklahoma.

He asks this court to construe various Oklahoma statutes and adjudge that he has already served his 1966 and 1973 sentences and that because of the State's errors in computing the manner in which he should serve his sentences he should not have to serve the balance of his 1974 sentence. In response to a similar claim that State statutes were inconsistent the Court of Appeals for this circuit stated in Ratley v. Crouse, 365 F.2d 320, 321 (CA10 1966):

"The question presented does not raise a federal question, so as to give a federal court authority to entertain this state prisoner's petition for a writ of habeas corpus. The question is simply one of interpretation of state statutes and properly, for the determination of the state courts."

Matters relating to sentencing, service of sentence and allowance of any credits are governed by state law and do not raise federal constitutional questions. Hill v. Page, 454 F.2d 679 (CA10 1971); Johnson v. Beto, 383 F.2d 197 (CA5 1967); Burns v. Crouse, 339 F.2d 883 (CA10 1964), cert. denied 380 U.S. 925; Handley v. Page, 279 F.Supp. 878 (W.D. Okla. 1968), affmd. 398 F.2d 351, cert. denied 394 U.S. 935.

The petitioner does not contend that Oklahoma law is being applied discriminately. Therefore this matter is one of state law alone, and raises no federal issue cognizable in federal habeas corpus. Accordingly, the Petition for Writ of Habeas Corpus will be dismissed.

IT IS SO ORDERED.

Dated this 13th day of December, 1974.


FRED DAUGHERTY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
) Plaintiff,)
 vs.) CIVIL ACTION NO. 74-C-386
)
)
 KENNETH DUANE HARNER and)
 ROSALON L. HARNER,)
)
) Defendants.)

E I L E D

DEC 13 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 13th
day of December, 1974, the plaintiff appearing by Robert P.
Santee, Assistant United States Attorney, and the defendants,
Kenneth Duane Harner and Rosalon L. Harner, appearing not.

The Court being fully advised and having examined
the file herein finds that Kenneth Duane Harner and Rosalon L.
Harner were served by publication, as appears from the Proof
of Publication filed herein.

It appearing that the said defendants have failed
to answer herein and that default has been entered by the
Clerk of this Court.

The Court further finds that this is a suit based
upon a mortgage note and foreclosure on a real property mortgage
securing said mortgage note and that the following described
real property is located in Tulsa County, Oklahoma, within
the Northern Judicial District of Oklahoma:

Lot Six (6), Block Eight (8), VALLEY VIEW
ACRES ADDITION, to the City of Tulsa, Tulsa
County, State of Oklahoma, according to the
recorded plat thereof.

THAT the defendants, Kenneth Duane Harner and Rosalon L.
Harner, did, on the 22nd day of March, 1974, execute and deliver
to the Administrator of Veterans Affairs, their mortgage and
mortgage note in the sum of \$9,500.00 with 8 1/4 percent interest
per annum, and further providing for the payment of monthly
installments of principal and interest.

The Court further finds that the defendants, Kenneth Duane Harner and Rosalon L. Harner, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon for more than eight months last past, which default has continued and that by reason thereof the above-named defendants are now indebted to the plaintiff in the sum of \$9,500.00 as unpaid principal, with interest thereon at the rate of 8 1/4 percent interest per annum from April 1, 1974, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against defendants, Kenneth Duane Harner and Rosalon L. Harner, in rem, for the sum of \$9,500.00 with interest thereon at the rate of 8 1/4 percent per annum from April 1, 1974, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said defendants to satisfy plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property and apply the proceeds thereof in satisfaction of plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

Lisa Daugherty
United States District Judge

APPROVED.



ROBERT P. SANTEE
Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America,)
)
 Plaintiff,)
) CIVIL ACTION NO. 74-C-62
 vs.)
) Tract No. 503ME
 160.00 Acres of Land, More or)
 Less, Situate in Osage County,)
 State of Oklahoma, and L. R.)
 Stith, et al., and Unknown)
 Owners,)
)
 Defendants.)

FILED
DEC 13 1974
Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

1.

NOW, on this _____ day of December, 1974, this matter comes on for disposition on application of Plaintiff, United States of America, for entry of judgment on a stipulation agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for Plaintiff, finds:

2.

This judgment applies to the entire estate condemned in Tract No. 503ME, as such estate and tract are described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of Federal Rules of Civil Procedure on all parties defendant in this cause who are interested in subject tract.

5.

The Acts of Congress set out in paragraph 2 of the Complaint herein give the United States of America the right, power, and authority to condemn for public use the estate described in paragraph 2 herein. Pursuant thereto, on January 29, 1974, the United States of America filed its Declaration of Taking of such

described property, and title to the described estate in such property should be vested in the United States of America as of the date of filing the Declaration of Taking.

6.

Simultaneously with filing of the Declaration of Taking, there was deposited in the Registry of this Court, as estimated compensation for the taking of a certain estate in the subject tract a certain sum of money, and none of this deposit has been disbursed, as set out in paragraph 14 below.

7.

On the date of taking in this action, the owner of the estate taken in subject tract was the defendant whose name is shown in paragraph 14 below. Such named defendant is the only person asserting any interest in the estate taken in such tract. All other persons having either disclaimed or defaulted, such named defendant is entitled to receive the just compensation for the estate taken in this tract.

8.

The owner of the subject property and the United States of America have executed and filed herein a Stipulation As To Just Compensation wherein they have agreed that just compensation for the estate condemned in subject tract is in the amount shown as compensation in paragraph 14 below, and such stipulation should be approved.

9.

Certain Stipulations For Exclusion Of Property have been executed by the owners and the United States of America, and were filed herein on July 24, 1974, September 3, 1974, and October 23, 1974, whereby certain improvements, situated on the subject tract were excluded from the taking in this case and it was agreed that the award of compensation for such tract would not include any sum for such improvements, and such Stipulations should be approved.

10.

This judgment will create a deficiency between the amount deposited as estimated compensation for subject tract and the amount

fixed by the Stipulation As To Just Compensation, and the amount of such deficiency should be deposited for the benefit of the owner. Such deficiency is set out in paragraph 14 below.

11.

It Is, Therefore, ORDERED, ADJUDGED, and DECREED that the United States of America has the right, power, and authority to condemn for public use the tract named in paragraph 2 herein, as such tract is particularly described in the Complaint filed herein; and such tract, with the exception of the property excluded by paragraph 13, to the extent of the estate described in such Complaint, is condemned and title thereto is vested in the United States of America, and all defendants herein and all other persons interested in such estate are forever barred from asserting any claim thereto.

12.

It Is Further ORDERED, ADJUDGED, and DECREED that on the date of taking, the owner of the estate condemned herein in subject tract was the defendant whose name appears below in paragraph 14, and the right to receive just compensation for the estate taken herein in this tract is vested in the party so named.

13.

It Is Further ORDERED, ADJUDGED, and DECREED that the Stipulations For Exclusion Of Property mentioned in paragraph 9 above are hereby confirmed, and title to the property covered by such Stipulations remains vested in the defendant owners.

14.

It Is Further ORDERED, ADJUDGED, and DECREED that the Stipulation As To Just Compensation, mentioned in paragraph 8 above, hereby is confirmed; and the sum therein fixed is adopted as the award of just compensation for the estate condemned in subject tract as follows:

TRACT NO. 503ME

Owner: L. R. Stith

Award of just compensation pursuant to Stipulation -----	\$50,000.00	\$50,000.00
Deposited as estimated compensation -	10,050.00	
Disbursed to owner -----		<u>None</u>
Balance due to owner -----		\$50,000.00
Deposit deficiency -----	\$39,950.00	

15.

It Is Further ORDERED, ADJUDGED, and DECREED that the United States of America shall deposit in the Registry of this Court, in Civil Action No. 74-C-62, to the credit of subject tract, the deficiency sum of \$39,950.00, and the Clerk of this Court then shall disburse

To - L. R. Stith ----- \$50,000.00.

/s/ Allen E. Barrow

UNITED STATES DISTRICT JUDGE

APPROVED:

/s/ Hubert A. Marlow

HUBERT A. MARLOW
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KARL KELSO, d/b/a KELSO DRYWALL COMPANY,)
)
 . Plaintiff,)
)
 -vs-)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

Case No. 74-C-266

E I L E D

DEC 13 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

This is an action by a taxpayer against the United States of America for determination that certain taxes assessed against him by the United States are invalid and for the return of certain token payments made by him on the assessments. Plaintiff also seeks to enjoin the United States from taking any steps toward the collection of the taxes in question. Plaintiff has alleged two causes of action arising out of the same basic operative facts.

For his first cause of action Plaintiff alleges that he is engaged in the drywalling business in Tulsa, Oklahoma; that Defendant audited his books for the years 1968, 1969, and 1970 and determined that Federal Insurance Contribution Taxes and Federal Unemployment Taxes had not been paid on the earnings of several persons employed by Plaintiff and assessed Federal Insurance Contribution Taxes and Federal Unemployment Taxes thereon. At the suggestion of a Collections Officer employed by the

Internal Revenue Service Plaintiff made token payments on the assessments and simultaneously filed a claim for refund. More than six months have passed since Plaintiff filed the claim for refund and no action has been taken by the Internal Revenue Service. Plaintiff therefore assumes that his claim has been rejected and has brought this action. It is Plaintiff's position that the persons upon whose earnings the abovementioned taxes were assessed were not his employees upon whose earnings such taxes must be paid but were, in fact, independent contractors.

For his second cause of action, Plaintiff alleges that he filed a timely protest to the Report of Estimated Deficiencies which resulted from the abovementioned audit of his books. The protest was mailed on September 29, 1971 and was received by the Internal Revenue Service on October 1, 1971. Defendant did not acknowledge receipt of the protest until October 11, 1972. Defendant filed a tax lien against Plaintiff prior to its acknowledgment of Plaintiff's protest. It is Plaintiff's position that the tax lien is void and he has sought its release. Defendant has refused to release it. Plaintiff states that he has been brought to the verge of bankruptcy by reason of the tax lien imposed by Defendant. Plaintiff's prayer for relief in his second cause of action is that Defendant be enjoined from

taking any action toward the collection of any tax assessed against him as a result of the abovementioned audit until the first cause of action has been determined on its merits.

Defendant has filed a Motion to Dismiss the second cause of action which Motion is currently at issue before the Court. The Motion states four grounds for dismissal. The first is that this court lacks subject matter jurisdiction over the second cause of action by reason of the sovereign immunity of the United States. The second is that the second cause of action is barred by 26 U.S.C. §7421(a). The third ground is that the second cause of action fails to state a claim upon which relief can be granted. The fourth ground is that, with regard to the second cause of action, the Complaint fails to comply with the pleading requirements of Rule 8(a), Federal Rules of Civil Procedure, in that it does not contain a short plain statement of the grounds upon which the Court's jurisdiction rests. Ground four is without merit and ground three depends on grounds one and two. Defendant's Motion is essentially a Rule 12(b)6, Federal Rules of Civil Procedure, Motion to Dismiss for failure to state a claim upon which relief can be granted and will be treated accordingly. The bases for the Motion are what Defendant has labeled grounds for dismissal one and two.

With regard to Defendant's first contention, which is that this suit insofar as the second cause of action is concerned, is barred by the sovereign immunity of the United States, it is true that the United States as a Sovereign is immune from suit except where Congress has waived the immunity by a specific statute. United States v. Alabama, 313 U.S. 274, 86 L.Ed. 1327, 61 S.Ct. 1011 (1941); Affiliated Ute Citizens v. United States, 406 U.S. 128, 31 L.Ed. 2d 741, 92 S.Ct. 1456 (1972). However, suits to enjoin the collection of taxes are allowed in certain narrowly limited circumstances. The United States Supreme Court has stated that notwithstanding the prohibition of 26 U.S.C. §7421(a) which reads:

"Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person against whom the tax was assessed."

a suit to restrain the collection of taxes may be brought if, (1) under no circumstances could the government ultimately prevail, and (2) equity jurisdiction otherwise exists. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 8 L.Ed. 2d 292, 82 S.Ct. 1125 (1962); Bob Jones University v. Simon, _____ U.S. _____, 40 L.Ed. 2d 496, 94 S.Ct. _____ (1974). The reason for this rule is that in such circumstances the assessment is not a tax but is merely the guise of a tax. Both of the above-

mentioned conditions must be satisfied to bring a case into the limited range of exceptions to 26 U.S.C. §7421(a). In

Enochs v. Williams Packing & Navigation Co., supra, the Court

stated:

"...if Congress had desired to make the availability of the injunctive remedy against the collection of federal taxes not lawfully due depend on the adequacy of the legal remedy, it would have said so explicitly. Its failure to do so shows that such a suit may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise. This is not to say, of course, that inadequacy of the legal remedy need not be established if §7421(a) is inapplicable; indeed, the contrary rule is well established."

Plaintiff has wholly failed to establish either one of the prerequisites. He pleads no facts which show that Defendant can under no circumstances ultimately prevail, nor does he plead facts which establish the existence of equity jurisdiction. For the purposes of a Motion to Dismiss for failure to state a claim upon which relief can be granted, the Complaint is considered in the light most favorable to Plaintiff and the allegations in his Complaint are taken as true. However, only well pleaded facts are taken as true and mere conclusory allegations are not taken as true. 5 Federal Practice & Procedure, Wright and Miller, 1357.

Plaintiff has failed to show that under no circumstances will Defendant prevail on the merits of this case. It is well established that tax assessments are presumed to be valid. Plaintiff has the burden of setting forth well-pleaded facts from which a district court can conclude that the assessments were only in the guise of a tax. Cole v. Cardoza, 441 F. 2d 1337 (Sixth Cir. 1971).

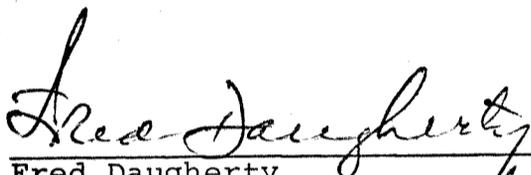
It appears from the pleadings which are before the Court at this time that a legitimate controversy as to the validity of the assessments in question exists. There is a legitimate controversy as to whether certain people are employees of Plaintiff or are independent contractors. It cannot be said that the Defendant has no chance of ultimately prevailing on the merits of this controversy by showing that the people involved were in fact employees of Plaintiff and that the assessment is not merely the guise of a tax.

Furthermore, there are no well pleaded facts which show that the equity jurisdiction of this Court in this case would otherwise exist. Plaintiff's conclusory allegation that he has been brought to the verge of bankruptcy by Defendant's tax lien is insufficient to establish the existence of equitable

jurisdiction. Enochs v. Williams Packing & Navigation Co.,
supra. The remedies afforded for the determination of the
validity and invalidity of the tax assessments appear adequate.

Therefore Defendant's Motion To Dismiss Plaintiff's
Second Cause of Action should be sustained.

It is so ordered this 13th day of December, 1974.



Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

CIVIL ACTION NO. 74-C-433

JOHN T. HARLESS and)
SANDRA JEAN HARLESS,)

Defendants.)

FILED

DEC 12 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 11th
day of December, 1974, the plaintiff appearing by Robert P.
Santee, Assistant United States Attorney, and the defendants,
John T. Harless and Sandra Jean Harless, appearing not.

The Court being fully advised and having examined
the file herein finds that John T. Harless and Sandra Jean
Harless were served with Summons and Complaint on November 8,
1974, as appears from the Marshal's Return of Service herein.

It appearing that the said defendants have failed
to answer herein and that default has been entered by the
Clerk of this Court.

The Court further finds that this is a suit based
upon a mortgage note and foreclosure on a real property mortgage
securing said mortgage note and that the following described
real property is located in Tulsa County, Oklahoma, within
the Northern Judicial District of Oklahoma:

Lot Twenty-two (22), in Block Seven (7),
NORTHGATE SECOND ADDITION, to the City of
Tulsa, Tulsa County, Oklahoma, according
to the recorded plat thereof.

THAT the defendants, John T. Harless and Sandra Jean
Harless, did, on the 25th day of May, 1973, execute and deliver
to the Administrator of Veterans Affairs, their mortgage and
mortgage note in the sum of \$11,500.00 with 4 1/2 percent
interest per annum, and further providing for the payment
of monthly installments of principal and interest.

The Court further finds that the defendants, John T. Harless and Sandra Jean Harless, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon for more than ten months last past, which default has continued and that by reason thereof the above-named defendants are now indebted to the plaintiff in the sum of \$11,483.66 as unpaid principal, with interest thereon at the rate of 4 1/2 percent interest per annum from February 1, 1974, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against defendants, John T. Harless and Sandra Jean Harless, in personam, for the sum of \$11,483.66 with interest thereon at the rate of 4 1/2 percent per annum from February 1, 1974, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said defendants to satisfy plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

William C. Barrow
United States District Judge

APPROVED.

Robert P. Santee

ROBERT P. SANTEE
Assistant United States Attorney

bcs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JIMMY DALE KUPIEC, 82 386,)
)
Petitioner,)
)
v.)
)
THE STATE OF OKLAHOMA, et al)
)
Respondents.)

No. 74-C-285 ✓

FILED

DEC 12 1974 *hm*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

This is a proceeding for writ of habeas corpus by a state prisoner who challenges the validity of the judgments and sentences of the District Court of Tulsa County in cases numbered CRF-70-1647 and CRF-70-1648. The respondents have filed their answer by and through the Attorney General for the State of Oklahoma and submitted therewith the original records including the trial transcripts of both cases.

The petitioner contends that he is unlawfully detained and seeks his release from custody on the following grounds:

1. "It was a denial of Sixth Amendment guarantee of the Fair Trial when petitioner was not prosecuted under a two (2) count information."
2. "The trial court erred in overruling petitioner's motion to suppress the in-court identification made by the witness, Jeanette Stout."
3. "The fair trial guaranteed petitioner by the Sixth Amendment was forever lost when the court refused to declare a mistrial when his co-defendant entered a plea of guilty to CRF-70-1648."
4. "Petitioner was denied a fair trial through the unethical and prejudicial remarks of the prosecuting attorneys."

From the court's examination of the records in said case. No. CRF-70-1648 it appears that the petitioner was charged by information on September 1, 1970, with the offense of Robbery With Firearm. After trial by jury he was found guilty on February 6, 1971 and sentenced on March 24, 1971 to a term of 20 to 60 years imprisonment.

In Case No. CRF-70-1647 the petitioner was charged by information on September 1, 1970, with the offense of First Degree Rape. After a trial by jury he was found guilty of this offense on March 25, 1971 and sentenced on April 5, 1971, to serve a term of 103 years imprisonment. The evidence is fully set forth in the Opinion of the Court of Criminal Appeals of the State of Oklahoma in petitioner's consolidated appeal handed down January 19, 1972. Kupiec v. State, 493 P.2d 444. Therein the appellate court treated among others the present issues concerning the in-court identification by the rape victim and the effect of petitioner's co-defendant's plea of guilty. Having determined all issues adversely to the petitioner the judgments and sentences in each case were affirmed. Thereafter the petitioner filed an application for post conviction relief in which he asserted that he had been subjected to double jeopardy and that his convictions were invalid because "two district attorneys refused to let anyone who opposed the death penalty sit on the jury." The sentencing court denied relief on April 21, 1972, and was affirmed June 21, 1972, by the Court of Criminal Appeals. On March 1, 1974, the petitioner again filed an application for post conviction relief in the sentencing court in which he stated that he presented his present allegations. The sentencing court on March 29, 1974, denied and dismissed this application without an evidentiary hearing on the ground that the petitioner had already exhausted his state remedies. Apparently no appeal was taken from this order to the Oklahoma Court of Criminal Appeals. Under these circumstances, the court finds the petitioner has exhausted his state remedies.

Under his first proposition the petitioner claims that he should not have been tried separately for the two offenses but should have been tried in a single trial under a two-count information filed pursuant to 22 O.S.A. § 404. However, "petitioner concedes although both crimes took place during the same incident they were separate and distinct acts and a conviction or acquittal on one would not bar prosecution on the other. Otherwise, this multiple

charge was not double jeopardy; therefore, the criminal rule of collateral estoppel adopted by United States Supreme Court in Ash v. Swenson, ____ U.S. ____, 89 S.Ct. ____, does not apply." The allegations do not present a federal constitutional question but simply involve an interpretation of state law. There is no rule compelling the joinder of separate offenses even though they arise out of the same transaction. Moton v. Swenson, 488 F.2d 1060 (CA8 1973); United States v. Corallo, 309 F.Supp. 1282 (S.D. N.Y. 1970); United States v. Miller, 259 F.Supp. 294 (E.D. Pa. 1966). The Oklahoma court has refused to give the Oklahoma statute the construction contended for by the petitioner. The federal court must accept the interpretation of state law unless it is inconsistent with the fundamental principles of liberty and justice. See Francia v. Rodriguez, 370 F.2d 827 (CA10 1967); Ratley v. Krouse, 365 F.2d 320 (CA10 1966); and Mesmer v. Raines, 298 F.2d 718 (CA10 1961). No such showing is made here.

The petitioner first contends that the in-court identification by the rape victim was tainted because he was without counsel at the line up. The record clearly reflects that the line up was conducted on August 31st, prior to any charge being filed against the petitioner on September 1st and therefore counsel was not constitutionally required. Kirby v. Illinois, 406 U.S. 892 (1972). He next contends that the in-court identification was tainted because allegedly a short time prior to the line up in the Tulsa Police Station the petitioner was paraded in the Tulsa County Sheriff's Office in front of the witness in handcuffs. In the first case tried, before the petitioner was identified at the trial, the court conducted an in camera hearing concerning the circumstances of any pre-trial confrontation. Mrs. Stout, the victim, testified that she did not see the petitioner at the Sheriff's office and there was no suggestiveness by the officers in any of the identification procedures. The mother of petitioner's co-defendant, and petitioner's wife and sister-in-law testified that the petitioner had been taken through the Sheriff's office in manacles in the presence of Mrs.

Stout. The trial court having heard all the evidence outside of the presence of the jury overruled the motion to suppress Mrs. Stout's identification testimony. The hearing afforded by the trial judge satisfies fully the requirements of 28 U.S.C.A. § 2254 and is presumed to be correct. Petitioner does not claim that this hearing did not meet the rule of Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), or challenge it on any of the grounds set forth in 28 U.S.C.A. § 2254(d) and (e). After independent review of the proceedings of the evidentiary hearing conducted by the District Court of Tulsa County, we find that there was factual and legal support for the adjudication of the trial court and approve the same. This court, therefore, is not required to hold an evidentiary hearing on this issue. See Maxwell v. Turner, 411 F.2d 805 (CA10 1969). The state in neither case made any effort to buttress its in-court identification by eliciting the challenged pretrial identification. Assuming, contrary to the victim's own testimony that she did not see the petitioner in the Sheriff's office, that petitioner's allegations are true concerning such an encounter, this would not necessarily fatally taint the in-court identification by the witness. The legality of the pretrial line up is of no relevance where there is not introduced at the trial any evidence of the line up and the in-court identification clearly has an independent source. United States v. Wade, 388 U.S. 218, 239-243 (1967); Clemmons v. United States, 408 F.2d 1230 (D.C. Cir. 1968) cert. denied, 394 U.S. 964. Improper suggestiveness does not alone require the exclusion of evidence. Neal v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972). In that case the Supreme Court recognized the rule of admissibility to be whether there is substantial likelihood of misidentification under the "totality of the circumstances." Critical factors to be evaluated in such consideration included "the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and confrontation." 409 U.S.

at 199. By each of these criteria the reliability of identification of the petitioner is demonstrated. The witness had ample opportunity to view her attacker in the light of her home where he was present for approximately an hour. She was attentive enough to his appearance to give the investigating officers a description. There was no doubt in her mind about her identification. The confrontation took place less than one week after the commission of the offense. She testified that her identification was based upon what she remembered from the time of the crime rather than the line up or pictures and that she would never forget his face. (Tr. 544). The court's examination of the record thus makes it abundantly clear that the in-court identification by the witness had an independent origin and it can be said with certainty that this witness would have made the same identification of petitioner at the time of the trial if there had been no intervening pretrial confrontation.

During the course of the armed robbery trial petitioner's co-defendant entered a plea of guilty outside the presence of the jury. The trial court stated to the jury:

"I want to advise you at this point that the question of guilt or innocence of the defendant Benjamin is no longer for your consideration; you will have for your consideration only the guilt or innocence of the defendant Kupiec. I would like to inquire at this point of the entire panel if any of you have heard anything about the case, or read anything about the case since its inception."

The trial court then received negative responses from all of the jurors. The statement by the court was nothing more than an explanation to the jury that the co-defendant was no longer a participant in the trial, and this did not constitute prejudicial error. See United States v. Thomas, 468 F.2d 422 (CA10 1972).

The remarks of the prosecutor complained of by the petitioner are at most trial errors and are not of constitutional significance. Trial errors involving misconduct of the prosecuting attorney can only be reviewed by appeal. Alexander v. Daugherty, 286 F.2d 647 (CA10 1961). On collateral attack the issue is not whether the statements of the district attorney were error but whether the conviction of the petitioner was the result of an unfair trial in violation of the

Fourteenth Amendment. Sampsell v. People of the State of California, 191 F.2d 721 (CA9 1951). It is only where criminal trials in state courts are conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended and federal court interference is warranted. Chavez v. Dickson, 280 F.2d 727 (CA9 1960). After careful consideration of the remarks of the prosecutor it cannot be said that they resulted in a denial of the fundamental fairness essential to the concept of justice. It is true, of course, that comment by the prosecutor or the court in a state court prosecution upon an accused's failure to take the stand and testify in his own behalf is federal constitutional error. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). The petitioner submits that the comment of the prosecutor in his closing argument in the armed robbery trial constituted such a forbidden comment. The prosecutor told the jury:

"I can't tell you what to do back there. That is your decision. Each of you told me that you would make that decision based upon the law and the evidence. There is only one verdict so far as guilt or innocence; there is nothing else but guilt in this case. Mr. Hopper [defense counsel] said he wasn't out there, but there is another story. That man raped that woman and robbed those people. You haven't heard it in court. You heard the story . . ."
(Emphasis supplied by petitioner.)
(Tr. 706, CRF-70-1648.)

Such comment of the prosecutor did not directly and unequivocally call the attention to the jury to the failure of the accused to testify. The applicable standard is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment upon the failure of the defendant to testify. Knowles v. United States, 224 F.2d 168 (CA10 1955). Tilford v. Page, 307 F.Supp. 781 (W.D. Okla. 1969). By this test there was no error. It is not improper for the prosecutor to call to the jury's attention that the evidence before it is uncontradicted. Robbins v. United States, 474 F.2d 26 (CA10 1973); United States v. Lepiscopo, 458 F.2d 977 (CA10 1972). It is the general rule that:

"It is not forbidden that counsel argue that the evidence against the defendant is uncontroverted or that the appellant failed to produce testimony on any phase of defense

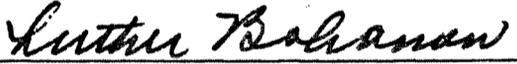
upon which he relies. This is especially true when evidence against the defendant could be contradicted by someone other than himself."

Ruiz v. United States, 365 F.2d 103 (CA10 1966). Here the evidence against the accused was uncontradicted. The only evidence presented by the defense at most tended to discredit the identification by the victim, Mrs. Stout. Under these circumstances this court cannot conclude that the comment was directed to the failure of the petitioner to testify or had the effect of emphasizing such failure. There is not here presented that sort of flagrant misconduct necessary to establish a denial of constitutional due process for relief on collateral attack. See Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

Since the application together with the files and records examined by the court conclusively show the petitioner is entitled to no relief and there are no material issues of fact, this court is not required to conduct an evidentiary hearing. Boyd v. State of Oklahoma, 375 F.2d 481 (CA10 1967). Accordingly, the Petition for Writ of Habeas Corpus will be denied.

IT IS SO ORDERED.

Dated this 9th day of December, 1974.


LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OKLAHOMA

PETER J. BRENNAN, Secretary of Labor,)
United States Department of Labor,)
)
Plaintiff,)
)
-vs-)
)
VERNON PRICE, d/b/a UPRIGHT DRYWALL)
CO.,)
)
Defendant.)

No. 73-C-269

FILED

DEC 11 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

This cause comes now for hearing upon the plaintiff's Motion for Default and this matter having been set, and notice have been given and the plaintiff appearing not and the defendant appearing by its attorney, Jeff Nix, the Court, upon proper motion pursuant to Rule 41(b), is of the opinion this matter should be dismissed for failure to prosecute.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED this cause be, and is hereby, dismissed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

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Allen E. Barrow, United States District Judge
for the Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 10 1974

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
 -v-)
)
 EDWARD W. LEE, ET AL,)
)
 Defendants.)

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Civil Action No. 74-C-332

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 9th
day of December, 1974, the plaintiff appearing by Robert P.
Santee, Assistant United States Attorney; the defendant
Interstate Securities, Inc. appearing by its attorney, Warren
L. McConnico, and the defendants Edward W. Lee and Margaret
Lee appearing not.

The Court, being fully advised and having examined
the file herein, finds that Interstate Securities, Inc. was
served with Summons and Complaint on August 14, 1974, as appears
from the Marshal's Returns of Service filed herein; and that
Edward W. Lee and Margaret Lee were served by publication, as
appears from Proof of Publication filed herein.

It appears that Interstate Securities, Inc. has filed
its Disclaimer on August 23, 1974, and that Edward W. Lee and
Margaret Lee have failed to answer herein and that default has
been entered by the Clerk of this Court.

The Court further finds that this is a suit based
upon a mortgage note and foreclosure on a real property mort-
gage securing said mortgage note covering the following-
described real property located in Tulsa County, Oklahoma,
within the Northern Judicial District of Oklahoma:

Lot Nineteen (19) in Block Three (3) Northgate
Third Addition to the City of Tulsa, Tulsa County,
Oklahoma, according to the recorded plat thereof.

That the defendants Edward W. Lee and Margaret Lee did, on the 14th day of September, 1970, execute and deliver to Diversified Mortgage & Investment Company their mortgage and mortgage note in the sum of \$14,250.00, with 8-1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

That by Assignment of Mortgage of Real Estate dated September 30, 1970, Diversified Mortgage & Investment Company assigned said note and mortgage to Federal National Mortgage Association; and that by Assignment of Mortgage of Real Estate dated February 1, 1971, Federal National Mortgage Association assigned said note and mortgage to the Secretary of Housing and Urban Development, Washington, D.C.

The Court further finds that the defendants Edward W. Lee and Margaret Lee made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon for more than 12 months last past, which default has continued, and that by reason thereof, the above-named defendants are now indebted to the plaintiff in the sum of \$14,232.71, with interest thereon from November 1, 1970, at the rate of 8-1/2 percent per annum, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against defendants Edward W. Lee and Margaret Lee, in rem, for the sum of \$14,232.71, with interest thereon at the rate of 8-1/2 percent per annum from November 1, 1970, plus the cost of this action, accrued and accruing, plus any additional sums advanced or to be advanced for taxes, insurance or abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said defendants to satisfy plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the defendants, and each of them, and all persons claiming under them since the filing of the complaint herein, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

151

Allen E. Barrow

United States District Judge

APPROVED:



ROBERT P. SANTEE
Assistant U. S. Attorney
Attorney for the Plaintiff,
United States of America

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DENNIS LOANE,

Petitioner,

vs.

PARK ANDERSON, Warden, Oklahoma
State Penitentiary, McAlester,
Oklahoma,

Respondent.

NO. 73-C-387

FILED

DEC 10 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration the motion for dismissal without prejudice and memorandum of the petitioner. The Court, having perused the file and being fully advised in the premises, finds that petitioner may still pursue his remedies in the State Courts first, as he asserts, pursuant to 22 O.S.A. §§ 1080, 1086; 12 O.S.A. §§ 1331, et seq.; and Campbell v. State, Okl. Cr., 500 P.2d 303 (1972). The motion should be sustained and petitioner thereby encouraged to first seek relief in the State Courts.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Dennis Loane be and it is hereby denied and dismissed without prejudice to petitioner's right to file, if necessary, a later petition.

Dated this 10th day of December, 1974, at Tulsa, Oklahoma.

Allen E. Barrow
Chief Judge, United States District
Court for the Northern District of
Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,) CIVIL ACTION NO. 74-C-394
)
 vs.)
)
 EDDIE WILLIAMS, SAVANAH WILLIAMS,)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma, and BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

DEC 10 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 9th day
of December, 1974, the plaintiff appearing by Robert P.
Santee, Assistant United States Attorney for the Northern District
of Oklahoma, and the defendants, Board of County Commissioners and
County Treasurer, appearing by and through their attorney, Gary J.
Summerfield, Assistant District Attorney of District No. 14, Tulsa
County, Oklahoma, and the defendants, Eddie Williams and Savannah
Williams, appearing not.

The Court being fully advised and having examined
the file herein finds that due and legal process of service was
made upon the defendants, County Treasurer and Board of County
Commissioners, Tulsa County, Oklahoma, on October 4, 1974, as
appears from the Marshal's Returns of Service herein and that these
defendants filed their Answers herein on October 23, 1974; that due
and legal process of service was made upon defendants, Eddie
Williams and Savannah Williams, as appears from the Marshal's Returns
of Service herein, and

It appearing that the defendants, Eddie Williams and
Savanah Williams, have failed to answer herein and that default
has been entered by the Clerk of this Court.

The Court further finds that this is a suit based
upon a mortgage note and foreclosure on a real property mortgage

securing said mortgage note and that the following described real property is located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Nineteen (19), Block One (1), SKYLINE HEIGHTS ADDITION, Tulsa County, State of Oklahoma, according to the recorded plat thereof,

and

A portion of Lot Twenty (20), Block One (1), being more particularly described as follows, to-wit: Beginning at the SE corner of Lot Nineteen (19), (NE corner of Lot Twenty (20)); Thence Southwesterly for 30.63 feet; to a point; Thence Northwesterly for 83.79 feet to the SW corner of Lot Nineteen (19) (NW corner of Lot 20); Thence East and along the original South line of said Lot Nineteen (19) (North line of Lot 20) for 113.59 feet to the point of beginning.

THAT the defendants, Eddie Williams and Savannah Williams, did, on the 3rd day of March, 1971, execute and deliver to Mercury Mortgage Company, Inc., their mortgage and mortgage note in the sum of \$17,850.00, with 7 percent interest per annum from date until paid, and further providing for the payment of monthly installments of principal and interest.

That by Assignment of Mortgage of Real Estate dated July 14, 1971, said Mortgage Note and Mortgage were assigned to New York Savings and Loan Association, and by Assignment of Mortgage of Real Estate dated August 3, 1973, the New York Savings and Loan Association assigned said Mortgage Note and Mortgage to the Secretary of Housing and Urban Development, Washington, D. C., his successors and Assigns.

The Court further finds that the defendants, Eddie Williams and Savannah Williams, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon for more than 12 months last past, which default has continued and that by reason thereof the above-named defendants are now indebted to the plaintiff in the sum of \$17,471.06 as unpaid principal, with interest thereon at the rate of 7 percent interest per annum from March 1, 1973, until paid,

plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Eddie Williams and Savannah Williams, the sum of \$ 401.50 , plus interest according to law, for ad valorem taxes for the year 1973, and \$365.60 for 1974 taxes, and that Tulsa County should have judgment, in rem, for said amount.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against defendants, Eddie Williams and Savannah Williams, in personam, for the sum of \$17,471.06 with interest thereon at the rate of 7 percent per annum from March 1, 1973, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa, State of Oklahoma, have and recover judgment, in rem, against the defendants, Eddie Williams and Savannah Williams, for the sum of \$ 767.10 as of the date of this judgment, plus interest thereafter according to law, and that such judgment be and is hereby superior to the first mortgage lien of the plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said defendants to satisfy plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, the defendants, Eddie Williams and Savannah Williams, and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and

foreclosed of any right, title, interest or claim in or to the
real property or any part thereof.

Allen E. Barrow
United States District Judge

APPROVED.

Robert P. Santee
ROBERT P. SANTEE
Assistant United States Attorney

Gary J. Summerfield
GARY J. SUMMERFIELD
Assistant District Attorney
District No. 14, Tulsa County, Okla.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

-v-

VERONICA BUTLER, ET AL,

Defendants.

FILED

DEC 9 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Civil Action No. 74-C-334

JUDGMENT OF FORECLOSURE

THIS MATTER comes on for consideration this 9th day
December, 1974, the plaintiff appearing by Robert
P. Santee, Assistant United States Attorney; the defendants
County Treasurer, Tulsa County, and Board of County Commissioners,
Tulsa County, appearing by their attorney, Gary J. Summerfield,
and the defendant Veronica Butler appearing not.

The Court, being fully advised and having examined the
file herein, finds that County Treasurer, Tulsa County, and Board
of County Commissioners, Tulsa County, were served with Summons
and Complaint on August 19, 1974, as appears from the Marshal's
Returns of Service filed herein; and that Veronica Butler was
served by publication, as appears from Proof of Publication filed
herein.

It appears that County Treasurer, Tulsa County, and
Board of County Commissioners, Tulsa County, have duly filed
their Answers on August 28, 1974, and that Veronica Butler has
failed to answer herein and that default has been entered by the
Clerk of this Court.

The Court further finds that this is a suit based
upon a mortgage note and foreclosure on a real property mortgage
securing said mortgage note covering the following-described
real property located in Tulsa County, Oklahoma, within the
Northern Judicial District of Oklahoma:

Lot Twenty-two (22), Block Two (2), Briarglen Meadows, an Addition in the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

That the defendant Veronica Butler did, on the 21st day of January, 1972, execute and deliver to the Mercury Mortgage Co., Inc. her mortgage and mortgage note in the sum of \$21,000.00, with seven percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

That by Assignment of Mortgage of Real Estate dated January 25, 1972, the Mercury Mortgage Co., Inc. assigned said note and mortgage to the Federal National Mortgage Association; that by Assignment of Mortgage of Real Estate dated November 29, 1972, the Federal National Mortgage Association assigned said note and mortgage to the Lomas & Nettleton Company; and that by Assignment of Mortgage of Real Estate dated June 6, 1973, the Lomas & Nettleton Company assigned said note and mortgage to the Secretary of Housing and Urban Development, Washington, D.C.

The Court further finds that the defendant Veronica Butler made default under the terms of the aforesaid mortgage note by reason of her failure to make monthly installments due thereon for more than 12 months last past, which default has continued, and that by reason thereof, the above-named defendant is now indebted to the plaintiff in the sum of \$20,840.06, with interest thereon from November 1, 1972, at the rate of seven percent per annum, until paid, plus the cost of this action, accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Veronica Butler the sum of \$457.40, for ad valorem taxes for the year 1973, and \$423.18 for 1974 ad valorem taxes, and that Tulsa County should have judgment, in rem, for said amount.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against defendant Veronica Butler, in rem, for the sum of \$20,840.06, with interest thereon at the rate of seven percent per annum from November 1, 1972, plus the cost of this action, accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by plaintiff for taxes, insurance or abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against the defendant Veronica Butler for the sum of \$ 880.58 as of the date of this judgment, plus interest thereafter according to law, and that such judgment is superior to the first mortgage lien of the plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said defendant to satisfy plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of plaintiff's judgment, which sale shall be subject to the tax judgment of Tulsa County, supra. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

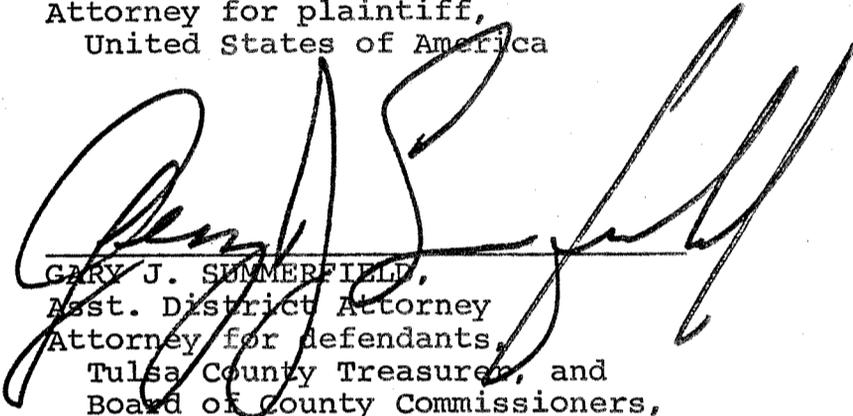
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the defendants, and each of them, and all persons claiming under them since the filing of the complaint herein, be and they are forever barred and foreclosed of

any right, title, interest or claim in or to the real property
or any part thereof.

15/ Allen E. Barrow
United States District Judge

APPROVED:


ROBERT P. SANTEE
Assistant United States Attorney
Attorney for plaintiff,
United States of America


GARY J. SUMMERFIELD,
Asst. District Attorney
Attorney for defendants,
Tulsa County Treasurer, and
Board of County Commissioners,
Tulsa County

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE MATTER OF
SAMUEL BROKERAGE, INCORPORATED,
Debtor.

In Proceedings for Involuntary
Bankruptcy.

No. 73-B-349

FILED

DEC 9 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

NOW on this 9 day of Dec., 1974,
comes on for hearing a Stipulation of Petitioners and Debtor
in the above entitled cause. The Court finds that said
parties to this cause have entered into a Settlement Agree-
ment and that Debtor and its President, Joe L. Samuel,
individually, have caused an Assignment to be made for the
benefit of creditors of the Debtor's bankruptcy claim
against Goldstein, Samuelson, Inc. in the United States
District Court for the Central District of California,
Bankruptcy No. 73-30131, in the amount of \$749,652.75 and
costs, in full settlement of Petitioners' claim and cause of
action set forth in the Petition herein. The Court further
finds based upon the affidavit of Petitioners' counsel that
more than ten (10) days prior to this date Notice of Dismissal
of this action was given to all creditors which appear on
the Schedule of Creditors previously filed with the Court
and there being no objection to dismissal of this proceeding
having been filed with the Court, it appears that Petitioners
have accepted said assignment in full satisfaction, release
and discharge of their cause of action and claim against
Debtor, and the Court, after due consideration, finds that
said dismissal should be approved.

IT IS, THEREFORE, ORDERED that this cause be, and
the same is, hereby dismissed with prejudice.



United States District Judge

APPROVED AS TO FORM:


Attorney for Petitioners
Attorney for Debtor

E I L E D

DEC 9 1974

Jack C. Silver, Clerk *JCS*

U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In the Matter of
SAMUEL BROKERAGE, INCORPORATED,
Debtor.

In Proceedings for Involuntary
Bankruptcy.

No. 73-B-349 ✓

STIPULATION

The parties herein, through their Attorneys of record, hereby stipulate that Debtor and Joe L. Samuel, individually, have assigned all of their right, title and interest in and to a claim in bankruptcy filed with the United States District Court for the Central District of California against Goldstein, Samuelson, Inc., Debtor, and bearing Bankruptcy Case Number 73-03131, a copy of said claim is attached hereto as Exhibit A and made a part hereof, the proceeds of said claim to be paid in trust for the benefit of Petitioners and all other creditors similarly situated, according to the provisions of the Settlement agreement attached hereto as Exhibit B and made part hereof, in full settlement of Petitioners' cause of action set forth in their petition filed herein, and Petitioners have accepted said assignment in full satisfaction, release and discharge of their cause of action and claim against the Debtor.

IT IS THEREFORE STIPULATED AND AGREED that Petitioners' cause of action be dismissed with prejudice.

DATED this 29th day of November, 1974.

SHDEED, FARRIER & HARTMANN

By

Jeff L. Hartmann
Jeff L. Hartmann
4308 North Classen Boulevard
Oklahoma City, Oklahoma 73118
405-528-2422
Attorneys for Petitioners

SONBERG AND WADDEL

By

Patrick O. Waddel
Patrick O. Waddel
907 Philtower Building
Tulsa, Oklahoma 74103
918-583-5985
Attorneys for Respondent Debtor

United States District Court
Central District of California

In the Matter of
GOLDSTEIN, SAMUELSON, INC.

PROOF OF CLAIM
IN BANKRUPTCY NO. 73-03131

Bankrupt - Debtor

STATE OF OKLAHOMA }
COUNTY OF TULSA } SS:

JOE L. SAMUEL

sworn, deposes and says:being duly

(a) If claimant an individual

(a) That he is the claimant herein, (doing business as JOE L. SAMUEL SAMUEL BROKERAGE INC. (TULSA, OKLA.) & OKLA. CITY, OKLAHOMA)

(b) If claimant is a partnership

(b) That he is a member of the partnership, known as and composed of himself and

(c) If claimant is a corporation

(c) That he is the of (Official Title)

NOTE: Attach to claim, itemized statements, contract promissory note, returned check, etc.

.....corporation, organized under the laws of the State of and is duly authorized to make this proof of claim on its behalf.

That the above-named bankrupt was at and before the filing by (or against) him of the petition herein (for adjudication of bankruptcy), and still is, justly and truly indebted (or liable) to within claimant in the amount of

SEVEN-HUNDRED FOURTY-NINE THOUSAND AND SIX-HUNDRED & FIFTY-TWO AND 75/100----- Dollars, (\$ 749,652.75)

That the consideration of said debt (or liability) (unless otherwise stated herein) is goods, wares and merchandise sold and delivered as per itemized statement attached hereto.

That no part of said debt (or liability) has been paid; that there are no set-offs or counterclaims to said debt (or liability); that claimant does not hold, and has not, nor has any person by his (or its) order, or to claimant's knowledge or belief, for his (or its) use, had or received, any security or securities for said debt (or liability); that no note or other negotiable instrument has been received therefor; nor has any judgment been rendered thereon except.....

BASED UPON CONTRACT WITH GOLDSTEIN-SAMUELSON INC. DATED APR. 1, 1972

Schedule Attached for total Commissions Due & Payable As Of February 27, 1973

(If the debt or liability is founded upon an instrument in writing) That such instrument or a certified copy of the judgment is attached hereto.

Subscribed, acknowledged and sworn to before me

this 17th day of December, 1973

James P. ...
Notary Public in and for said County and State

My Commission Expires 12/1/76

(Claimant sign) *Joe L. Samuel*
(Name of individual, agent, officer or partner making oath)

(Name of firm or corporation)

5906 South Knoxville
Business address

Tulsa, Oklahoma 74135
City, State Zip Code

THIS AREA FOR OFFICIAL NOTARIAL SEAL

FILED

DEC 9 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

SETTLEMENT AGREEMENT

Pursuant to a resolution of the Board of Directors of Samuel Brokerage, Incorporated, an Oklahoma corporation, having its principal office in Tulsa, Oklahoma, and in consideration of forbearance on the part of petitioners pursuing their proceedings in involuntary bankruptcy in the District Court for the Northern District of Oklahoma against Samuel Brokerage, Incorporated, in case No. 73-B-349, Samuel Brokerage, Incorporated, and Joe L. Samuel, individually, hereinafter referred to collectively as the corporation, the assignee hereby assigns to Randall W. Williams and Joe L. Samuel, as trustees, all of its interest in the attached bankruptcy claim filed in the United States District Court for the Central District of California -- In the Matter of Goldstein, Samuelson, Inc., Bankruptcy No. 73-03131, under the following terms and conditions:

1. The corporation hereby expressly represents and warrants that all creditors, with the exception of persons formerly employed by the corporation as brokers, have been paid in full; provided, however, that this representation and warranty specifically excludes claims, if any, which customers of the corporation may have against the corporation due to opportunity of such claimants to file claims in the aforescribed bankruptcy proceeding of Goldstein, Samuelson, Inc.

2. The corporation hereby assigns and delivers to the above named trustees all its right, title and interest in and to the above mentioned bankruptcy claim, to have and to hold the same and any cash, securities, or other property which the trustees may, pursuant to any of the provisions hereof at any time hereafter, hold or acquire, for the uses and purposes and upon the terms and conditions herein set forth.

3. The trustees shall hold and use their best efforts to collect the claim which forms the corpus of this trust, and shall distribute the proceeds thereof as follows:

a. Trustees shall within sixty (60) days from and after the receipt of proceeds of the above mentioned claim, pay to the order of former brokers having claims for unpaid commissions, hereinafter referred to as beneficiaries, $\frac{4}{5}$ of the total amount collected under said claim to be apportioned to individual brokers on the basis of the relationship between the dollar amount claimed for each individual broker as it relates to the total dollar amount collected under the claim; and $\frac{1}{5}$ of the proceeds of said claim shall be paid to the corporation.

4. The trustees shall have the following powers, all of which shall be exercised in a fiduciary capacity:

a. To hold all of the trust property in the form in which received.

b. To demand, receive, receipt for, sue for, and collect any and all rights, money, properties, or claims to which this trust may be entitled, and to compromise, settle, arbitrate, or abandon any claim or demand in favor of or against this trust.

c. To employ agents, legal counsel, brokers, and assistants and to pay their fees and expenses, as they may deem necessary or advisable to carry out the provisions of this trust.

5. The trustees shall take no action under the terms of this trust except by mutual agreement.

6. The trustees shall give to the beneficiaries upon written request made not oftener than annually, complete information relating to the status of the claim which forms the corpus of this trust. The trustees shall be entitled at any time to have a judicial settlement of their accounts.

7. The trustees designated herein shall receive no compensation for services rendered under this agreement.

8. No trustee shall be required to give any bond or other security. No trustee shall be liable for any mistake or error of judgment in the administration of the trust property resulting in loss of the trust, save only for willfull misconduct or fraud.

9. This trust agreement shall be construed and regulated according to the laws of the State of Oklahoma, where it is made and where it is to be enforced.

10. The trust hereby created is irrevocable, and the corporation hereby surrenders all right and power to amend, modify, or revoke this agreement in any respect.

11. The trustees acknowledge receipt from the corporation of the property described in paragraph 2, and do hereby accept this trust upon the terms set forth in this agreement.

IN WITNESS WHEREOF, the parties have executed this agreement in triplicate on the 29th day of November, 1974.

SAMUEL BROKERAGE, INCORPORATED

By Joe L. Samuel
President

ATTEST:

Luc Ann Samuel
Secretary

Randall W. Williams
by Jeff L. Hartmann, Attorney
Randall W. Williams, Trustee

Joe L. Samuel
Joe L. Samuel, Individually

Joe L. Samuel
Joe L. Samuel, Trustee

STATE OF OKLAHOMA)
COUNTY OF TULSA) ss:

Before me, the undersigned notary public in and for said County and State, personally appeared Joe L. Samuel, President of Samuel Brokerage, Incorporated, and personally acknowledged to me that he had signed the foregoing Settlement Agreement of his own free will and accord and for the uses and purposes therein set out.

My Commission expires:
10/13/75

Donna J. Stone
Notary Public

[SEAL]

STATE OF OKLAHOMA)
COUNTY OF TULSA) ss:

Before me, the undersigned notary public in and for said County and State, personally appeared JOE L. SAMUEL, individually, and acknowledged to me that he had signed the foregoing Settlement Agreement of his own free will and accord and for the uses and purposes therein set out.

My Commission expires:
10/13/75

Donna J. Stone
Notary Public

[SEAL]

STATE OF OKLAHOMA)
COUNTY OF Oklahoma) ss:

Before me, the undersigned notary public in and for said County and State, personally appeared RANDALL W. WILLIAMS, ^{by} and acknowledged to me that he had signed the foregoing Settlement Agreement of his own free will and accord as Trustee and for the uses and purposes therein set out.

My Commission expires:
9/29/76

Paula Belsheim
Notary Public

[SEAL]

STATE OF OKLAHOMA)
COUNTY OF TULSA) ss:

Before me, the undersigned notary public in and for said County and State, personally appeared JOE L. SAMUEL, and acknowledged to me that he had signed the foregoing Settlement Agreement of his own free will and accord as Trustee and for the uses and purposes therein set out.

My Commission expires:
10/13/75

Donna J. Stone
Notary Public

[SEAL]

FILED

DEC 9 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ASSIGNMENT

ASSIGNMENT made this 29th day of November, 1974, by Samuel Brokerage, Incorporated, an Oklahoma corporation, and Joe L. Samuel, individually, hereinafter called the Assignors, to Randall W. Williams and Joe L. Samuel, Trustees, hereinafter called the Assignees.

FOR VALUE RECEIVED, the Assignors hereby assign all of their right, title and interest in and to the bankruptcy claim attached hereto to the Assignees to be administered in accordance with the provisions of the Settlement Agreement attached hereto and made part hereof.

"ASSIGNORS":

SAMUEL BROKERAGE, INCORPORATED

By Joe L. Samuel
President

Joe L. Samuel
Joe L. Samuel, Individually

STATE OF OKLAHOMA)
COUNTY OF TULSA) ss:

Before me, the undersigned notary public in and for said County and State, personally appeared Joe L. Samuel, President of Samuel Brokerage, Incorporated, and personally acknowledged to me that he had signed the foregoing Assignment of his own free will and accord in the capacity set forth above and for the uses and purposes therein set out.

My Commission expires:

10/13/75

[SEAL]

Donna J. Stone
Notary Public

STATE OF OKLAHOMA)
COUNTY OF TULSA) ss:

Before me, the undersigned notary public in and for said County and State, personally appeared JOE L. SAMUEL and acknowledged to me that he signed the above and foregoing Assignment of his own free will and accord in the capacity set forth above and for the uses and purposes therein set out.

My Commission expires:

10/13/75

[SEAL]

Donna J. Stone
Notary Public

There is medical opinion evidence in the record before the Court stating that Plaintiff is not disabled (Tr. 84, 86, and 130) and there is other evidence which indicates that Plaintiff is partially disabled, (Tr. 112). There is, however, no evidence that Plaintiff is completely disabled.

42 U.S.C. §405(g) provides in part:

"...The court...may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence, if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based."

The leading case regarding what constitutes "good cause" appears to be Schroeder v. Hobby, 222 F. 2d 713 (Tenth Cir. 1955). In that case the Court states:

"The Social Security Act is to be liberally construed as an aid to the achievement of its Congressional purposes and objectives. Narrow technicalities which proscribe or thwart its policies and purposes are not to be adopted."

This language is quoted with approval in Blanscet v. Ribcoff, 201 F. Supp. 257 (W.D. Ark. 1962) and Martin v. Richardson, 325 F. Supp. 686 (W.D. Va. 1971), which cases further state:

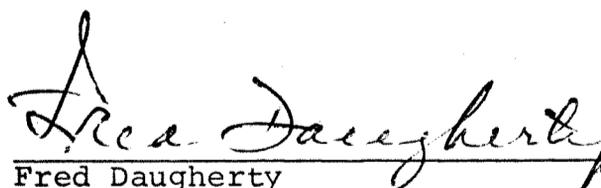
"In these circumstances, courts must not require such a technical and cogent showing of good cause as would justify the vacation of a judgment or the granting of a new trial, where no party will be prejudiced by the acceptance of additional evidence and the evidence offered bears directly and substantially on the matter in dispute."

The evidence which Plaintiff wants included in the record appears to be relevant to the merits of Plaintiff's claim and is non-prejudicial. This case is very similar to Martin v.

Richardson, supra, wherein a Motion to Remand was granted. Defendant cites Hupp v. Celebrezze, 220 F. Supp. 463 (N.D. Iowa 1962) and Lucas v. Finch, 322 F. Supp. 1209 (S.D. W.Va. 1970) as authority for the proposition that this case should not be remanded. The Hupp test for remand, which is that a Motion to Remand should be granted only if more evidence is necessary to develop the facts necessary to the determination of the case, appears to be against the weight of more recent authority. The Lucas case is entirely consistent with the ruling herein. Lucas simply stands for the proposition that a Motion to Remand should not be granted if the new evidence sought to be introduced is irrelevant to the facts at issue and such evidence should not constitute good cause. In the case at hand the evidence sought to be introduced is relevant to the facts at issue.

Plaintiff's Motion for Remand should be granted and the Secretary should consider the letter from Dr. Legler which is attached to Plaintiff's Motion. The Clerk will take appropriate action to remand the case.

It is so ordered this 9th day of December, 1974.


Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
OF OKLAHOMA

STATE OF OKLAHOMA, EX REL)
 BOARD OF REGENTS OF THE)
 UNIVERSITY OF OKLAHOMA)
 A Public Body Corporate,)
)
 PLAINTIFF,)
)
 VS.)
)
 79 ACRES OF LAND IN THE S/2)
 NW/4 SECTION 34, T17N-R14E,)
 TULSA COUNTY, OKLAHOMA; AND)
 ROSELLA KELLEY, NOW CHARLES;)
 AND THE UNITED STATES GOVERN-)
 MENT,)
)
 DEFENDANTS.)

CIVIL ACTION
NO. 73-C-411

FILED
 DEC 6 1974
 Jack C. Silver, Clerk
 U. S. DISTRICT COURT

FINAL ORDER AND JUDGMENT

This cause came on for hearing on this ^{6⁷³} day of *December*, 1974, upon the oral motion for judgment upon agreement and compromise by and between the plaintiff, Regents of the University of Oklahoma, and the defendants, Rosella Kelley, now Charles and the United States Government, the parties being present in open court by their attorneys, David Swank, attorney for the plaintiff, and Hubert Marlow, Assistant United States Attorney, Attorney for the defendants.

The Court having heard the evidence introduced and being fully advised finds:

(1) That the filing of the Condemnation Action, the appointment of the commissioners and the oath of the commissioners and their subsequent report are regular in all respects.

(2) That previously demands for jury trial were made and at this time all such demands for the right to trial by jury are waived by the defendants, Rosella Charles, the United States Government and by the plaintiff, Regents of the University of Oklahoma as to the taking of this property by the plaintiff.

(3) That the taking of the property described as:

the S/2 NW/4 Section 35, Township 17 North, Range 14 East, Tulsa County, State of Oklahoma, less a tract of land containing .9469 acres, more or less, in the SE/4 SE/4 NW/4, of Section 35 Township 17 North, Range 14 East, Tulsa County, State of Oklahoma, more particularly described as follows; Beginning at a point on the 1/4 Section line 200.00 feet North of the Southeast corner of the NW/4 of Section 35, T-17-N, R-14-E, thence 275.00 West along a line parallel to the South line of the SE/4 SE/4 NW/4, of Section 35, thence 150.00 feet North along a line parallel to the East line of the SE/4 SE/4 NW/4 of Section 35, thence 275.00 feet East along a line parallel to the South line of the SE/4 SE/4 NW/4 of Section 35, Thence 150.00 feet South along the East line of the SE/4 SE/4 NW/4, of Section 35, to the point of beginning.

is necessary for the purposes for the plaintiff, and that said property is owned in fee simply by the defendant, Rosella Kelley, Now Charles.

(4) That the plaintiff has paid to the Clerk of this Court the sum of Fifty-thousand Dollars (\$50,000.00) in full payment for said property upon the agreement and compromise of the plaintiff and the defendants and that such sum is a just and proper compensation for the taking of the property by the plaintiff.

(5) That Court further finds that the said taking by condemnation by the plaintiff is proper and the plaintiff, Regents of the University of Oklahoma, are declared to be the fee owner.

(6) The Court further finds that the defendant, Rosella Charles and the United States of America have agreed to accept as full and complete settlement of all claims due for damages by taking of said property the sum of Fifty-Thousand Dollars (\$50,000.00).

(7) The Court further finds that as a part of the agreement and compromise by the parties that the plaintiff has agreed that the defendant Rosella Charles and her husband may live in the house of the defendant located upon said property for term of one year from the date of this order without the payment of any rent to the plaintiff.

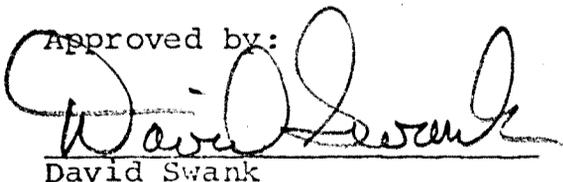
IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the plaintiff shall have judgment against the defendants taking and condemning the fee interest owned by the said Rosella Charles in the real property described above in paragraph 3 of this order and the plaintiff is hereby declared to be the owner in fee of said property, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Rosella Charles recover from the plaintiff the sum of Fifty Thousand Dollars (\$50,000.00) together with the court cost incurred in this action, and

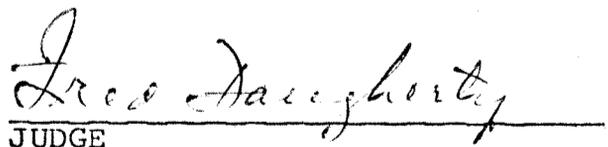
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of this Court is directed to pay the Fifty Thousand Dollars (\$50,000.00) paid into this Court by the plaintiff to the Bureau of Indian Affairs, United States Department of the Interior for deposit to the account of Rosella Charles, and that such payment shall satisfy the judgment for Rosella Charles rendered in this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Rosella Charles and her husband shall be allowed to live in the home of the defendant's located upon the said property for a period of one year from the date of this order pursuant to the settlement agreement but that such tenancy shall create no interest in the said defendant Rosella Charles and her husband to the said property.

Approved by:



David Swank
Attorney for Plaintiff
630 Parrington Oval
Norman, Oklahoma 73069


JUDGE


Hubert Marlow
Attorney for Defendants
Assistant United States Attorney
United States Court House
Tulsa, Oklahoma 74103

United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 74-C-476

Pawnee Indian Tribe of Oklahoma, and The Pawnee Business Council of The Pawnee Indian Tribe of Oklahoma,

vs.

Rogers Morton, Secretary of Interior; Morris Thompson, Commissioner of Indian Affairs; and James Hale, Superintendent of Pawnee Agency,

JUDGMENT

This action came on for trial ~~(hearing)~~ before the Court, Honorable Fred Daugherty, United States District Judge, presiding, and the issues having been duly tried ~~heard~~ and a decision having been duly rendered,

It is Ordered and Adjudged by the Court that the issues involved in this case are resolved in favor of the defendants and against the plaintiffs, in accordance with the findings of facts and conclusions of law and decision of this Court made in open court, and the plaintiffs' action herein is dismissed.

FILED

DEC 6 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 6th day of December, 1974.


Clerk of Court

ENTERED this 4th day of December, 1974.

Allen S. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EUGENE L. STRATTON,)
)
) Plaintiff,)
 vs.) No. 74-C-350
)
) CASPAR WEINBERGER, as Secretary)
 of Health, Education and Welfare,)
 United States of America,)
)
) Defendant.)

FILED
MAY 4 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

This case comes to this Court under the provisions of §205(g) of the Social Security Act [42 U.S.C. §405(g)] to review a final decision of the Secretary of Health, Education and Welfare.

On November 23, 1973, the Administrative Law Judge entered a decision which found that the plaintiff was entitled to disability insurance benefits and a period of disability, which disability ceased in October of 1973. This decision became the final decision of the Secretary when the Appeals Council denied the plaintiff's request for review on March 14, 1974. The plaintiff now petitions the District Court to set aside the Secretary's decision, or in the alternative, to remand the cause to the Secretary for the submission of additional evidence.

There is sufficient evidence in the record to support the Secretary's decision. The burden of proof in this case is upon the plaintiff to show the existence of his disability and its degree of severity. The medical evidence found in the record proves to be conflicting, and the record contains the report of a vocational expert that there were a number of jobs for which the plaintiff was qualified. Therefore, it would be improper for this Court to overturn the Secretary's decision upon the record for lack of substantial supporting evidence.

However, the plaintiff has also asked this Court to remand this case to the Secretary for the submission of additional evidence. At the initial hearing at which the plaintiff's claim for disability insurance benefits was heard, the plaintiff was not represented by counsel. The counsel for plaintiff alleges that there is additional evidence of the disability of the plaintiff which was not presented to or considered by the hearing examiner. This Court's function is, of course, limited to review of the Secretary's decision based upon the record as compiled below and not to proceed de novo. Additional evidence cannot be considered by this Court in its reviewing function as it was not a part of the record below, and what the Secretary might find from additional evidence, this Court is not able to say.

The attorney for the plaintiff has represented to the Court that there exists additional evidence which should have been considered in the plaintiff's administrative proceedings. The attorney also contends that the plaintiff was ineffective in representing himself before the Administrative Judge.

In determining whether "good cause" exists for remand to the Secretary, it should be remembered that the Social Security Act is to be liberally construed as an aid to the achievement of its congressional purposes and objectives. The Court must not require a showing of good cause that would justify the vacation of a judgment or the granting of a new trial, where the acceptance of additional evidence will not be prejudiced to either party. Blanscet v. Ribicoff, 201 F. Supp 257 (W.D. Ark., 1962). See Sage v. Celebrezze, 246 F. Supp. 285 (W.D. Va., 1965) and Webb v. Finch, 431 F.2d 1179 (C.A. 6, 1970).

The new evidence which the plaintiff seeks to put before the Secretary may well bear on the merits of his claim for disability benefits. Considering the purpose for which the Social Security Act was enacted, the Court feels that in this particular case in light of the representations made to the Court that there is additional evidence available, and in view of the fact that at the hearing before the Administrative Law Judge the plaintiff was without counsel and his presentation possibly ineffective, the Court finds that there is good cause for remanding this case to the Secretary for the taking of additional evidence.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that this case should be, and is hereby remanded to the Secretary of Health, Education and Welfare for the purpose of having additional testimony taken pursuant to 42 U.S.C. §405(g).

Dated this 3rd day of December, 1974.

Walter Bohannon

UNITED STATES DISTRICT JUDGE

FILED

DEC 3 1974

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

~~FILED~~

~~DEC 2 1974~~

~~Jack C. Silver, Clerk
U. S. DISTRICT COURT~~

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DONALD F. DIEDRICH and)
 MARILYN DIEDRICH,)
)
 Defendants,)

CIVIL ACTION NO. 73-C-127

NOTICE OF DISMISSAL

COMES NOW the Plaintiff, United States of America, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal of the above-captioned action, without prejudice.

Dated this 3rd day of December, 1974.

UNITED STATES OF AMERICA

NATHAN G. GRAHAM
United States Attorney



ROBERT P. SANTEE
Assistant United States Attorney

The Court further finds that the defendants, Joe Coon and Mary Coon, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon for more than five months last past, which default has continued and that by reason thereof the above-named defendants are now indebted to the plaintiff in the sum of \$10,974.54 as unpaid principal, with interest thereon at the rate of 8 1/4 percent interest per annum from July 1, 1974, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against defendants, Joe Coon and Mary Coon, in personam, for the sum of \$10,974.54 with interest thereon at the rate of 8 1/4 percent per annum from July 1, 1974, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said defendants to satisfy plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property and apply the proceeds thereof in satisfaction of plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.


United States District Judge

APPROVED.

A handwritten signature in black ink, appearing to read "Robert P. Santee". The signature is written in a cursive, somewhat stylized font with a prominent initial "R".

ROBERT P. SANTEE
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EARNEST L. POTTER, #85337,)
)
 Petitioner,)
)
 v.)
)
 STATE OF OKLAHOMA and)
 SAM C. JOHNSTON, Warden)
 O.S.P., et al.,)
)
 Respondents.)

No. 74-C-220

FILED
DEC 2 1974
Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

This cause is before the court on the petition of Earnest L. Potter for a writ of habeas corpus. The petitioner is serving a 20 year sentence in the custody of the respondents at the Vocational Training Center, Stringtown, Oklahoma, resulting from his conviction for the crime of Robbery By Force and Fear in Case No. CRF-72-517, District Court of Tulsa County, Oklahoma. The respondents filed their answer by and through the Attorney General for the State of Oklahoma and submitted with their Response the original record and transcript of trial in the petitioner's criminal case.

The petitioner contends that he is unlawfully detained and seeks his release from custody on the grounds that he was denied a fair trial by misconduct of the prosecutor and that a statement of the petitioner resulting from his warrantless arrest in violation of his constitutional rights was used in his trial.

From the court's examination of the files and records in this case it appears that the petitioner was convicted after a trial by jury and sentenced on October 16, 1972 to a term of 30 years imprisonment. A direct appeal was perfected in the Oklahoma Court of Criminal Appeals by the petitioner in which he presented the same matters he now urges before this court. The court found his claim concerning the arrest and the statement to be without

merit. The court did, however, find that because of remarks made by the prosecutor in his closing argument that the sentence should be modified to 20 years imprisonment, and as so modified the judgment and sentence was affirmed. Potter v. State, 511 P. 2d 1120. The petitioner then returned to the sentencing court with an application for post conviction relief on these same matters. The application was denied without an evidentiary hearing and an appeal was again perfected to the Oklahoma Court of Criminal Appeals. On March 4, 1974, the appellate court then approved the order denying petitioner post conviction relief.

The petitioner contends that his warrantless arrest was constitutionally impermissible because the arresting officer could have procured a warrant and therefore his subsequent statement was tainted. He does not contend the arresting officer lacked probable cause. He does not contend that his Miranda rights were not fully protected. At the trial, before the jury was permitted to hear petitioner's statements, a hearing outside its presence was conducted by the court. It was stipulated that the petitioner had had his Miranda rights explained to him and that he understood those rights. The arresting officer testified to facts establishing probable cause. The reliability of the informer was demonstrated by the fact that he had been used in the past to secure convictions in Tulsa County. The judge overruled the Motion to Suppress and permitted the statement to be presented to the jury. The action of the court was proper. Although it may have been practicable for the officer to secure a warrant there was no requirement that he do so since probable cause did exist for the arrest. Ford v. United States, 352 F.2d 927 (D.C. Cir. 1965).

In support of his claim that he was denied a fair trial because of the misconduct of the prosecutor petitioner points out that in his opening statement the prosecutor referred to the testimony of a witness whom he failed to call at the trial, and in his closing argument commented upon the failure of the defense to

use a witness who was available in the courtroom and also told the jury:

"If you go to feeling sorry for them well feel sorry for them all the way and let them go, let them have this crowbar and let them have this club and put them back out on the street where they have got the ability to go hit somebody else in the head."

The remarks of the prosecutor are at most trial errors and are not of constitutional significance. Trial errors involving misconduct of the prosecuting attorney can only be reviewed by appeal. Alexander v. Daugherty, 286 F.2d 647 (CA10 1961). On collateral attack the issue is not whether the statements of the district attorney were error but whether the conviction of the petitioner was the result of an unfair trial in violation of the Fourteenth Amendment. Sampsell v. People of the State of California, 191 F.2d 721 (CA9 1951). It is only where criminal trials in state courts are conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended and federal court interference is warranted. Chavez v. Dickson, 280 F.2d 727 (CA9 1960). After careful consideration of the remarks of the prosecutor it cannot be said that they resulted in a denial of the fundamental fairness essential to the concept of justice. The failure of the prosecutor to call the witness identified in the opening statement was apparently the result of objection by petitioner's counsel. Counsel interrupted the statement to protest the testimony of the witness would be irrelevant and should be excluded. The court indicated that it would not permit it to go to the jury. (Tr. 10). The Court of Criminal Appeals found that these remarks of the prosecutor were made in good faith and did not prejudice the petitioner. Many things happen in the course of a trial which may alter the planned presentation of the case so that all of the evidence described in advance is not presented and such variance is not necessarily reversible error. See United States v. Woodring, 446 F.2d 733 (CA10 1971). It would appear that the prosecutor in good faith intended to call the witness but changed his mind in view of petitioner's

objection and the court's probable ruling.

The comment upon the failure of the defense to present a witness would not even appear to be error under the circumstances here presented. See United States v. Garcia, 412 F.2d 999 (CA10 1969). It certainly cannot be construed as a comment upon the failure of petitioner to testify. The applicable standard is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment upon the failure of the defendant to testify. Knowles v. United States, 224 F.2d 168 (CA10 1955); Tilford v. Page, 307 F.Supp. 781 (W.D. Okla. 1969). By this test there was no error. The comment by the district attorney about a particular witness was not directed to the failure of the petitioner to testify and did not have the effect of emphasizing such failure.

The final remarks complained of represent an attempt to counteract any feeling of sympathy for the apparently youthful defendants. We agree with the Court of Criminal Appeals that he went too far. This is not, however, a case where the comments of the prosecutor infringed upon any specific guarantees of the Bill of Rights. It is not a case where the prosecutor consistently and repeatedly misrepresented the evidence before the jury. Cf. Miller v. Pate, 386 U.S. 1 (1967). It is not a case where there was non-disclosure by the prosecution of specific evidence favorable to the accused. Cf. Brady v. Maryland, 373 U.S. 83 (1963). There was otherwise no unfair manipulation of the evidence so as to have an affect on the jury's determination. Such improper exhortation like the other matters complained of constituted only the ordinary trial error of a prosecutor, not that sort of flagrant misconduct necessary to establish a denial of constitutional due process for relief on collateral attack. See Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

Since the application together with the files and records examined by the court conclusively show that the petitioner is entitled to no relief and there are no material issues of fact an

evidentiary hearing is not required. Boyd v. State of Oklahoma,
375 F.2d 481 (CA10 1967).

Accordingly, the Petition for Writ of Habeas Corpus
will be denied.

IT IS SO ORDERED.

Dated this 27th day of November, 1974.

Luther Bohanon

LUTHER BOHANON
UNITED STATES DISTRICT JUDGE