

ENTERED ON DOCKET
DATE JUN 30 1994

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
ADESEGUN A. OGUNSEYE;)
SHIRLEY ANN OGUNSEYE aka)
SHIRLEY DREW; STATE OF OKLAHOMA,)
ex rel., OKLAHOMA TAX COMMISSION;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

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CIVIL ACTION NO. 94-C 288E ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 29TH day of June, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, **Adesegun A. Ogunseye aka Greg Ogunseye and Shirley Ann Ogunseye aka Shirley Ann Drew aka Shirley Drew**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, **Adesegun A. Ogunseye aka Greg Ogunseye and Shirley Ann Ogunseye aka Shirley Ann Drew aka Shirley Drew**, were served with Summons and Complaint on May 6,

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1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint on April 4, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 29, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 29, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on April 25, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on April 25, 1994; and that the Defendants, **Adesegun A. Ogunseye aka Greg Ogunseye and Shirley Ann Ogunseye aka Shirley Ann Drew aka Shirley Drew**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot One (1), Block One (1), ATLANTA CIRCLE ADDITION, an addition in the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on February 28, 1979, the Defendant, **Shirley Drew**, and **Thomas Drew**, executed and delivered to **TURNER CORPORATION OF OKLAHOMA, INC.** their mortgage note in the amount of \$25,750.00, payable in monthly installments, with

interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Shirley Drew, and Thomas Drew, then husband and wife, executed and delivered to TURNER CORPORATION OF OKLAHOMA, INC. a mortgage dated February 28, 1979, covering the above-described property. Said mortgage was recorded on March 5, 1979, in Book 4385, Page 514, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 12, 1988, TURNER CORPORATION OF OKLAHOMA, INC. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on September 16, 1988, in Book 5128, Page 1749, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 1, 1988, the Defendants, Adesegun A. Ogunseye aka Greg Ogunseye and Shirley Ann Ogunseye aka Shirley Ann Drew aka Shirley Drew, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on December 1, 1989.

The Court further finds that on June 12, 1980, the Defendant, Shirley Ann Ogunseye aka Shirley Ann Drew aka Shirley Drew, filed a Chapter 7 Bankruptcy in the United States Bankruptcy Court for the Northern district of Oklahoma, Case number 80-667. The Defendant, Shirley Ann Ogunseye aka Shirley

Ann Drew aka Shirley Drew, was discharged from bankruptcy on October 7, 1980, and the case was closed on April 12, 1981.

The Court further finds that the Defendant, Adesegun A. Ogunseye aka Greg Ogunseye and Shirley Ann Ogunseye aka Shirley Ann Drew aka Shirley Drew, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Adesegun A. Ogunseye aka Greg Ogunseye and Shirley Ann Ogunseye aka Shirley Ann Drew aka Shirley Drew, are indebted to the Plaintiff in the principal sum of \$37,528.75, plus interest at the rate of 9.5 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$3.00 which became a lien on the property as of June 20, 1991; a lien in the amount of \$22.00, which became a lien on the property as of June 26, 1992; a lien in the amount of \$15.00 which became a lien as of June 25, 1993; and a claim against the property in the amount of \$15.00 for the tax year 1993. Said liens and claims are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission has a lien on the property which is the subject matter of this action by virtue of

a tax warrant, number EGE92000024-00, in the amount of \$2,482.01, plus interest, penalties, and costs, and filed on February 13, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, Adesegun A. Ogunseye aka Greg Ogunseye and Shirley Ann Ogunseye aka Shirley Ann Drew aka Shirley Drew, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, Adesegun A. Ogunseye aka Greg Ogunseye and Shirley Ann Ogunseye aka Shirley Ann Drew aka Shirley Drew, in the principal sum of \$37,528.75, plus interest at the rate of 9.5 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.38 percent per annum until paid, plus the costs of this action, 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 Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$55.00 for personal property taxes for the years 1990-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, have and recover judgment in rem in the amount of \$2,482.01 plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Adesegun A. Ogunseye aka Greg Ogunseye and Shirley Ann Ogunseye aka Shirley Ann Drew aka Shirley Drew and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Adesegun A. Ogunseye aka Greg Ogunseye and Shirley Ann Ogunseye aka Shirley Ann Drew aka Shirley Drew, to satisfy the in rem judgment of the Plaintiff 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 according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the

Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$3.00, personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of \$2,482.01, state taxes, plus accrued and accruing interest for state taxes which are currently due and owing.

Fifth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$52.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

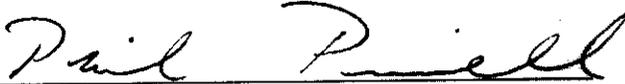
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

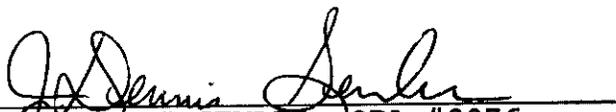
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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


UNITED STATES DISTRICT JUDGE

APPROVED:

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Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94-C 288E

PP:lg

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

ENTERED ON DOCKET

DATE ~~JUN 30 1994~~

FILED

JUN 30 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

FRED E. MASSINGALE,
Petitioner,
vs.
MICHAEL CODY,
Respondent.

No. 93-C-83-B

ORDER

Petitioner's pro-se application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is before the Court for consideration. Respondent has filed a Rule 5 response, and Petitioner has filed a reply and a surreply. The Court determines that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992). As more fully discussed below, the Court concludes that the petition for a writ habeas of corpus should be denied.

I. BACKGROUND

In this proceeding, Petitioner attacks his April 19, 1984 conviction in Case No. CRF-84-785 in the District Court of Tulsa County, where a jury found him guilty of the charge of robbery with a firearm, after former conviction of a felony. In accordance with the jury verdict, the trial court sentenced Petitioner to 513 years imprisonment on April 27, 1984. The Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction in a published opinion on

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January 7, 1986, but modified the judgment and sentence to forty-five years imprisonment. Massingale v. State, 713 P.2d 15 (Okla. Crim. App. 1986). Petitioner exhausted his state remedies by presenting on post-conviction the claims he had not raised on direct appeal.

Although Petitioner's arguments are for the most part unintelligible and very lengthy, the Court has tried its best to understand them and construe them in the Petitioner's favor.¹ With regard to his first ground for relief, the Court understands the Petitioner to allege that the under-funding of the Public Defender's Office has delayed and prejudiced his appeal. In support of the prejudice factor, Petitioner alleges (1) his appellate attorney did not have "adequate means" to properly perfect his direct criminal appeal; (2) his trial attorney did not help the appellate attorney with the appellate brief although they both worked in the same office; and (3) the under-funding and backlog forced his appellate attorney to "throw[] together a brief arguing the second stage of the trial only and [leaving] Petitioner with no avenues to appeal the first stage of the trial."

As to his second ground for relief, Petitioner argues that he was denied the effective assistance of counsel when his counsel

¹Although Petitioner alleged in exhibit "B" attached to his brief in support of his petition for a writ of habeas corpus that the Oklahoma Court of Criminal Appeals abused its discretion in reassessing the Petitioner's sentence and in affirming his conviction, the Court concludes that Petitioner did not properly raise that issue in this habeas corpus petition. Nor does the fact that the Attorney General addressed the merits of that issue in his Rule 5 response properly present that issue before this Court.

failed to raise on appeal issues regarding the guilt or innocence phase of the trial. He alleges that counsel should have argued that he was not the alleged robber and that the trial judge prejudiced his defense when he refused to recuse himself.

Respondent objects to Petitioner's application on the ground that the legal representation afforded the Petitioner on appeal did not fall below that expected of a reasonable competent and skillful appellate attorney and that Petitioner's appeal was decided in a rather expedient manner.

II. ANALYSIS

A. Delay

Petitioner is not entitled to habeas relief solely on the basis of the twenty-two month delay in processing his direct criminal appeal. The delay in adjudicating Petitioner's direct criminal appeal was less than the two-year threshold set in Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994) (Harris II), and Petitioner has not shown that his case may warrant a finding that the passage of less than two years would constitute inordinate delay in his case. See id. at 1561. In any case, even if the twenty-two-month period in adjudicating Petitioner's direct criminal appeal amounted to inordinate delay, the Court concludes that Petitioner has not shown actual prejudice to the appeal, itself, arising from the delay. See id. at 1566 (holding that any petitioner whose conviction has been affirmed on appeal, is not entitled to habeas relief based solely on delay in adjudicating his

or her appeal, unless the petitioner can show actual prejudice to the appeal, itself, arising from the delay).

Nor would the Petitioner be entitled to habeas relief on the ground of delay in filing his appellate brief. Even if funding was the real cause, as Petitioner alleges, the Tenth Circuit has held that "[o]nce counsel file[s] an appellate brief . . . , counsel's ineffectiveness because of delay ends." *Id.* at 1569. Lastly, the fact that Petitioner's trial counsel did not help with petitioner's appellate brief is meritless. Petitioner's appellate counsel was the only one responsible for Petitioner's direct criminal appeal.

B. Ineffective Assistance of Appellate Counsel

1. Standard

As to his claim of ineffective assistance of appellate counsel, Petitioner argues that he was denied the effective assistance of counsel because his counsel failed to raise issues regarding the innocence phase of the trial on direct appeal. Under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," *id.* at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, *id.* at 694. Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel. See, e.g., Claudio v. Scully,

982 F.2d 798, 803 (2d Cir. 1992), cert. denied, 113 S. Ct. 2347 (1993).

In attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument that could be made. See Jones v. Barnes, 463 U.S. 745, 754 (1983). A petitioner, however, may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker.

When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986); Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987) (ineffective assistance of counsel when appellate counsel ignored "a substantial, meritorious Fifth Amendment issue" raising instead a weak issue"). The claim whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim, so long as the "failure to raise the state . . . claim fell 'outside the wide range of professionally competent assistance.'" Claudio, 982 F.2d at 805 (quoting Strickland, 466 U.S. at 690).

In assessing the attorney's performance, a reviewing court

must judge his conduct on the basis of the facts of the particular case, "viewed as of the time of counsel's conduct," Strickland, 466 U.S. at 690, and may not use hindsight to second-guess his strategy choices, see Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993). Counsel is not required to forecast changes in the governing law. See, e.g., Horne v. Trickey, 895 F.2d 498, 500 (8th Cir. 1990) (ineffectiveness not established by claim that "counsel should have realized that the Supreme Court was planning a significant change rises to the level of constitutional ineffectiveness").

In evaluating the prejudice component of the Strickland test, a court must determine whether, absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The outcome determination, unlike the performance determination, may be made with the benefit of hindsight. See Fretwell, 113 S. Ct. at 844. To establish prejudice in the appellate context, a petitioner must demonstrate that "there was a 'reasonable probability' that [his] claim would have been successful before the [state's highest court]." Claudio, 982 F.2d at 803 (footnote omitted).

2. Case at hand

After meticulously reviewing Petitioner's brief, reply brief, and supplemental reply brief, the Court concludes that Petitioner's appellate counsel's failure to argue Petitioner's innocence and the

trial judge's failure to recuse himself did not fall below the standard of reasonably effective assistance. Petitioner has failed to establish that the ignored issues are more likely to result in a reversal or new trial than those issues actually raised on appeal. See Gray, 800 F.2d at 647. Although Petitioner tries to argue that there may have been someone else in the neighborhood who could have robbed the pawnshop and who looked like the Petitioner, the evidence in this case reveals that the question of guilt was not at issue. The Petitioner was identified by the robbery victim as the man who robbed him, and he was apprehended just after the robbery, hiding in a field behind the pawn shop he had robbed. (Trial tr. at 18, 71.) The stolen goods and money were also found a short distance away. (Id. at 72-75.) Moreover, the Petitioner matched the description of the man who the police officers saw fleeing the scene. (Id. at 71.).

As to the trial judge's refusal to recuse himself in Petitioner's case, the Court concludes that the Petitioner has not "demonstrated [] any prejudice which denied him due process or fundamental fairness." Robinson v. State, 818 P.2d 1250, 1252 (Okla. Crim. App. 1991), cert. denied, 112 S. Ct. 1285 (1992). The Court notes that Petitioner waited until the morning of the trial to raise the judge's appearance of impropriety although he had known for quite some time that the trial judge, assigned to his case, had been a former prosecutor in a 1972 case against the Petitioner. (Trial tr. at 4-6.)

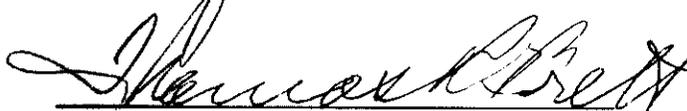
In any case, the Court notes that the failure to raise a

particular issue on appeal is not in and of itself indicative of ineffective assistance of appellate counsel. The U.S. Supreme Court has recognized that appellate counsel serves best by winnowing out weaker arguments and focusing upon stronger central claims. Jones v. Barnes, 463 U.S. 745, 751-52. Petitioner's appointed counsel followed to the letter the Supreme Court's suggestion in Jones. He focused on the second stage of the trial and obtained a remarkable reduction of Petitioner's sentence from 513 years to forty-five years. Therefore, the Court concludes that appellate counsel's decision not to present all possible issues on direct appeal did not deny Petitioner the effective assistance of counsel.

III. CONCLUSION

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's application for a writ of habeas corpus be denied.

SO ORDERED THIS 30th day of June, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE JUN 30 1994

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

FILED
JUN 29 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MARY E. EVANS,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH & HUMAN)
 SERVICES,)
)
 Defendant.)

93-C-0188-B

ORDER

The Secretary of Health and Human Services denied Social Security disability benefits to Plaintiff, Mary Evans. Ms. Evans now appeals that decision, raising the following issues: (1) The Secretary failed to follow to consider Grid Rules 201.14 and 201.00(g); (2) The Secretary failed to properly evaluate Plaintiff's pain; and (3) Substantial evidence does not support the Secretary's decision as the Secretary failed to take into account the entirety of Plaintiff's impairments.¹ For the reasons discussed below, the Secretary's decision is affirmed.

I. Standard of Review

In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g).² The Court's role "on review is to determine whether the Secretary's

¹ Plaintiff previously applied for benefits on September 17, 1986. On March 25, 1987, the Secretary denied that application. The ALJ did not reopen that case and, as a result, res judicata applies. The current application alleges disability since June 1, 1987. Therefore, the question is whether Plaintiff was entitled to disability benefits at anytime between June 1, 1987 and March 31, 1991.

² Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." In addition, on January 20, 1994, the parties consented to proceed before the United States

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decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" is characterized by a conspicuous absence of credible choices or the absence of contrary medical evidence. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard; or fails to provide the Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).³

II. Analysis

Born in 1941, Plaintiff completed the 12th grade. She last worked in April 1986 as an assembler-welder for a manufacturer, leaving employment she said, because of "carpal tunnel syndrome".

On March 14, 1991, Plaintiff applied for disability benefits because of back and hand problems. The Secretary initially denied the application and again on reconsideration. After hearing, the Administrative Law Judge ("ALJ") also denied benefits.⁴ Plaintiff

Magistrate Judge pursuant to 28 U.S.C. §636(c)(3).

³ When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("ALJ") must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

⁴ The ALJ found that Plaintiff could not perform her past relevant work as an assembler/welder. However, he concluded that she could work in assembly jobs, cashier and order clerk.

Plaintiff subsequently filed the instant appeal.

The first issue raised by Plaintiff is whether the ALJ improperly failed to consider Grid Rule 201.00(g). 20 C.F.R. §404, Subpt. P, App.2 Part of that regulation states:

Individuals approaching advanced age(age 50-54) may be significantly limited in vocational adaptability if they are restricted to sedentary work. When such individuals have no past work experience or can no longer perform vocationally relevant past work and have no transferable skills, a finding of disability ordinarily obtains.

In this case, Plaintiff was born on October 26, 1991. She met the special insured status requirement for Title II benefits through March 31, 1991. The ALJ denied her application on May 11, 1992. Given those facts, the Secretary argues that Plaintiff was no longer qualified for benefits after March 31, 1991 -- while she was still 49 years old. As a result, the Secretary contends 201.00(g) does not apply.

Section 404.315 states that an individual is entitled to disability benefits if "you have enough social security earnings to be insured for disability." That means Plaintiff was eligible for benefits only until March 31, 1991. At that time, she was 49 years old. Therefore, 201.00(g) is not applicable in this case.

The second issue is whether the ALJ properly evaluated Plaintiff's subjective complaints of pain. Under *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987), the ALJ must first determine whether a claimant has established a pain-producing impairment by objective medical evidence. Second, the ALJ must decide whether there is a "loose nexus" between the impairment and a claimant's subjective allegations of pain. If those two prongs are met, the question becomes **whether**, considering all the subjective and objective evidence, a claimant's pain is in fact **disabling**. *Id. at 163-164.*

In this case, the ALJ determined that a pain-producing impairment existed. He then concluded a loose nexus existed between the impairment and Plaintiff's subjective complaints of pain. The primary issue here is whether substantial evidence supports the ALJ's finding that Plaintiff's pain was not disabling.

In *Luna*, the Tenth Circuit set forth the factors to determine a claimant's credibility regarding subjective complaints of pain as (1) a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed; (2) regular use of crutches or a cane; (3) regular contact with a doctor; (4) possibility that psychological disorders combine with physical problems; (5) claimant's daily activities; and (6) dosage, effectiveness and side effects of medication. These factors, however, are not exhaustive. *Id.* at 165.

As noted on page 13 of the Record, the ALJ analyzed factors 1,3,5 and 6 of those discussed in *Luna*.⁵ Based on that analysis, the ALJ wrote:

The ALJ finds that claimant's testimony is not credible. Exhibit 28 is clear and unequivocal that the claimant can and, in fact, perform substantial gainful activity, not a full and unrestricted range, though, but significant enough so that the claimant would be able to work. Also noted from the findings in Exhibit 31, the claimant has a very mild case for disability. The claimant also refused to participate in her own health care...The claimant's fractured left arm also healed normally. The ALJ notes that claimant's swelling, to the extent that it exists, is in the claimant's left hand while she is, in fact, right handed in her activities of daily living. The claimant's pains have been found to be rather nominal in Exhibit 30 and her hands were also found not to be swollen and she had no back pain. *Record* at 14.

⁵ For example, the ALJ noted the following: (1) The claimant testified that her hands swell and are in pain, and claims she cannot hold a pencil to write. She also has pain in her shoulders, back, neck and hip. Her hands go numb and tingle; (2) Driving long distance will cause pain in the claimant's neck and shoulders. Bending is not a problem, however, stooping is. She has to have someone help her up after sitting for a while; (3) Plaintiff had taken Tagamet, Vitamin B and Allercet, but no side effects were noted; (4) The claimant has undergone surgery on her wrist and has been treated for a fracture; (5) The claimant cannot stand for more than 30 minutes or walk for any significant distance. She cannot reach above her head; and (6) Limited daily activities. *Id.* at 13-14.

Based in part on the foregoing analysis, the ALJ found that Plaintiff could return to work. Given his analysis, the Court finds that the ALJ properly evaluated Plaintiff's complaints of pain. In addition, the Court finds that substantial evidence supports the ALJ's decision of no disability.

Setting aside Plaintiff's testimony (which the ALJ discounted), little, if any, medical evidence supports a disability finding. Of particular significance is a July 1, 1987 letter from Dr. Robert L. Eyester. Dr. Eyester, Plaintiff's treating physician, stated that he did not believe Evans was disabled. *Id. at 157.* A May 29, 1991 examination supported Dr. Eyester's conclusion.

Dr. Wesley Ingram, the Secretary's consulting physician, stated that "in this examiner's opinion, [the] patient has a very mild case for disability, in that I find no significant abnormalities. Her carpal tunnel is mild at this time, even though she claims it is severe. She refuses to take the medications she was given. She refuses to see the orthopedic surgeon that was working with her in Wichita. So, in my opinion, patient has a very mild case for disability." *Id. at 194-95.*⁶

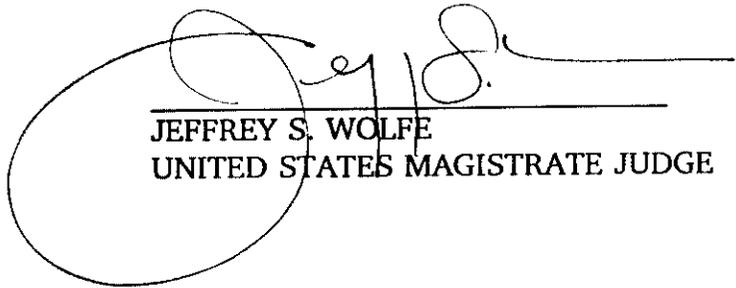
In addition to the reports of Drs. Eyester and Ingram, the vocational expert testified that Plaintiff could return to work in **sedentary** jobs such as assembler, order clerk and cashier. *Id. at 50.*⁷ Therefore, the medical evidence, combined with that of the testimony

⁶ Plaintiff points to evidence submitted by Dr. Peter Winston (*Record at 155*) and Dr. Gerald Stephanz (*Record at 153*). However, while that evidence may support Plaintiff's disability claim, it is not enough to override the Secretary's decision. In addition, Plaintiff's claim that the ALJ did not adequately examine her impairments is without merit.

⁷ Plaintiff contends that the ALJ misinterpreted the vocational expert's testimony. That is not the case. As a part of the hypothetical question, the ALJ asked the vocational expert that, if all of Plaintiff's testimony was taken as true, whether she could work. The vocational expert stated that she could not. However, the ALJ specifically found Plaintiff's testimony to be not credible. Given that finding the vocational expert found that Plaintiff could return to work.

from the vocational expert, is substantial evidence supporting the Secretary's decision of no disability. The Secretary's decision is **AFFIRMED**.

SO ORDERED THIS 29th day of June, 1994.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET
DATE JUN 29 1994

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT WAYNE CROSBY;
ELOIS MAE CROSBY;
COUNTY TREASURER, Creek County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Creek County, Oklahoma,

Defendants.

F I L E D
JUN 29 1994
Richard L. Mark
U.S. District Court
Northern District of Oklahoma

CIVIL ACTION NO. 93-C-379-E

O R D E R

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that the Judgment of Foreclosure entered herein on the 23rd day of March, 1994, Canceling the Sale scheduled for June 23, 1994, and dismissing this action without prejudice. The Court, having considered the motion and the records and files in this case, and being fully advised in the premises, finds that good cause has been shown for the relief sought and that the motion should be granted.

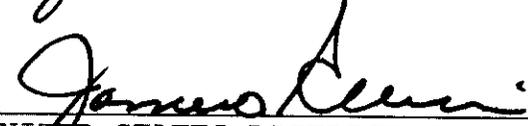
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Judgment of Foreclosure entered in the case on March 23, 1994, be, and the same is hereby vacated, set aside and held for naught.

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IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Sale scheduled for June 23, 1994, be, and the same is hereby canceled.

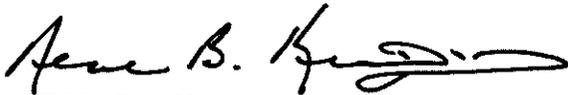
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action be, and the same is hereby dismissed without prejudice.

Dated this 27th day of June, 1994.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

NBK:flv

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

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

JONATHAN J. HIATT,
548-67-7665

Defendant.

CIVIL NUMBER 94-C-455B

ENTERED ON DOCKET
DATE JUN 29 1994

FILED

JUN 23 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

NOTICE OF DISMISSAL

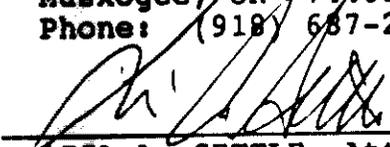
COMES NOW the Plaintiff, United States of America, by and through its attorney, Clifton R. Byrd, District Counsel, Department of Veterans Affairs, Muskogee, Oklahoma, and voluntarily dismisses said action without prejudice under the provisions of Rule 41(a)(1), Federal Rules of Civil Procedure.

Respectfully submitted,

UNITED STATES OF AMERICA

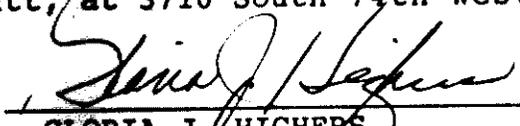
CLIFTON R. BYRD
District Counsel
Department of Veterans Affairs
125 South Main Street
Muskogee, OK 74401
Phone: (918) 687-2191

By:


LISA A. SETTLE, Attorney

CERTIFICATE OF MAILING

This is to certify that on the _____ day of _____, 1994, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Jonathan J. Hiatt, at 3710 South 74th West Court, Tulsa, OK 74107.


GLORIA J. HIGHERS
Paralegal Specialist

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

FILED

JUN 28 1994

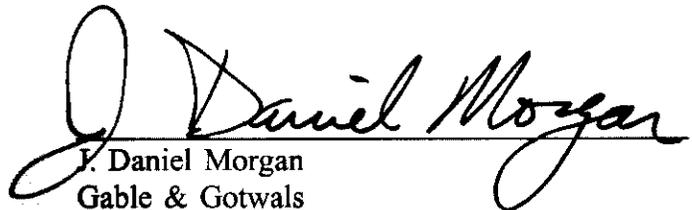
LEROY WHITFIELD,)
)
 Plaintiff,)
)
 -vs-)
)
 JOHN CHRISTNER TRUCKING, INC.,)
)
 Defendant.)

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Case No. 93-C-1079-B

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties hereby stipulate that this case be dismissed with prejudice. Each party will bear his/its own attorneys' fees and costs.



J. Daniel Morgan
Gable & Gotwals
Suite 2000
15 West 6th Street
Tulsa, Oklahoma 74119
(918) 582-9201

Attorney for Plaintiff



Tom Lane
W.C. "Bill" Sellers, Inc.
P.O. Box 1404
Sapulpa, OK 74067-1404

Attorney for Defendant

ENTERED ON DOCKET

DATE JUN 29 1994

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 LOUIS J. BRESSMAN; BETTY J.)
 BRESSMAN; TULSA ADJUSTMENT)
 BUREAU, INC., a corporation;)
 OSTEOPATHIC HOSPITAL FOUNDERS)
 ASSOCIATION, a corporation)
 d/b/a OKLAHOMA OSTEOPATHIC)
 HOSPITAL; THE STATE OF)
 OKLAHOMA ex rel. OKLAHOMA TAX)
 COMMISSION; CITY OF BROKEN)
 ARROW, a municipal)
 corporation; COUNTY TREASURER,)
 Tulsa County, Oklahoma; and)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

Richard [Signature] Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 93-C-391-E

DEFICIENCY JUDGMENT

This matter comes on for consideration this 27th day of June, 1994, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, for leave to enter a Deficiency Judgment. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, and the Defendants, Louis J. Bressman and Betty J. Bressman, appear neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that copies of Plaintiff's Motion and Declaration were mailed by first-class mail to Louis J. Bressman and Betty J. Bressman, 300 West Keywest, Broken Arrow, Oklahoma 74011, and to all answering parties and/or counsel of record. The Court further finds that the amount of the Judgment rendered on December 27, 1993, in favor of the Plaintiff United States of

25

America, and against the Defendants, Louis J. Bressman and Betty J. Bressman, with interest and costs to date of sale is \$101,155.50.

The Court further finds that the appraised value of the real property at the time of sale was \$60,500.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered December 27, 1993, for the sum of \$60,000.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on June 21, 1994.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, is accordingly entitled to a deficiency judgment against the Defendants, Louis J. Bressman and Betty J. Bressman, as follows:

Principal Balance plus pre-Judgment Interest as of 12-27-93		\$99,185.04
Interest From Date of Judgment to Sale		961.36
Appraisal by Agency		335.00
Abstracting		264.00
Publication Fees of Notice of Sale		185.10
Court Appraisers' Fees		<u>225.00</u>
TOTAL	\$	101,155.50
Less Credit of Appraised Value	-	<u>60,500.00</u>
DEFICIENCY	\$	40,655.50

plus interest on said deficiency judgment at the legal rate of 5.28 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns have and recover from Defendants, Louis J. Bressman and Betty J. Bressman, a deficiency judgment in the amount of \$40,655.50, plus interest at the legal rate of 5.28 percent per annum on said deficiency judgment from date of judgment until paid.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

NBK/esf

ENTERED ON DOCKET
JUN 28 1994
DATE _____

FILED

JUN 27 1994

Clerk
COURT
OKLAHOMA

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

GREGORY TOLIVER,
Plaintiff,

vs.

MARK GRAZIANO, et al,
Defendants.

No. 94-C-478-E

ORDER

The Court recently granted Plaintiff, a state prisoner, leave to proceed in forma pauperis. The Court will now consider whether Plaintiff's action is frivolous under 28 U.S.C. § 1915(d).

In his complaint, Plaintiff, pro se, sues Public Defender Mark Graziano, Judge Clifford Hopper, District Attorney David Moss, and Assistant District Attorney Sarah Smith. He alleges that the Defendants conspired to violate his due process rights by twice putting him in jeopardy for the same crime in September and October of 1988. He further alleges that his attorney failed to properly examine a hostile witness, screamed at him in front of the Judge and jurors because he had brought his bible in the courtroom, and refused to let him take the stand. Plaintiff seeks \$5 million in damages and immediate release from confinement.

Attached to Plaintiff's complaint are the following exhibits:
(1) an opinion from the Oklahoma Court of Criminal Appeals reversing Plaintiff's sentence in Case No. CRF-88-3293 on double jeopardy ground; (2) an opinion from the Oklahoma Court of Criminal Appeals affirming Plaintiff's conviction in Case No. CRF-88-3301;

4

(3) an excerpt from the trial transcript; and (4) copies of two judgments and sentence.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts. Neitzke v. Williams, 490 U.S. 319, 324 (1989). 28 U.S.C. § 1915 permits an indigent litigant to commence a civil action without prepayment of fees or costs. See 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows an in forma pauperis suit to be dismissed if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous under section 1915(d) if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327).

After liberally construing Plaintiff's pro se pleading, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law. Plaintiff cannot establish federal jurisdiction to litigate his malpractice action against Mark Graziano. See Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990) (per curiam) (claim against attorney did not establish federal question jurisdiction, where plaintiff claimed that the attorney had agreed to represent plaintiff but failed to make himself available the week before trial and failed to appear the day of trial). Cf. Brown v. Schiff, 614 F.2d 237, 239 (10th Cir.) (per curiam), cert. denied, 446 U.S. 941 (1980)

(claims of legal malpractice by a former defendant in a criminal case do not constitute a constitutional violation). In any case, "[t]he conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation." Bilal, 904 F.2d at 15. Cf., Tower v. Glover, 467 U.S. 914, 920 (1984) (citing Polk County v. Dodson, 454 U.S. 312, 325 (1981)) (public defender does not act under color of state law when representing an indigent defendant in a state criminal proceeding).

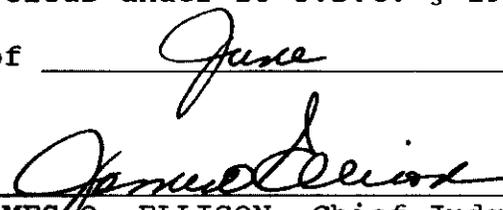
Judge Hooper is absolutely immune from plaintiff's suit because he presided over plaintiff's criminal case in his judicial capacity. See Stump v. Sparkman, 435 U.S. 349, 356 (1978); Schepp v. Fremont County, 900 F.2d 1448, 1451 (10th Cir. 1990). Similarly, the district attorney's are entitled to absolute immunity from plaintiff's suit because their performance was "intimately associated with the judicial phase of the criminal process." Dicesare v. Stuart, 12 F.3d 973, 976 (10th Cir. 1993) (citing Imbler v. Pachtman, 424 U.S. 409, 430 (1976)).

In any event, the Court notes that Plaintiff's action would be barred by the two year statute of limitations. Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988) (the applicable statute of limitations for civil rights actions under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another"). Plaintiff's action arose in September and October 1988 when Plaintiff was tried in Case Nos. CRF-88-3301 and CRF-88-3293. See Plaintiff's letter received May 20, 1994. Moreover,

Plaintiff's inmate status is an insufficient justification for tolling the statute of limitations in this case. The State of Oklahoma has no tolling provision for civil lawsuits filed by prisoners. See Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989).

Accordingly, the Court concludes that Plaintiff's civil rights action must be **dismissed** as frivolous under 28 U.S.C. § 1915(d).

SO ORDERED THIS 24th day of June, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

DATE JUN 28 1994

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

F D

JUN 27 1994

CLESTER BILLS,
Plaintiff,
vs.
United States Federal Court,
et al.,
Defendants.

No. 94-C-477-E
consolidated with
94-C-491-E

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

The Court recently granted Plaintiff, a federal prisoner, leave to proceed in forma pauperis and consolidated the above causes of action. The Court will now consider whether Plaintiff's consolidated action is frivolous under 28 U.S.C. § 1915(d).

In his complaints, Plaintiff, pro se, sues Chief of Police Ron Palmer, Sheriff Stanley Glanz, and appointed counsel Charles Whitman on the basis of an allegedly invalid search warrant.¹ He alleges (1) that the search was invalid; (2) that the federal marshall had Curtis Pratt, a witness, in their custody, but failed to produce him; (3) that state police officers recovered a gun during a search of his house although the search warrant specified only drugs; and (4) that Charles Whitman acted as an agent of the federal courts when he misrepresented him in court. Plaintiff seeks to suppress the evidence obtained against him as a result of

¹Although the Plaintiff also named as defendants in the caption of his complaint the Federal Court and the U.S. Marshall, he failed to list these defendants in the first part of his complaint. In any case, the Court notes that Plaintiff would not be able to sue these federal defendants under 42 U.S.C. § 1983.

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the allegedly illegal search, and requests a hearing to address the validity of the search warrant. Plaintiff also seeks money damages for his mental pain and suffering.

By way of background, the Court notes that Plaintiff was indicted on May 3, 1993, of possession of a firearm by a convicted felon, and of receiving and possessing unregistered firearms. On October 19, 1993, a federal jury found Defendant guilty as to both counts and this Court sentenced the Defendant to 41 months imprisonment. Appointed counsel Charles Whitman then timely filed a direct appeal and sought to withdraw as counsel of record on direct appeal. On March 10, 1994, the Tenth Circuit Court of Appeals, however, denied counsel's motion to withdraw and appointed him as counsel of record on appeal.

ANALYSIS

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts. Neitzke v. Williams, 490 U.S. 319, 324 (1989). 28 U.S.C. § 1915 permits an indigent litigant to commence a civil action without prepayment of fees or costs. See 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows an in forma pauperis suit to be dismissed if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous under section 1915(d) if it is based on "an indisputably

meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327).

After construing Plaintiff's pro se pleading liberally, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law. An action under 42 U.S.C. § 1983 is not the proper avenue to seek to suppress the evidence entered at trial on the basis of an invalid search warrant especially when a Plaintiff has a direct criminal appeal presently pending before the Tenth Circuit Court of Appeals. Similarly, the Plaintiff cannot establish federal jurisdiction to litigate his malpractice action against Charles Whitman. See Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990) (per curiam) (claim against attorney did not establish federal question jurisdiction). Cf. Brown v. Schiff, 614 F.2d 237, 239 (10th Cir.) (per curiam), cert. denied, 446 U.S. 941 (1980) (claims of legal malpractice by a former defendant in a criminal case do not constitute a constitutional violation). While an attorney practicing in federal courts is an officer of the federal court, this does not make him or her a federal official performing acts, or refusing to perform acts, done under color of federal authority. No attempt to allege a denial of a civil right can change this fact.

As to Ron Palmer and Stanley Glanz, the Court concludes that the Plaintiff has not alleged any involvement by the Tulsa County Sheriff's Department, the Tulsa Police Department, or any of their employees, and thus, they cannot be liable under section 1983. See

Meade v. Grubbs, 841 F.2d 1512, 1528 (10th Cir. 1990) (a defendant cannot be liable under section 1983 unless that defendant personally participated in the challenged action).

Accordingly, the Court concludes that Plaintiff's consolidated action must be dismissed as frivolous under 28 U.S.C. § 1915(d).

SO ORDERED THIS 24th day of June, 1994.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

DATE JUN 28 1994

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

FILED

JUN 27 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JAMIE KEETER, an infant by her)
guardians ad litem, JAMES and)
LINDA KEETER, and JAMES and)
LINDA KEETER, individually,)

Plaintiffs,)

vs.)

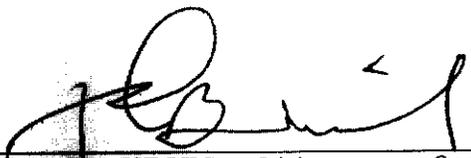
SUN REFINING AND MARKETING)
COMPANY, ABC CORPS. #1 TO #3,)
(fictitious names) & JOHN DOES)
#1 TO #3 (fictitious names),)

Defendants.)

Case No. 93-C-976-B
(transferred from U.S.D.C.
District of New Jersey,
Case No. 93-3373(MTB)

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

COME NOW the attorneys for the Plaintiffs, Jamie Keeter, an infant by her guardians ad litem, James and Linda Keeter, and James and Linda Keeter, individually, and hereby stipulate and agree that the above captioned cause may, upon Order of the Court, be dismissed with prejudice to further litigation pertaining to all matters involved herein, and state that a compromise settlement covering all claims involved in the above captioned cause has been made between the parties and the said parties hereby request the Court to dismiss said action with prejudice pursuant to this Stipulation.



JOHN H. NICKS, Attorney for Plaintiffs
1448 South Carson
Tulsa, OK 74119
(918) 584-2047

- AND -

14

OK

JAMES M. CURRAN, Attorney for Plaintiffs
Richardson, Heilman & Curran
The Jefferson Building
West Wing, Second Floor
330 Milltown Road
East Brunswick, NJ 08816
(908) 254-7070



ROBERT P. REDEMANN, Attorney for Defendant
Rhodes, Hieronymus, Jones, Tucker & Gable
Suite 2800, 15 West 6th Street
Tulsa, OK 74119-5430
(918) 582-1173

c:\keeter\stip-dis

DATE JUN 28 1994

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

F D

CLESTER BILLS,
Plaintiff,
vs.
United States Federal Court,
et al.,
Defendants.

JUN 27 1994

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 94-C-477-E
consolidated with
94-C-491-E

ORDER

The Court recently granted Plaintiff, a federal prisoner, leave to proceed in forma pauperis and consolidated the above causes of action. The Court will now consider whether Plaintiff's consolidated action is frivolous under 28 U.S.C. § 1915(d).

In his complaints, Plaintiff, pro se, sues Chief of Police Ron Palmer, Sheriff Stanley Glanz, and appointed counsel Charles Whitman on the basis of an allegedly invalid search warrant.¹ He alleges (1) that the search was invalid; (2) that the federal marshall had Curtis Pratt, a witness, in their custody, but failed to produce him; (3) that state police officers recovered a gun during a search of his house although the search warrant specified only drugs; and (4) that Charles Whitman acted as an agent of the federal courts when he misrepresented him in court. Plaintiff seeks to suppress the evidence obtained against him as a result of

¹Although the Plaintiff also named as defendants in the caption of his complaint the Federal Court and the U.S. Marshall, he failed to list these defendants in the first part of his complaint. In any case, the Court notes that Plaintiff would not be able to sue these federal defendants under 42 U.S.C. § 1983.

4

the allegedly illegal search, and requests a hearing to address the validity of the search warrant. Plaintiff also seeks money damages for his mental pain and suffering.

By way of background, the Court notes that Plaintiff was indicted on May 3, 1993, of possession of a firearm by a convicted felon, and of receiving and possessing unregistered firearms. On October 19, 1993, a federal jury found Defendant guilty as to both counts and this Court sentenced the Defendant to 41 months imprisonment. Appointed counsel Charles Whitman then timely filed a direct appeal and sought to withdraw as counsel of record on direct appeal. On March 10, 1994, the Tenth Circuit Court of Appeals, however, denied counsel's motion to withdraw and appointed him as counsel of record on appeal.

ANALYSIS

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meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327).

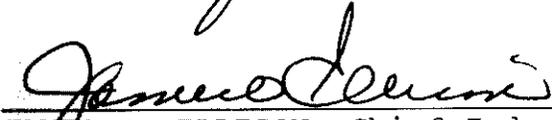
After construing Plaintiff's pro se pleading liberally, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law. An action under 42 U.S.C. § 1983 is not the proper avenue to seek to suppress the evidence entered at trial on the basis of an invalid search warrant especially when a Plaintiff has a direct criminal appeal presently pending before the Tenth Circuit Court of Appeals. Similarly, the Plaintiff cannot establish federal jurisdiction to litigate his malpractice action against Charles Whitman. See Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990) (per curiam) (claim against attorney did not establish federal question jurisdiction). Cf. Brown v. Schiff, 614 F.2d 237, 239 (10th Cir.) (per curiam), cert. denied, 446 U.S. 941 (1980) (claims of legal malpractice by a former defendant in a criminal case do not constitute a constitutional violation). While an attorney practicing in federal courts is an officer of the federal court, this does not make him or her a federal official performing acts, or refusing to perform acts, done under color of federal authority. No attempt to allege a denial of a civil right can change this fact.

As to Ron Palmer and Stanley Glanz, the Court concludes that the Plaintiff has not alleged any involvement by the Tulsa County Sheriff's Department, the Tulsa Police Department, or any of their employees, and thus, they cannot be liable under section 1983. See

Meade v. Grubbs, 841 F.2d 1512, 1528 (10th Cir. 1990) (a defendant cannot be liable under section 1983 unless that defendant personally participated in the challenged action).

Accordingly, the Court concludes that Plaintiff's consolidated action must be dismissed as frivolous under 28 U.S.C. § 1915(d).

SO ORDERED THIS 24th day of June, 1994.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

DATE JUN 27 1994

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

HOLDEN DUNFORD, Jr.,)
)
 Petitioner,)
)
 vs.)
)
 EDWARD EVANS, et al.,)
)
 Respondents.)

No. 93-C-738-BU

FILED

JUN 27 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Petitioner's application for a writ of habeas corpus is now at issue before the Court. The Respondents have filed a Rule 5 response and Petitioner has filed a reply.

In this proceeding, Petitioner alleges that his right to a speedy appeal of his September 22, 1992 first-degree-burglary conviction, Case No. 92-2071, has been unreasonably delayed in violation of his due process and equal protection rights. Respondents argue that Petitioner's appeal has not been inordinately delayed because it has been pending for less than two years.

Although a criminal defendant has no constitutional right to appeal his conviction, once a state provides an appeal-as-of-right to a criminal defendant, that appeal must meet federal constitutional guarantees of due process and equal protection. Evitts v. Lucey, 469 U.S. 387, 393 (1985). In Harris v. Champion, 15 F.3d 1548, 1558 (10th Cir. 1994) (Harris II), the Tenth Circuit Court of Appeals stated that in addition to providing appointed counsel and a free transcript, the State of Oklahoma must "afford [each] defendant a timely appeal, for an appeal that is inordinately delayed is as much a 'meaningless ritual,' as an

appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings." The Tenth Circuit then adopted the following balancing test to determine whether the delay in adjudicating a petitioner's direct criminal appeal violated the petitioner's due process rights:

(1) the length of the delay; (2) the reason for the delay and whether that reason is justified; (3) whether the petitioner asserted his right to a timely appeal; and (4) whether the delay prejudiced the petitioner.

Id. at 1559. As to the length of delay, the Tenth Circuit held that "a two-year delay in finally adjudicating a direct criminal appeal ordinarily will give rise to a presumption of inordinate delay."

After carefully reviewing the record in this case, the Court concludes that Petitioner is not entitled to habeas relief based solely on the delay in processing his direct criminal appeal. In Harris II, the Tenth Circuit construed the length of the delay "as a threshold that a petitioner must meet before the court need consider the other factors." Id. at 1559. Petitioner's direct criminal appeal has been pending for only twenty-two months since the filing of Petitioner's notice of appeal, and the Petitioner has not shown that his case may warrant a finding that the passage of less than two years would constitute inordinate delay in his case. See id. at 1561. Accordingly, the Court denies Petitioner's application for a writ of habeas corpus as prematurely filed.¹

¹In the event Petitioner is seeking to allege ineffective assistance of counsel as a result of the delay in filing his appellate brief, the Court concludes that Petitioner would not be entitled to relief on this ground either. In Harris II, 15 F.3d at

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C § 2254 be denied.

SO ORDERED THIS 24th day of JUNE, 1994.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

1569, the Tenth Circuit specifically held that counsel's ineffectiveness because of delay in filing an appellate brief ends once counsel files the brief.

ENTERED ON DOCKET

DATE JUN 27 1994

FILED

JUN 27 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

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

JESSIE M. HENDERSON,

Plaintiff,

vs.

INDEPENDENT SCHOOL DISTRICT
NO. 1 OF TULSA COUNTY,
OKLAHOMA, D. BRUCE HOWELL
and BLAINE G. SMITH,

Defendants.

Case No. 93-C-426 B

ORDER OF DISMISSAL WITH PREJUDICE

For good cause shown, upon the parties' joint application for dismissal with prejudice, it is ordered that this case be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this case is dismissed with prejudice.

SO ORDERED THIS 27 day of June, 1994.



THOMAS R. BRET, DISTRICT JUDGE
UNITED STATES DISTRICT COURT

28

21 (Okla. Crim. App. Apr. 28, 1992); Johnson v. State, No. 92-320 (Okla. Crim. App. Jun. 15, 1992); Thierry v. State, No. PC-93-662 (Okla. Crim. App. Sep. 7, 1993).

Respondent has moved to dismiss Petitioner's application for failure to exhaust state remedies. He argues that while Petitioner sought post-conviction relief in the District Court of Tulsa County, he failed to appeal the denial to the Court of Criminal Appeals. Petitioner replies that Oklahoma provides no state corrective process under which the Petitioner could have received a full, fair, and adequate hearing of his federal claims in Oklahoma State court, citing Goodwin v. State of Oklahoma, 923 F.2d 156, 157-58 (10th Cir. 1991) (recognizing that exhaustion of state remedies is futile where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition).¹

ANALYSIS

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal

¹Because Petitioner failed to comply with this Court's order requesting him to submit copies of the unpublished opinions, the Court will not be able to address Petitioner's futility argument under Goodwin. The Court also rejects Petitioner's argument that the Respondent failed to comply with Rule 5 of the rules governing section 2254 cases, when he moved to dismiss for failure to exhaust state remedies instead of addressing Petitioner's claims on the merits. The Court's February 26, 1994 order fully contemplated a motion to dismiss based upon alleged nonexhaustion. (Doc. #3 at 2.)

claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the state highest Court. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not exhausted his state judicial remedies in Oklahoma state court or brought himself within one of the exceptions to the exhaustion rule. Cf. Hall v. Spears, No. 92-6164, slip op. at 2 (10th Cir. Aug. 4, 1992) (unpublished opinion; attached to this order) (holding that petitioner who attacked an Oklahoma conviction on the ground that it was enhanced by an invalid Iowa conviction, had to exhaust his state remedies by first challenging his Iowa conviction in the Iowa courts); see also 28 U.S.C. § 2254(b). Although the Petitioner is indeed "in custody" under Gamble, the "in custody" status does not excuse him from the requirement of exhausting his state judicial remedies. See Hall, slip op. at 2. In Gamble, the Tenth Circuit merely recognized that a federal court has jurisdiction when the constitutionality of an expired conviction used for enhancement purposes has been attacked. Gamble, 898 F.2d 118-19; accord Hardiman v. Reynolds, 971 F.2d 500,

502 n.3 (10th Cir. 1992). However, neither Gamble nor Hardiman created an exception to the exhaustion doctrine.

ACCORDINGLY, IT IS HEREBY ORDERED that Respondent's motion to dismiss [docket #5] be **granted**, and that the petition for a writ of habeas corpus be **dismissed without prejudice** for failure to exhaust state judicial remedies.

IT IS SO ORDERED this 27 day of June, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

David W. HALL, Petitioner-Appellant,
v.

Denise SPEARS, Respondent-Appellee.
No. 92-6164.

United States Court of Appeals, Tenth Circuit.
Aug. 4, 1992.

W.D.Okl., No. 91-CV-971.
W.D.Okl.
AFFIRMED.

Before JOHN P. MOORE, TACHA and BRORBY, Circuit Judges.
ORDER AND JUDGMENT [FN*]

BRORBY, Circuit Judge.

**1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Mr. Hall, an Oklahoma State inmate, appeals the dismissal of his pro se petition for habeas relief. We grant permission for Mr. Hall to proceed in forma pauperis and affirm.

Mr. Hall, in June 1990, entered guilty pleas in Oklahoma to several counts of sexual offenses and a firearm charge, all after conviction of a former felony. The prior conviction took place in the State of Iowa, and it was this conviction that resulted in an enhancement of his Oklahoma sentences, which were ten years each to run concurrently.

Mr. Hall, in his pro se petition, claimed his guilty plea to some of the Oklahoma convictions was not knowingly and voluntarily entered as the prior Iowa conviction used to enhance his Oklahoma sentence was invalid. Mr. Hall asserted in a conclusory fashion that the Iowa conviction was coerced, was a product of ineffective assistance of counsel, was a product of the Iowa court failure to advise him of his rights, and was accomplished without a competency hearing.

Mr. Hall pursued his remedies in the Oklahoma courts, which held: (1) the proper method of attacking a former conviction is in the state imposing the conviction, i.e., Iowa; and (2) Mr. Hall failed to adequately explain his
Copr.(C) West 1994. No claim to original govt. work

CITE AS: 972 F.2D 356, 1992 WL 186285, **1 (10TH CIR.(OKL.))
 failure to directly appeal the Iowa conviction and he was therefore procedurally barred from presenting this claim to the Oklahoma courts. However, the Oklahoma courts stated Mr. Hall could again come before them and receive relief if he successfully challenged his Iowa conviction in the Iowa courts.

The bottom line is that no state court has addressed the merits of Mr. Hall's claims concerning his Iowa conviction. To make this situation more interesting, the State of Oklahoma failed to raise the issue of exhaustion and instead conceded Mr. Hall had exhausted his state remedies. Mr. Hall alleged he had no Iowa trial court records to support his claim.

The district court dismissed Mr. Hall's petition without prejudice until Mr. Hall properly challenged his Iowa conviction in the Iowa courts. [FN1] The district court reasoned that as Iowa has all of the court records, it is in a better position to hear and weigh any evidence bearing on the validity of the Iowa conviction and is better equipped to apply Iowa law.

In his pro se appeal of this decision, Mr. Hall raises the same six arguments raised in the district court, i.e., the Iowa conviction is constitutionally invalid, and asserts he is attacking the Oklahoma sentence that was enhanced by the invalid Iowa conviction. The State of Oklahoma has elected not to respond. [FN2]

28 U.S.C. s 2254(b) provides that an application for habeas shall not be granted "unless it appears that the applicant has exhausted the remedies available in the courts of the State." The question we must answer is which state: the state imposing the enhanced sentence, or the state where the conviction arose which gives rise to the enhanced sentence?

**2 The exhaustion doctrine is designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings. It is therefore improper to upset a state court conviction without any opportunity to the state court to correct an alleged constitutional violation. In the case before us, it would be equally improper for either an Oklahoma court or a federal court to upset an Iowa conviction without first extending to Iowa the opportunity to correct any alleged constitutional violations. We therefore hold that when a conviction is attacked under 28 U.S.C. s 2254, the petitioner attacking the conviction must first exhaust available remedies in the state of conviction or bring himself within one of the exceptions to the exhaustion rule. Mr. Hall has done neither. Mr. Hall misperceives the "in custody" requirement and argues the federal district court has jurisdiction as he is "in custody" because of the Iowa conviction's use in enhancing his Oklahoma sentence. Mr. Hall cites *Maleng v. Cook*, 490 U.S. 488 (1989); *Gamble v. Parsons*, 898 F.2d 117 (10th Cir.), cert. denied, 111 S.Ct. 212 (1990); and *Lowery v. Young*, 887 F.2d 1309 (7th Cir.1989). All three cases hold a state prisoner is in custody when another state has imposed a conviction used to enhance petitioner's present sentence. Mr. Hall is indeed "in custody"; however, this does not excuse him from the requirement of exhausting his remedies in the state imposing the conviction he now challenges. The "in custody" requirement is basically jurisdictional while the exhaustion requirement is founded upon principles of comity.

Mr. Hall must exhaust his state remedies by first challenging his Iowa conviction in the Iowa courts, then the Oklahoma courts and the federal courts

CITE AS: 972 F.2D 356, 1992 WL 186285, **2 (10TH CIR.(OKL.))

become available for Mr. Hall to pursue his remedy.

The judgment of the district court is AFFIRMED.

FN* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3.

FN1. The district court dismissed until Mr. Hall "successfully challenged" the prior conviction in the Iowa courts. We assume the word "successfully" was inadvertently used to mean allowing the Iowa courts an opportunity to review Mr. Hall's claims.

FN2. States undoubtedly save time and money in electing this course of action. In so doing, the state shifts its burden of examining the other side of the coin to this Court. Oklahoma's position before the trial court was that Mr. Hall's petition was an attempt to appeal the prior Iowa conviction and an assertion that the district court lacked jurisdiction. We simply note this Court always appreciates a response by the state.

ND OF DOCUMENT

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DATE JUN 27 1994

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

FILED

JUN 27 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

REPO COMPANY, INC.,)
)
Plaintiff,)
)
vs.)
)
DONALD S. WELLS,)
)
Defendant.)

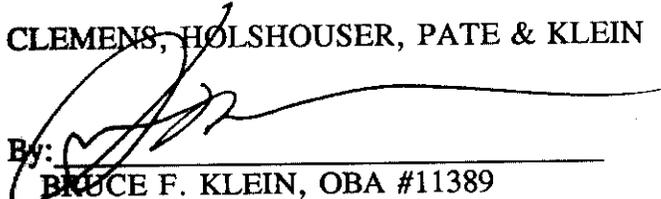
NO. 94-C-71-~~JK~~

STIPULATED DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, The Repo Company, Inc., by and through its attorney, Bruce F. Klein, and the Defendant, Donald S. Wells, by and through his counsel, Melinda J. Martin, and hereby stipulate that the proceedings be discontinued as to Plaintiff's claims without prejudice to refiling. It is stipulated by the parties that they shall bear their own attorneys fees and costs.

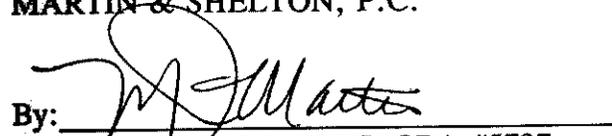
Respectfully submitted,

CLEMENS, HOLSHOUSER, PATE & KLEIN

By: 

BRUCE F. KLEIN, OBA #11389
MARK J. PEREGRIN, OBA #12438
205 N.W. 63rd Street, Suite 160
Oklahoma City, OK 73116
(405) 848-8842
Attorneys for Plaintiff

MARTIN & SHELTON, P.C.

By: 

MELINDA J. MARTIN, OBA #5737
Martin & Shelton, P.C.
320 South Boston Avenue, Suite 905
Tulsa, OK 74103
Attorneys for Defendant

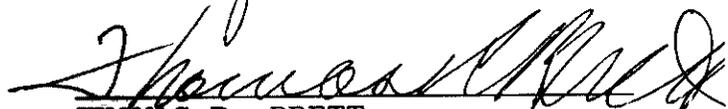


basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous under section 1915(d) if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327).

After liberally construing Plaintiff's pro se pleading, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law. Plaintiff's negligence claim with regard to the removal and disposition of his dental plate does not amount to a constitutional violation. West v. Atkins, 487 U.S. 42, 48 (1988) (only the violation of a right secured by the Constitution or laws of the United States is actionable under 42 U.S.C. § 1983). Neither negligence nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause of the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981).

Accordingly, the Court concludes that Plaintiff's civil rights action must be dismissed as frivolous under 28 U.S.C. § 1915(d).

SO ORDERED THIS 27 day of June, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Petitioner contends that he should not be required to exhaust his state remedies because such would be futile and a waste of judicial resources as the Oklahoma Court of Criminal Appeals has recently rejected the same issue of law in Day v. State, No. PC-92-21 (Okla. Crim. App. Apr. 28, 1992); Johnson v. State, No. 92-320 (Okla. Crim. App. Jun. 15, 1992); Thierry v. State, No. PC-93-662 (Okla. Crim. App. Sep. 7, 1993).¹

Respondent has moved to dismiss Petitioner's application for failure to exhaust state remedies. He argues that, since Petitioner's conviction was affirmed on direct appeal, the Petitioner has only filed a request for a Writ of Mandamus with the Oklahoma Court of Criminal Appeals. Petitioner replies that Oklahoma provides no state corrective process under which the petitioner could receive a full, fair, and adequate hearing of his federal claims, citing Goodwin v. State of Oklahoma, 932 F.2d 156, 157-58 (10th Cir. 1991).

ANALYSIS

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the state highest Court. See Picard v. Conner,

¹The Petitioner has failed to submit copies of these unpublished opinion, and the Court has no access to them.

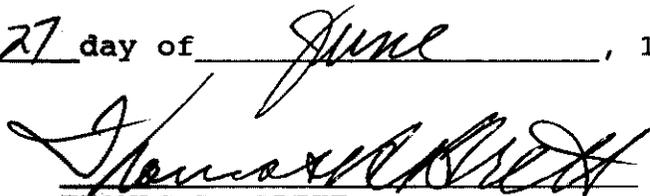
404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not exhausted his state judicial remedies in the State of Illinois or brought himself within one of the exceptions to the exhaustion rule. See Hall v. Spears, No. 92-6164, slip op. at 2 (10th Cir. Aug. 4, 1992) (unpublished opinion; attached to this order) (holding that petitioner who attacked an Oklahoma conviction on the ground that it was enhanced by an invalid Iowa conviction, had to exhaust his state remedies by first challenging his Iowa conviction in the Iowa courts); see also 28 U.S.C. § 2254(b). Although the Petitioner is indeed "in custody" under Gamble, the "in custody" status does not excuse him from the requirement of exhausting his state judicial remedies in the states which imposed the convictions he now challenges. See Hall, slip op. at 2. In Gamble, the Tenth Circuit merely recognized that a federal court has jurisdiction when the constitutionality of an expired conviction used for enhancement purposes has been attacked. Gamble, 898 F.2d 118-19; accord Hardiman v. Reynolds, 971 F.2d 500, 502 n.3 (10th Cir. 1992). However, neither Gamble nor Hardiman created an exception to the exhaustion doctrine.

Therefore, the Court concludes that Petitioner must exhaust his state remedies by first challenging his prior conviction in Illinois State court. The Oklahoma Courts and the Federal Courts will then become available for Petitioner to pursue his remedy. See Hall, slip op. at 2.

ACCORDINGLY, IT IS HEREBY ORDERED that Respondent's motion to dismiss [docket #4] be **granted**, and that the petition for a writ of habeas corpus be **dismissed without prejudice** for failure to exhaust state judicial remedies.

IT IS SO ORDERED this 27 day of June, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

David W. HALL, Petitioner-Appellant,
v.

Denise SPEARS, Respondent-Appellee.
No. 92-6164.

United States Court of Appeals, Tenth Circuit.
Aug. 4, 1992.

W.D.Okl., No. 91-CV-971.
W.D.Okl.
AFFIRMED.

Before JOHN P. MOORE, TACHA and BRORBY, Circuit Judges.
ORDER AND JUDGMENT [FN*]

BRORBY, Circuit Judge.

**1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Mr. Hall, an Oklahoma State inmate, appeals the dismissal of his pro se petition for habeas relief. We grant permission for Mr. Hall to proceed in forma pauperis and affirm.

Mr. Hall, in June 1990, entered guilty pleas in Oklahoma to several counts of sexual offenses and a firearm charge, all after conviction of a former felony. The prior conviction took place in the State of Iowa, and it was this conviction that resulted in an enhancement of his Oklahoma sentences, which were ten years each to run concurrently.

Mr. Hall, in his pro se petition, claimed his guilty plea to some of the Oklahoma convictions was not knowingly and voluntarily entered as the prior Iowa conviction used to enhance his Oklahoma sentence was invalid. Mr. Hall asserted in a conclusory fashion that the Iowa conviction was coerced, was a product of ineffective assistance of counsel, was a product of the Iowa court failure to advise him of his rights, and was accomplished without a competent hearing.

Mr. Hall pursued his remedies in the Oklahoma courts, which held: (1) the proper method of attacking a former conviction is in the state imposing the conviction, i.e., Iowa; and (2) Mr. Hall failed to adequately explain his
Copr.(C) West 1994. No claim to original govt. work

CITE AS: 972 F.2D 356, 1992 WL 186285, **1 (10TH CIR.(OKL.))

failure to directly appeal the Iowa conviction and he was therefore procedurally barred from presenting this claim to the Oklahoma courts. However, the Oklahoma courts stated Mr. Hall could again come before them and receive relief if he successfully challenged his Iowa conviction in the Iowa courts.

The bottom line is that no state court has addressed the merits of Mr. Hall's claims concerning his Iowa conviction. To make this situation more interesting, the State of Oklahoma failed to raise the issue of exhaustion and instead conceded Mr. Hall had exhausted his state remedies. Mr. Hall alleged he had no Iowa trial court records to support his claim.

The district court dismissed Mr. Hall's petition without prejudice until Mr. Hall properly challenged his Iowa conviction in the Iowa courts. [FN1] The district court reasoned that as Iowa has all of the court records, it is in a better position to hear and weigh any evidence bearing on the validity of the Iowa conviction and is better equipped to apply Iowa law.

In his pro se appeal of this decision, Mr. Hall raises the same six arguments raised in the district court, i.e., the Iowa conviction is constitutionally invalid, and asserts he is attacking the Oklahoma sentence that was enhanced by the invalid Iowa conviction. The State of Oklahoma has elected not to respond. [FN2]

28 U.S.C. s 2254(b) provides that an application for habeas shall not be granted "unless it appears that the applicant has exhausted the remedies available in the courts of the State." The question we must answer is which state: the state imposing the enhanced sentence, or the state where the conviction arose which gives rise to the enhanced sentence?

**2 The exhaustion doctrine is designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings. It is therefore improper to upset a state court conviction without any opportunity to the state court to correct an alleged constitutional violation. In the case before us, it would be equally improper for either an Oklahoma court or a federal court to upset an Iowa conviction without first extending to Iowa the opportunity to correct any alleged constitutional violations. We therefore hold that when a conviction is attacked under 28 U.S.C. s 2254, the petitioner attacking the conviction must first exhaust available remedies in the state of conviction or bring himself within one of the exceptions to the exhaustion rule. Mr. Hall has done neither.

Mr. Hall misperceives the "in custody" requirement and argues the federal district court has jurisdiction as he is "in custody" because of the Iowa conviction's use in enhancing his Oklahoma sentence. Mr. Hall cites *Maleng v. Cook*, 490 U.S. 488 (1989); *Gamble v. Parsons*, 898 F.2d 117 (10th Cir.), cert. denied, 111 S.Ct. 212 (1990); and *Lowery v. Young*, 887 F.2d 1309 (7th Cir.1989). All three cases hold a state prisoner is in custody when another state has imposed a conviction used to enhance petitioner's present sentence. Mr. Hall is indeed "in custody"; however, this does not excuse him from the requirement of exhausting his remedies in the state imposing the conviction he now challenges. The "in custody" requirement is basically jurisdictional while the exhaustion requirement is founded upon principles of comity.

Mr. Hall must exhaust his state remedies by first challenging his Iowa conviction in the Iowa courts, then the Oklahoma courts and the federal courts

CITE AS: 972 F.2D 356, 1992 WL 186285, **2 (10TH CIR.(OKL.))

become available for Mr. Hall to pursue his remedy.

The judgment of the district court is **AFFIRMED**.

FN* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3.

FN1. The district court dismissed until Mr. Hall "successfully challenged" the prior conviction in the Iowa courts. We assume the word "successfully" was inadvertently used to mean allowing the Iowa courts an opportunity to review Mr. Hall's claims.

FN2. States undoubtedly save time and money in electing this course of action. In so doing, the state shifts its burden of examining the other side of the coin to this Court. Oklahoma's position before the trial court was that Mr. Hall's petition was an attempt to appeal the prior Iowa conviction and an assertion that the district court lacked jurisdiction. We simply note this Court always appreciates a response by the state.

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NW
6-23

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JUN 27 1994

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES EUGENE DIXON;
MARSHA MARIE DIXON;
CITY OF BROKEN ARROW, Oklahoma
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C-365-B

FILED

JUN 27 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27th day
of June, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Phil Pinnell, Assistant United States Attorney;
the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by
J. Dennis Semler, Assistant District Attorney, Tulsa County,
Oklahoma; the Defendant, CITY OF BROKEN ARROW, Oklahoma, appears
by Michael R. Vanderburg, City Attorney, City of Broken Arrow,
Oklahoma; and the Defendants, JAMES EUGENE DIXON and MARSHA MARIE
DIXON, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, JAMES EUGENE DIXON,
acknowledged receipt of Summons and Complaint on or about
April 27, 1994; that the Defendant, MARSHA MARIE DIXON,
acknowledged receipt of Summons and Complaint on April 27, 1994;
that the Defendant, CITY OF BROKEN ARROW, Oklahoma, acknowledged

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receipt of Summons and Complaint on April 18, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 18, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 15, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 9, 1994; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on May 4, 1994; and that the Defendants, JAMES EUGENE DIXON and MARSHA MARIE DIXON, have failed to answer and default has therefore been entered by the Clerk of this Court.

The Court further finds that on November 27, 1991, JAMES EUGENE DIXON and MARSHA MARIE DIXON filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-04268-C. On April 10, 1992, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on May 11, 1992.

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

Lot Twenty-nine (29), Block Seven (7), INDIAN SPRINGS PARK II, an Addition to the city of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat No. 3860.

The Court further finds that on April 29, 1988, the Defendants, JAMES EUGENE DIXON and MARSHA MARIE DIXON, executed and delivered to Sears Mortgage Corporation, a mortgage note in the amount of \$75,650.00, payable in monthly installments, with interest thereon at the rate of Nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, JAMES EUGENE DIXON and MARSHA MARIE DIXON, executed and delivered to Sears Mortgage Corporation a mortgage dated April 29, 1988, covering the above-described property. Said mortgage was recorded on May 2, 1988, in Book 5096, Page 921, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 14, 1989, Sears Mortgage Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on January 9, 1990, in Book 5229, Page 1827, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 1, 1989, the Defendants, JAMES EUGENE DIXON and MARSHA MARIE DIXON, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on October 1, 1990 and April 1, 1991.

The Court further finds that the Defendants, JAMES EUGENE DIXON and MARSHA MARIE DIXON, made default under the terms

of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, JAMES EUGENE DIXON and MARSHA MARIE DIXON, are indebted to the Plaintiff in the principal sum of \$174,128.92, plus interest at the rate of Nine percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$32.00 which became a lien on the property as of July 7, 1988. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, Oklahoma, claims no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat of INDIAN SPRINGS PARK II ADDITION.

The Court further finds that the Defendants, JAMES EUGENE DIXON and MARSHA MARIE DIXON, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, JAMES EUGENE DIXON and MARSHA MARIE DIXON, in the principal sum of \$174,128.92, plus interest at the rate of Nine percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.28 percent per annum until paid, plus the costs of this action, and 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 Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$32.00 for personal property taxes for the year 1987, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CITY OF BROKEN ARROW, Oklahoma, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat of INDIAN SPRINGS PARK II ADDITION.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, JAMES EUGENE DIXON and MARSHA MARIE DIXON, have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, JAMES EUGENE DIXON and MARSHA MARIE DIXON, to satisfy the judgment of the Plaintiff 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 according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$32.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

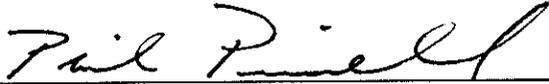
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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


UNITED STATES DISTRICT JUDGE

APPROVED:

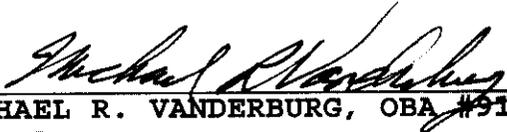
STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL
Assistant United States Attorney
3900 U.S. Courthouse
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(918) 581-7463



J. DENNIS SEMLER, OBA #8076
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County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



MICHAEL R. VANDERBURG, OBA #9180
City Attorney,
CITY OF BROKEN ARROW
P. O. Box 610
Broken Arrow, OK 74012
Attorney for Defendant,
City of Broken Arrow, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-365-B

NBK:flv

ENTERED ON DOCKET

DATE 6-24-94

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 GAYLE EUGENE SALMON; LETA J.)
 SALMON; CITY OF GLENPOOL,)
 Oklahoma; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

JUN 23 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C 366B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this _____ day
 of _____, 1994. The Plaintiff appears by Stephen C.
 Lewis, United States Attorney for the Northern District of
 Oklahoma, through Neal B. Kirkpatrick, Assistant United States
 Attorney; the Defendants, **County Treasurer, Tulsa County,
 Oklahoma, and Board of County Commissioners, Tulsa County,
 Oklahoma,** appear by J. Dennis Semler, Assistant District
 Attorney, Tulsa County, Oklahoma; and the Defendants, **Gayle
 Eugene Salmon, Leta J. Salmon, and City of Glenpool, Oklahoma,**
 appear not, but make default.

The Court being fully advised and having examined the
 court file finds that the Defendants, **Gayle Eugene Salmon and
 Leta J. Salmon,** acknowledged receipt of Summons and Complaint on
 April 29, 1994; that the Defendant, **City of Glenpool, Oklahoma,**
 acknowledged receipt of Summons and Complaint on May 16, 1994;
 that Defendant, **County Treasurer, Tulsa County, Oklahoma,**
 acknowledged receipt of Summons and Complaint on April 15, 1994;

and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on April 14, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on April 29, 1994; and that the Defendants, **Gayle Eugene Salmon, Leta J. Salmon, and City of Glenpool, Oklahoma**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Thirty (30), Block Six (6), BRENTWOOD II, an Addition to the City of Glenpool, Tulsa County, State of Oklahoma, according to the recorded Amended plat thereof.

The Court further finds that on September 29, 1982, the Defendants, **Gayle Eugene Salmon and Leta J. Salmon**, executed and delivered to MIDLAND MORTGAGE CO. their mortgage note in the amount of \$55,000.00, payable in monthly installments, with interest thereon at the rate of thirteen and one-half percent (13.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, **Gayle Eugene Salmon and Leta J. Salmon, Husband and Wife**, executed and delivered to MIDLAND MORTGAGE CO. a mortgage dated September 29, 1982, covering the above-described property. Said mortgage was

recorded on October 1, 1982, in Book 4641, Page 1274, in the records of Tulsa County, Oklahoma.

The Court further **finds** that on September 28, 1988, Midland Mortgage Co. assigned **the** above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his **successors** and assigns. This Assignment of Mortgage was recorded on **October 19**, 1988, in Book 5135, Page 442, in the records of Tulsa County, Oklahoma.

The Court further **finds** that on October 1, 1988, the Defendants, Gayle Eugene Salmon and Leta J. Salmon, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of **its** right to foreclose. Superseding agreements were reached between these same parties on October 1, 1989 and February 1, 1991.

The Court further **finds** that the Defendants, Gayle Eugene Salmon and Leta J. Salmon, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance **agreements**, by reason of their failure to make the monthly **installments** due thereon, which default has continued, and **that** by reason thereof the Defendants, **Gayle Eugene Salmon and Leta J. Salmon**, are indebted to the Plaintiff in the principal **sum** of \$87,040.51, plus interest at the rate of 13.5 percent per **annum** from Mach 31, 1994 until judgment, plus interest **thereafter** at the legal rate until fully paid, and the costs of this **action**.

The Court further **finds** that the United States has liens upon the property by **virtue** of a Notice of Lien For Fine

Imposed Pursuant to the Sentencing Reform Act of 1984, Serial Number 062, Case No. 88-CR-084-004-C against Gayle Eugene Salmon, dated March 19, 1992, and recorded on March 30, 1992 in Book 5392 at Page 1152 in the records of Tulsa County, Oklahoma; and a re-recording of the Notice of Lien for Fine Imposed Pursuant to the Sentencing Reform Act of 1984, Serial Number 062, Case No. 88-CR-084-C against Gayle Eugene Salmon, dated December 16, 1992 and recorded on December 18, 1992, in Book 5462, Page 1869, in the records of Tulsa County, Oklahoma; and that the amount owed on these lien will be paid out of the proceeds of the sale if the property should yield an amount in excess of the debt to the Secretary of Housing and Urban Development, according to its priority as provided by 18 U.S.C. § 3613.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$42.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$37.00, which became a lien on the property as of June 25, 1993; and a claim against the subject property in the amount of \$36.00, for the 1993 tax year. Said liens and claims are inferior to the interest of the Plaintiff, **United States of America**.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, **Gayle Eugene Salmon, Leta J. Salmon, and City of Glenpool, Oklahoma**,

are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Gayle Eugene Salmon and Leta J. Salmon**, in the principal sum of \$87,040.51, plus interest at the rate of 13.5 percent per annum from March 31, 1994 until judgment, plus interest thereafter at the current legal rate of 5.28 percent per annum until paid, plus the costs of this action, 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 Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$115.00 for personal property taxes for the year 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Gayle Eugene Salmon, Leta J. Salmon, City of Glenpool, Oklahoma, and the Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Gayle Eugene Salmon and Leta J. Salmon**, to satisfy the in rem judgment of the Plaintiff 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 according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$115.00, personal property taxes which are currently due and owing.

The surplus from said sale, 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 pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barrèd and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



for NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 366B

NBK:lg

DATE JUN 24 1994

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

IN RE:)
)
 MALONEY-CRAWFORD, INC.,)
)
 Debtor.)
)
 MALONEY-CRAWFORD, INC.,)
)
 Appellant,)
)
 vs)
)
 FIDELITY AND DEPOSIT COMPANY)
 OF MARYLAND,)
)
 Appellee.)

FILED

JUN 23 1994

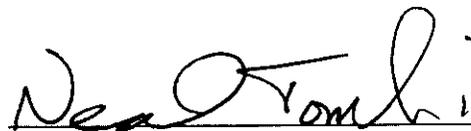
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DISTRICT COURT CASE NO.
93-C-871-B

STIPULATION FOR DISMISSAL

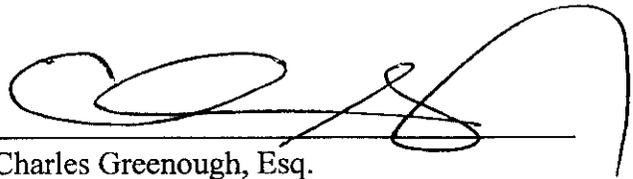
Maloney-Crawford, Inc., Plaintiff and Appellant herein, and Fidelity and Deposit Company of Maryland, Defendant and Appellee herein, hereby stipulate to the dismissal of the above-referenced appeal to the United States District Court for the Northern District of Oklahoma. Each party shall bear their own attorneys fees and costs.

Respectfully submitted,



Neal Tomlins, OBA No. 10499
TOMLINS & GOINS
A Professional Corporation
21 Centre Park
2642 East 21st Street, Suite 230
Tulsa, Oklahoma 74114
(918) 747-6500

Attorneys for Maloney-Crawford, Inc.



Charles Greenough, Esq.
Doerner, Stuart, Saunders, Daniel,
Anderson & Biolchini
320 South Boston, Suite 500
Tulsa, Oklahoma 74103

Counsel for Fidelity and Deposit Company
of Maryland

ENTERED ON DOCKET

DATE 6-24-94

FILED

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

JUN 23 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LEOTIS HERBERT WOOTEN,)
)
 Petitioner,)
)
 vs.)
)
 LEROY L. YOUNG, et al.,)
)
 Respondent.)

No. 93-C-286-B ✓

ORDER

Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now before the Court for consideration. Respondent has filed a Rule 5 response and a supplemental response. Petitioner has filed a reply and a supplemental reply. For the reasons stated below, Petitioner's application for a writ of habeas corpus should be denied.

I. BACKGROUND

On January 29, 1987, the Petitioner pled guilty to the charge of Uttering a Forged Instrument in Washington County, Oklahoma, Case Number CRF-86-333. The district court assessed punishment at ten-year imprisonment, with all but the first three years suspended. On April 23, 1988, the Petitioner was arrested and charged with first degree rape and two counts of forcible sodomy, Case Number CRF-88-117. On April 29, 1988, the State moved to revoke Petitioner's suspended sentence on the basis of the crimes charged in Case No. CRF-88-117. On September 13 through 15, 1988, Petitioner was tried and acquitted on all counts in Case Number

CRF-88-117. At a September 19, 1988 revocation hearing, the district court granted the State's application to revoke Petitioner's suspended sentence on the basis of the evidence before the court at the trial. The court found that the evidence at trial established by a preponderance of the evidence that "Mr. Wooten had committed the crimes of first-degree rape, forcible anal sodomy, and forcible oral sodomy. And, therefore, was in violation of his rules and conditions of probation." (Revocation Hearing Tr. at 12, attached to Doc. #11.) Petitioner unsuccessfully appealed to the Oklahoma Court of Criminal Appeals. (Decision attached to Doc. #1.)

The State's evidence at the trial included the victim's testimony that Petitioner had forced her to have vaginal intercourse, oral sodomy, and anal intercourse at James Abraham's abandoned house after punching her in the stomach, hitting her, and telling her how easy it would be to kill her. Before leaving the scene of the crime, Petitioner tied the victim's feet with her knee-high nylons and tied her hands with a piece of curtain. (Trial Tr. 389-98, 402-05.) The victim, however, managed to free herself and run naked with her hands tied behind her back to the B & B bar where she had been with the Petitioner earlier that evening. Marva Jo Tisdale, a barmaid, took the victim to the bathroom, cut the cloth behind her arms, and got her some clothes. (Id. at 406-414.) The victim then remained in the bathroom until closing when Ms. Tisdale took her to a friend's house, Linda LeFlore, where she called the police.

The victim's testimony was corroborated by Ms. Tisdale and Ms. LeFlore. Ms. Tisdale testified that the victim came running into the bar naked with her hands tied behind her back asking for help. (Id. at 70-71.) Ms. LeFlore testified that the victim came to her door early on the morning of April 23, 1988, and told her that she had been assaulted and raped by the Petitioner. (Id. at 164-65.) Ms. LeFlore testified that the victim had two fresh bruises on her face. An examination at the hospital also revealed a bruise in her left groin and above her left knee and evidence of recent sexual intercourse. (Id. at 195-96, 202.) The Police also discovered the victim's comb, shoes, and the nylons used to tie her feet at the abandoned house. (Id. at 248, 251.) Lastly, the bedspread had blood on it consistent with the victim's blood type. (Id. at 250, 358, 359.)

In this application, the Petitioner asserts that the district court erred in revoking his suspended sentence on the basis of acts upon which he was acquitted. The Respondent argues that the State properly revoked Petitioner's suspended sentence because the burden of proof for a revocation proceeding is less than that for a trial. In his reply, Petitioner urges that "no criminal conduct [was ever] established, and that the district court could not revoke petitioner's suspended sentence absent reliable evidence that the petitioner had committed another crime," citing Marshall v. Garrison, 659 F.2d 440, 446 (4th Cir. 1981). Petitioner also argues that the revocation of his suspended sentence on the basis of charges which did not support a guilty verdict violated the

double jeopardy clause.

ANALYSIS

Though revocation of a suspended sentence is not a stage of a criminal prosecution, it does result in a loss of liberty, Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973), and the probationer consequently cannot be denied due process. Morrisey v. Brewer, 408 U.S. 471, 482 (1972). In defining the scope of due process protection in revocation proceedings, the Supreme Court has insisted upon procedural guarantees sufficient to assure that the finding of a violation will be "based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." Id. at 484. In Moore v. State, 644 P.2d 1079, 1081 (Okla. Crim. App. 1982), the Oklahoma Court of Criminal Appeals held that revocation of a suspended sentence can be based upon an offense for which a probationer has been exonerated through acquittal as long as the evidence presented at the revocation hearing established that the probationer had violated the terms of his suspended sentence by a preponderance of the evidence.

This Court must presume the State court's factual findings correct. Sumner v. Mata, 455 U.S. 591, 597 (1982). Petitioner has not demonstrated that any of the seven exceptions to the presumption of correctness set forth in section 2254(d)(1)-(7) apply to this case, or that the factual determinations made by the State court are not fairly supported by the evidence in the state

court record. Petitioner generally argues that there was no evidence presented at the revocation hearing and that "the court's discretion was not based [on] verified facts." The Court notes, however, that at the revocation hearing, the State court incorporated all the evidence presented at the recent jury trial and heard arguments. (Revocation Hearing Tr. attached to Doc. #11.) Therefore, the State court's findings of fact that Petitioner violated the terms of his suspended sentence are entitled to a presumption of correctness.

The Court does not agree with Petitioner's assertion that the Due Process Clause is offended in every case where a suspended sentence is revoked on the basis of acts upon which a defendant was acquitted. There is no inherent inconsistency between a finding at a revocation hearing that a defendant has committed a crime, and the earlier acquittal of that crime in a jury trial. Only a preponderance of the evidence is required for the revocation of a suspended sentence, whereas a conviction requires a finding of guilt beyond a reasonable doubt. Moreover, because a revocation proceeding is not a criminal prosecution and the prior acquittal only establishes the existence of a reasonable doubt, an acquittal cannot bar proof of that crime at the revocation hearing. See Moore, 644 P.2d at 1080-81; see also 3 W. LaFave and J. Israel, Criminal Procedure, § 25.4(c) (1984).

The Court also rejects Petitioner's double-jeopardy argument. Although a defendant is at risk at a parole revocation hearing, that risk does not rise to the level of being "put in jeopardy" in

the constitutional sense. As noted above a revocation hearing is not equivalent to a criminal prosecution. Martuzky v. State, 574 P.2d 430, 432 (Okla. Crim. App. 1973). Moreover, the purpose of a revocation hearing is not to punish a criminal for violation of the law, but rather to determine whether he has violated the conditions of his probation. The court's authority to revoke probation does not depend on whether the defendant's probationary conduct is criminal. Rather, the function of the court at the probation revocation hearing is to determine whether to impose or execute a sentence for an offense of which the defendant has already been convicted and for which a suspended sentence was imposed. See Moore, 644 P.2d at 1081.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's application for a writ of habeas corpus be denied.

SO ORDERED THIS 23rd day of June, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

2. This case is hereby remanded to the District Court in and for Mayes County, Case No. CJ-93-146.

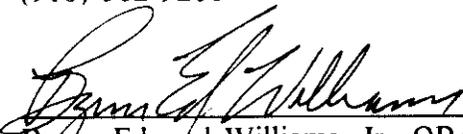
3. All parties will bear their own costs and attorney fees with respect to all matters relating to the dismissal of the seventh cause of action for RICO claims, and the removal and remand of this case to the Mayes County District Court.

s/ TERRY C. KERN

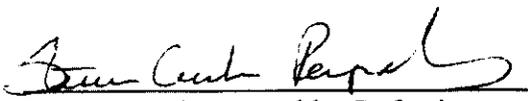
JUDGE OF THE DISTRICT COURT

STIPULATED TO AND APPROVED
AS TO FORM AND SUBSTANCE:


Elsie Draper, OBA #2484
Renée DeMoss, OBA #10779
GABLE & GOTWALS, INC.
15 West Sixth Street, Suite 2000
Tulsa, Oklahoma 74119-5447
(918) 582-9201


Byron Edward Williams, Jr., OBA #9634
Attorney for Plaintiff
13 North Elliott, Suite B
Pryor, Oklahoma 74361
(918) 825-2280


Larry L. Oliver, OBA #6769
Attorney for Plaintiff
2211 E. Skelly Drive
Tulsa, Oklahoma 74105
(918) 745-6084


Steven Curtis Reynolds, Defendant
331 S.E. 15th
Pryor, Oklahoma 74361

FILED DATE JUN 23 1994

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA JUN 22 1994

CHRIS and TRUDY MANER,

Plaintiffs,

vs.

STATE FARM INSURANCE COMPANY, a corporation, and, DAVID HALL, an individual,

Defendant.

Richard M. Lawrence, Clerk U.S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA

Case No. 93-C-610b

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs and Defendant and hereby stipulate that this case be dismissed with prejudice against all parties. Each party will pay their own attorney fees.

Respectfully submitted,

[Handwritten signature of Michael D. Harris]

DAVID O. HARRIS, OBA #3889 MICHAEL D. HARRIS, OBA #15253

3015 East Skelly Drive, #270 Tulsa, OK 74105 (918) 747-1058

ATTORNEYS FOR PLAINTIFFS

SELMAN & STAUFFER, INC.

By [Handwritten signature of Paul B. Harmon] NEAL E. STAUFFER, OBA #13168 PAUL B. HARMON, OBA #14611

700 Petroleum Club Building 601 South Boulder Tulsa, OK 74119 (918) 592-7000

ATTORNEYS FOR DEFENDANT

ENTERED ON DOCKET

DATE 6-23-94

FILED

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

JUN 23 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JANE CANDACE MITCHELL,

Plaintiff,

vs.

GANNON REEVES,

Defendants.

Case No. 93-C-468-E

JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

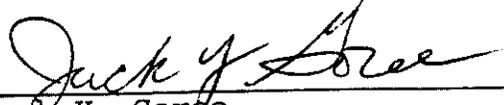
The Plaintiff and Defendants jointly request this Court to enter an order of Dismissal without Prejudice for the Plaintiff's causes of action against the Defendant, Gannon Reeves, in the above styled action, pursuant to Rule 41 FRCP(a)(1).

WHEREFORE, premises considered, the Plaintiff and Defendants respectfully request this Court to enter its Order of Dismissal without Prejudice of the Plaintiff's claims against the Defendant herein.

Respectfully submitted,

SNEED, LANG, ADAMS & BARNETT

By: 
G. Steven Stidham
2300 Williams Center Tower II
Two West Second Street
Tulsa, Oklahoma 74103
(918) 583-3145
ATTORNEYS FOR PLAINTIFF

By: 
Jack Y. Gorie
GOREE & KING, INC.
7335 South Lewis, Suite 306
Tulsa, Oklahoma 74136-6888
(918) 496-3366
ATTORNEYS FOR DEFENDANT

ENTERED ON DOCKET

DATE 6-23-94

kkt

OBA# 8382

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

FILED

JUN 23 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ROYAL INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
MICHAEL J. CULHANE,)
)
Defendant.)

No. 93-C-0861-E

STIPULATION OF DISMISSAL

Comes now the parties and, based upon the compromise settlement entered into between the parties, hereby stipulate that the above captioned case be dismissed with prejudice to its refileing.

Ronald C. Bennett
RONALD C. BENNETT OBA# 711
Attorney for Plaintiff

Brad Smith
BRAD SMITH OBA# 8382
Attorney for Defendant

ENTERED ON DOCKET

DATE 6-23-94

FILED

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

JUN 22 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

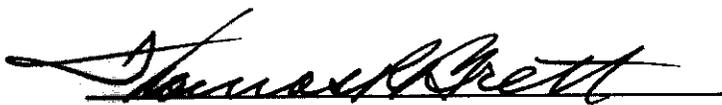
JERRY NELSON DUNCAN)
)
 Plaintiff,)
 v.)
)
 STATE FARM MUTUAL AUTOMOBILE)
 INSURANCE COMPANY,)
)
 Defendant.)

CASE NO. 93-C-37-B ✓

J U D G M E N T

In accordance with the jury verdict rendered this date, in favor of the Plaintiff, Jerry Nelson Duncan, and against the Defendant, State Farm Mutual Automobile Insurance Company, judgment is herewith entered in favor of the Plaintiff, Jerry Nelson Duncan, and against the Defendant, State Farm Mutual Automobile Insurance Company, in the amount of \$100,000.00, plus interest at the rate of 6.99 % annually from January 14, 1993, until this date, and interest from and after this date at the rate of 5.28% annually until paid. Costs of this action are assessed in favor of Plaintiff if timely applied for pursuant to Local Rule 54.1. Each party is to bear his or its own attorneys fees.

DATED, this 22nd day of June, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 5-23-94

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

HENSON-WILLIAMS REALTY, INC., an Oklahoma corporation,)
Plaintiff,)
vs.)
DOMINION CAPITAL, INC., a Virginia corporation; and H-W PROPERTIES, INC., a Delaware corporation,)
Defendants.)

FILED

JUN 23 1994

Richard L. ... Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-574-BU

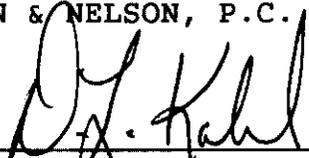
NOTICE OF DISMISSAL WITHOUT PREJUDICE

Plaintiffs Henson-Williams Realty, Inc., pursuant to Fed. R. Civ. P. 41(a)(1) hereby dismisses its claims herein without prejudice to the refiling thereof.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By:



Claire V. Eagan, OBA #554
Donald L. Kahl, OBA #4855
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR PLAINTIFF
HENSON-WILLIAMS REALTY, INC.

basis of factors concerning the offense and the offender. Following the changes at issue, a non-violent offender was considered for parole at twelve months after he had served fifteen percent of his sentence (15/12 date). A violent offender, on the other hand, was considered for parole at twenty-four months after he had served fifteen percent of his sentence (15/24 date).¹

For a parole guideline change to be deemed ex post facto it must involve a "law" which is applied retrospectively and which disadvantages the person affected. See Weaver v. Graham, 450 U.S. 24, 28 (1981). The Magistrate Judge advises that the Oklahoma parole guidelines are laws within the meaning of the Ex Post Facto Clause as they leave the Parole Board no discretion to consider a prisoner for parole prior to the date set in the guidelines, i.e. either the 15/12 or the 15/24 date. The Magistrate Judge further advises that the parole guidelines have been retroactively applied to Petitioner in violation of the Ex Post Facto Clause, and thus, that Petitioner should be considered immediately for parole from his second sentence so that he can be serving his third one.

Respondents argue that this Court should follow the majority of the Circuits that parole regulations are not "laws" for ex post facto purposes. They further argue that Petitioner cannot be disadvantaged by the new rules. In that respect, they state the following:

[T]he matter involved is merely when the defendant will be considered for parole. The only matter changed is when that consideration will occur. It is the position of the Respondent that, unlike the credits involved in

¹The regulations at issue are on the left-hand side of the file.

Weaver, there is nothing concrete involved, thus, there can be no disadvantage to the Petitioner when the rules governing that non-concrete matter are changed. Furthermore, the Petitioner cannot show that the rule change substantially alters the consequences of a crime already completed through an act which is retrospective in nature. The law is prospective in that it only attaches when a future event, i.e., the consideration for parole, occurs. As such the Petitioner is not affected by an ex post facto application of any "law" and his legitimate expectations of the system cannot include a guarantee of a certain date of release onto parole status.

(Docket #8 at 3.)

II. ANALYSIS

Although the Tenth Circuit has not decided whether the Oklahoma parole regulations are "laws" subject to the ex post facto prohibition, other Circuits have held that the Ex Post Facto Clause is implicated by changes to state administrative parole regulations. Brooks v. Oklahoma Pardon and Parole Bd., No. 93-6126 slip op. at 5 (10th Cir. Dec. 20, 1993) (1993 WL 525749) (unpublished opinion, attached to this order) (citing Flemming v. Oregon Bd. of Parole, 998 F.2d 721 (9th Cir. 1993); Akins v. Snow, 922 F.2d 1558 (11th Cir.), cert. denied, 111 S. Ct. 2915 (1991)). The majority of the Circuits, however, have held that an administrative parole regulation, whether state or federal, does not constitute a law for ex post facto purposes if the regulation merely guides and directs the extensive discretion of the paroling authority. See Bailey v. Gardebring, 940 F.2d 1150, 1156-57 (8th Cir. 1991) (holding Minnesota parole regulations are not "laws" within the meaning of the ex post facto clause; the regulations are

merely procedural aids for the parole commission's use when exercising its discretionary authority), cert. denied, 112 S. Ct. 1516 (1992); Devine v. New Mexico Dep't of Corrections, 866 F.2d 339, 343 n.7 (10th Cir. 1989) (stating in dicta that "[t]he majority of Circuits (including the Tenth) have reasoned that where guidelines merely channel the discretion of the parole authority, the guidelines do not constitute ex post facto laws because they do not directly disadvantage particular defendants"); Francis v. Fox, 838 F.2d 1147, 1150 (11th Cir. 1988) (holding that Alabama administrative regulation governing work release for prisoners is not a "law" within the meaning of the ex post facto clause; it is a policy rule that demonstrates how administrative discretion will likely be exercised); Wallace v. Christensen, 802 F.2d 1539, 1553-54 (9th Cir. 1986) (holding that United States parole commission guidelines are procedural guideposts, not subject to the ex post facto clause); Cf. United States v. Bell, 991 F.2d 1445, 1449-52 (8th Cir. 1993) (holding that ex post facto clause applies to United States Sentencing Guidelines and rejecting argument that guidelines merely guide and direct the discretion of the sentencing court); but see Flemming, 998 F.2d at 724-27 (limiting earlier Ninth Circuit case to context of federal parole guidelines and implying that the crucial issue in ex post facto challenges to changes in opportunities for early release, "regardless if such opportunities are contingent on the exercise of official discretion").

To decide whether the parole regulations at issue here are

laws subject to the Ex Post Facto Clause, this Court must determine "whether the Oklahoma parole statute permits the Board to exercise extensive discretion and whether the regulations merely guide and channel the Board's discretion." Brooks, slip op. at 5 (remanding issue of whether Oklahoma parole regulations are laws for ex post facto purposes). After carefully reviewing the record in this case, the Court concludes that the Oklahoma parole statute grants the Board "broad discretion to adopt whatever regulations it deems appropriate" to govern parole consideration, id., and that the regulations at issue do not "merely guide and direct the Parole Board's discretion," but rather leave the Board no room to exercise its discretion in setting parole consideration dates.²

The Court refutes Respondents' objection that Petitioner was not adversely affected by the changes in parole regulations. To affect an offender for ex post facto purposes, changes in parole regulation "need not technically increase the punishment" attached to a crime, but need only "substantially disadvantage" the offender's parole eligibility. Lindsey v. Washington, 301 U.S. 397, 401-02 (1937). By altering the period for parole

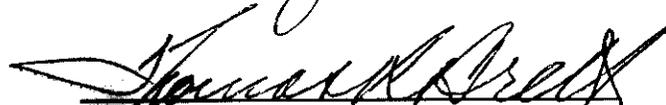
²The Respondents have not objected to the Report on the ground that the change in the frequency of parole consideration is only a procedural change. See Dobbert v. Florida, 432 U.S. 282, 293 (1977) (a procedural change is not ex post facto even though it may work to the disadvantage of an individual). But see Roller v. Cavanaugh, 984 F.2d 120, 123-24 (4th Cir. 1993) (change in parole reconsideration from every year to every two years "effectively 'revoked' [prisoner's] eligibility for an extra year following a denial"); Akins, 922 F.2d at 1562 (change from annual parole reconsideration to consideration every eight years rendered prisoner "ineligible for parole between two parole reconsideration hearings").

consideration, the Board has in fact increased the time Petitioner must spend in prison before he can become eligible for parole on his second and third concurrent sentences. Cf. Akins, 922 F.2d at 1564. Therefore, this change substantially disadvantages the Petitioner for ex post facto purposes.

III. CONCLUSION

Accordingly, the Court concludes that the Report and Recommendation of the Magistrate Judge [docket #5] should be adopted and affirmed. IT IS THEREFORE ORDERED That Petitioner's application for a writ of habeas corpus [docket #1] be granted. Petitioner shall be considered immediately for parole from his second sentence so that he can begin serving his third one. A "presumptive parole date" of eighteen (18) months shall be set for his third sentence also.

SO ORDERED THIS 21ST day of June, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Copr.(C) West 1994 No claim to orig. U.S. Govt. works.
Citation 13 F.3d 404 (Table) FOUND DOCUMENT Page(P) P 1 OF 14 Database CTA Mode PAGE
UNPUBLISHED DISPOSITION
(CITE AS: 13 F.3D 404, 1993 WL 525749 (10TH CIR.(OKL.)))

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Alfred BROOKS, Plaintiff-Appellant,
v.
OKLAHOMA PARDON AND PAROLE BOARD, Farrell Hatch, Defendants-Appellees.
No. 93-6126.
United States Court of Appeals, Tenth Circuit.
Dec. 20, 1993.

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13 F.3d 404 (Table) FOUND DOCUMENT P 2 OF 14 CTA PAGE
(CITE AS: 13 F.3D 404, 1993 WL 525749 (10TH CIR.(OKL.)))
Before ANDERSON and EBEL, Circuit Judges, and WINDER, [FN**] District Judge.
ORDER AND JUDGMENT [FN1]

**1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir. R. 34.1.9. This case is therefore ordered submitted without oral argument.

Pro se plaintiff Alfred Brooks appeals the district court's dismissal of his civil rights complaint, filed pursuant to 42 U.S.C.1983. Plaintiff is a state prisoner in Oklahoma, serving one life sentence, plus two twenty-year sentences and a five-year sentence. Plaintiff received an initial parole hearing after he served fifteen years of his life sentence. The Oklahoma Pardon & Parole Board (Parole Board) denied parole and voted to reconsider plaintiff's parole eligibility in three years. Plaintiff complained that defendants, the Parole Board and Farrell Hatch, Parole Board Chairman, violated his rights to due process and equal protection by failing to conduct his initial parole consideration hearing after he served ten years of his life sentence, as allegedly required by state statute. Plaintiff also complained that defendants violated the due process and ex post facto provisions of the Constitution by failing to reconsider him for parole on an annual basis. Defendants moved to dismiss the complaint. A United States magistrate judge issued a report recommending dismissal of the complaint for failure to state a claim upon which

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relief can be granted. The district court adopted all findings and recommendations of the magistrate judge and dismissed the complaint. We exercise jurisdiction under > 28 U.S.C. 1291 and affirm in part and reverse in part and remand for further proceedings.

I. Initial Parole Hearing

On appeal, plaintiff challenges the district court's dismissal of the due process and equal protection claims premised upon the allegedly untimely initial parole hearing. Plaintiff contends that the Oklahoma parole statute, Okla. Stat. tit. 57, 332.7(B), required defendants to hold his initial parole hearing after he served ten years of his life sentence. The district court dismissed plaintiff's constitutional claims because it found no such statutory requirement. We review the district court's interpretation of state law de novo. > Salve Regina College v. Russell, 499 U.S. 225, 231 (1991). Upon full review of the record and applicable statute, we agree with the district court. "[T]he plain language of [332.7(B)] limits only the Parole Board's

authority to recommend parole for certain habitual offenders until after the offender has served the lesser of one-third of his sentence or ten years." Findings and Recommendation of United States Magistrate Judge, R. 12 at 8. The statute does not require parole consideration in all cases after an inmate has served ten years. Plaintiff concedes that he was considered for and denied parole in September 1990, after he served fifteen years of his life sentence.

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The Parole Board was not statutorily required to consider plaintiff for parole sooner than it did. See Okla. Stat. tit. 57, 332.7(A) (requiring Parole Board to consider prisoner's eligibility for parole upon completion of one-third of the sentence). [FN2]

II. Parole Reconsideration Hearings

**2 When the Parole Board denied plaintiff parole in September 1990, it also voted to reconsider his parole eligibility in three years. Plaintiff alleged in his complaint that parole regulations in effect at the time of his offense required annual parole reconsideration hearings. He also alleged that defendants retrospectively applied a new parole regulation to delay his parole reconsideration hearing for two additional years. The district court, adopting the findings and conclusions of the magistrate judge, found that plaintiff failed to allege a due process or ex post facto violation.

A. Due Process Claim

We affirm the district court's dismissal of the due process claim. As the district court noted, the Oklahoma statutes do not require the Parole Board to reconsider a prisoner's parole eligibility once parole has been denied. This court has examined the Oklahoma parole statutes and concluded that they do not create a liberty interest in parole. > Shirley v. Chestnut, 603 F.2d 805, 807 (10th Cir.1979). "In the absence of such liberty interest, the specific due process procedures ... are not applicable." Id. Therefore, delay in

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receiving a parole reconsideration hearing does not give rise to a due process violation.

B. Ex Post Facto Claim

Our review of the ex post facto claim is more difficult because the record does not contain copies of the relevant unpublished parole regulations. [FN3] Defendants filed a court-ordered Martinez report, > see Martinez v. Aaron, 570 F.2d 317, 318-20 (10th Cir.1978), disputing plaintiff's description of the parole regulations in effect at the time of his offense (the "old regulations"). According to defendants' sworn description of the old regulations, inmates were given annual parole reconsideration hearings, but an exception to this rule allowed the Parole Board to vote not to reconsider a particular case for up to three years. Defendants explained in the Martinez report that the provision for this exception was amended in 1991 to allow the Board to vote to delay reconsideration of a particular case for up to five years. Defendants attached to their report a copy of parole regulations that became effective on August 8, 1991--nearly a full year after the Board voted to delay plaintiff's reconsideration hearing.

Along with the Martinez report, defendants filed a motion to dismiss the complaint. Defendants argued that no new regulations had been applied to plaintiff and that the old regulations allowed the Board to refuse to consider parole eligibility for three years, as it had in plaintiff's case. Defendants

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maintained, therefore, that a new regulation was not retrospectively applied, and even if it had been, plaintiff was not disadvantaged by the new rule because he received exactly what was provided for under the old rule. Defendants advanced two other theories in support of dismissing the ex post facto claim. They argued that the changes to the old regulations were merely procedural, and plaintiff lacks a liberty interest in parole.

**3 In a sworn and verified response to the Martinez report and the motion to dismiss, plaintiff claimed that defendants inaccurately described the old regulations. Plaintiff disputed that the old regulations allowed the Board

to delay parole reconsideration hearings for three years. Additionally, plaintiff pointed out that defendants failed to attach a copy of the old regulations to the Martinez report.

For purposes of resolving the ex post facto issue, the district court accepted plaintiff's description of the old regulations. The district court, therefore, presumed that the old regulations did not allow the Parole Board to wait three years between parole consideration hearings, and that when the Board voted to delay plaintiff's hearing, it retrospectively applied a new regulation. The court found, however, that retrospective application of the new regulation did not result in more onerous punishment. The court noted that the statutory parole law, which had not changed, lacks any requirement for reconsideration of parole. The court reasoned that plaintiff has no expectation of receiving

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parole reconsideration hearings and, therefore, "a change in the frequency with which the Parole Board considers Plaintiff's parole eligibility does not result in a more onerous punishment." R. 12 at 7. The court also characterized the Parole Board's new regulation as a "procedural change," id. at 8, that does not run afoul of the ex post facto clause.

A review of ex post facto principles facilitates our review of the district court's reasoning. The Constitution prohibits states from passing any ex post facto law. U.S. Const. art. I, 10, cl. 1. The prohibition is aimed at any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." > Weaver v. Graham, 450 U.S. 24, 28 (1981) (quoting > Cummings v. Missouri, 71 U.S. 277, 325-26 (1866)). "[T]o fall within the ex post facto prohibition, two critical elements must be present: first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" > Miller v. Florida, 482 U.S. 423, 430 (1987) (quoting > Weaver, 450 U.S. at 29). "[N]o ex post facto violation occurs if a change does not alter 'substantial personal rights,' but merely changes 'modes of procedure which do not affect matters of substance.'" Id. (quoting > Dobbert v. Florida, 432 U.S. 282, 293 (1977)).

The district court concluded that plaintiff had not shown that he had been
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disadvantaged by the Parole Board's treatment, as required under the second element of the ex post facto test. [FN4] Essentially, the district court gave three reasons for dismissing the ex post facto claim: (1) plaintiff has no statutory right to parole reconsideration; (2) the parole regulations are not laws subject to the ex post facto clause; and (3) the change to the parole regulations was procedural, not substantive. We consider these reasons in turn.

**4 The Supreme Court has clearly stated that "a law need not impair a 'vested right' to violate the ex post facto prohibition." > Weaver, 450 U.S. at 29; > Arnold v. Cody, 951 F.2d 280, 281 (10th Cir.1991). Therefore, the absence of a statutory right to a parole reconsideration hearing provides no basis for dismissal of the ex post facto claim. > See Weaver, 450 U.S. at 30 ("The presence or absence of an affirmative enforceable right is not relevant ... to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred."); > see also Roller v. Cavanaugh, 984 F.2d 120, 122 (4th Cir.) ("The ex post facto clauses are a restriction on the power of government and operate without regard to the affirmative 'rights' of the individual."), cert. dismissed, 62 U.S.L.W. 4011 (U.S. Nov. 30, 1993) (No. 92-1510).

Next, we consider whether the regulations are "laws" subject to the ex post facto prohibition, an analysis that merges somewhat with the analysis of

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whether changes are procedural or substantive for ex post facto purposes. The ex post facto prohibition restricts "arbitrary and potentially vindictive legislation." > Weaver, 450 U.S. at 29 (emphasis added). The regulations at

issue were not enacted by the Oklahoma state legislature. We must determine whether they are, nonetheless, tantamount to legislation, and, thus, subject to the ex post facto prohibition. Although this court has not addressed the issue, other circuits have held that the ex post facto clause is implicated by changes to state administrative parole regulations. > See *Flemming v. Oregon Bd. of Parole*, 998 F.2d 721 (9th Cir.1993); > *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), cert. denied, > 111 S.Ct. 2915 (1991). Generally, however, courts have held that an administrative parole regulation, whether state or federal, does not constitute a law for ex post facto purposes if the regulation merely guides and directs the extensive discretion of the paroling authority. > See *Bailey v. Gardebring*, 940 F.2d 1150, 1156-57 (8th Cir. 1991) (holding Minnesota parole regulations are not "laws" within meaning of Ex Post Facto Clause; the regulations are merely procedural aids for the parole commission's use when exercising its discretionary authority), cert. denied, > 112 S.Ct. 1516 (1992); > *Devine v. New Mexico Dep't of Corrections*, 866 F.2d 339, 343 n.7 (10th Cir.1989) (stating in dicta that "[t]he majority of Circuits (including the Tenth) have reasoned that where guidelines merely channel the discretion of the parole authority, the guidelines do not constitute ex post

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facto laws because they do not directly disadvantage particular defendants"); > *Francis v. Fox*, 838 F.2d 1147, 1150 (11th Cir.1988) (holding that Alabama administrative regulation governing work release for prisoners is not a "law" within meaning of Ex Post Facto Clause; it is a policy rule that demonstrates how administrative discretion will likely be exercised); > *Wallace v. Christensen*, 802 F.2d 1539, 1553-54 (9th Cir.1986) (holding that United States Parole Commission Guidelines are procedural guideposts, not subject to the Ex Post Facto Clause); > Cf. *United States v. Bell*, 991 F.2d 1445, 1449-52 (8th Cir.1993) (holding that Ex Post Facto Clause applies to United States Sentencing Guidelines and rejecting argument that Guidelines merely guide and direct the discretion of the sentencing court); > but see *Flemming*, 998 F.2d at 724-27 (limiting earlier Ninth Circuit case to context of federal parole guidelines and implying that the crucial issue in ex post facto challenges to changes in state parole regulations is whether the changed regulation reduces an inmate's opportunities for early release, "regardless if such opportunities are contingent on the exercise of official discretion").

**5 Therefore, to determine whether the parole regulations are laws subject to the Ex Post Facto Clause, we consider whether the Oklahoma parole statute permits the Board to exercise extensive discretion and whether the regulations merely guide and channel the Board's discretion. Although it did not undertake such an analysis, the district court found that "[t]he Parole Board in this

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case has applied a procedural change in its rules promulgated under its authority to enforce the parole law that remains unchanged from the date of Plaintiff's offenses." R. 12 at 8. Our review of the Oklahoma parole statute shows that the Board is authorized to do far more than enforce the statute, however. The Board is required to "adopt policies and procedures governing parole consideration." Okla. Stat. tit. 57, 332.7(A). The statute lacks "mandated standards of inmate-parole-release eligibility [and] also those that would structure eligibility for mere consideration of parole release." > *Phillips v. Williams*, 608 P.2d 1131, 1135 (Okla.), cert. denied, > 449 U.S. 860 (1980). "The Board's only statutory guidance in the exercise of its discretion is that it act as the public interest requires...." Id.; Okla. Stat. tit. 57, 354. Clearly, the Board has broad discretion to adopt whatever regulations it deems appropriate.

Without looking to the regulations themselves, however, we cannot decide whether the parole regulations are laws for ex post facto purposes because we cannot determine whether the regulations at issue merely guide and direct the Parole Board's discretion. > Cf. *Miller*, 482 U.S. at 435 (considering effect of particular set of guidelines and rejecting argument that guidelines "provide flexible 'guideposts' for use in the exercise of discretion"); > *Francis*, 838 F.2d at 1150 (examining particular parole regulation to determine its status as a law or mere policy rule). The only regulations in the record are those

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acted by the Parole Board nearly one year after it voted to delay plaintiff's
parole reconsideration hearing. Those regulations may or may not resemble the
regulations in effect when plaintiff committed his offense, or those in effect
when the Board voted to delay plaintiff's reconsideration hearing. Plaintiff's
brief description of the old regulations provides little guidance. Based on
the inadequate record before us, we cannot determine whether the parole
regulations are laws for ex post facto purposes.

Finally, we examine the district court's conclusion that the change in the
frequency of parole reconsideration, from every year to every three years, is a
procedural change. "Even though it may work to the disadvantage of a
defendant, a procedural change is not ex post facto." > Dobbert, 432 U.S. at
293.

Hence, no ex post facto violation occurs if the change is merely procedural
and does "not increase the punishment, nor change the ingredients of the
offence or the ultimate facts necessary to establish guilt." On the other
hand, a change in the law that alters a substantial right can be ex post facto
"even if the statute takes a seemingly procedural form."

**6 > Miller, 482 U.S. at 433 (citations omitted). The Fourth and Eleventh
Circuits have held that the reduction in frequency of parole consideration is
not merely a procedural change. > Roller, 984 F.2d at 123-24 (change in
parole reconsideration from every year to every two years "effectively

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'revoked' [prisoner's] eligibility for an extra year following a denial.");
> Akins, 922 F.2d at 1562 (change from annual parole reconsideration to
consideration every eight years rendered prisoner "ineligible for parole
between two parole reconsideration hearings."). Based only on the scant record
before us, we are not prepared to hold otherwise. This issue should be
examined on remand in light of the relevant regulations.

We REVERSE the dismissal of the ex post facto claim and REMAND the claim for
further development of the record. On remand, the district court should, if
possible, obtain the parole regulations in effect at the time of plaintiff's
offense, as well as the regulations in effect when the Board voted not to
reconsider plaintiff's parole eligibility for three years. The judgment of the
United States District Court for the Western District of Oklahoma is AFFIRMED
in all other respects.

FN** Honorable David K. Winder, Chief Judge, United States District Court
for the District of Utah, sitting by designation.

FN1. This order and judgment has no precedential value and shall not be
cited, or used by any court within the Tenth Circuit, except for purposes
of establishing the doctrines of the law of the case, res judicata, or
collateral estoppel. 10th Cir. R. 36.3.

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FN2. Plaintiff has not argued that fifteen years is more than one-third of
his sentence.

FN3. The parole regulations are not part of Oklahoma's parole statute.
They have been adopted by the Parole Board pursuant to its statutory power
to "adopt policies and procedures governing parole consideration." Okla.
Stat. tit. 57, 332.7(A).

FN4. The first element of the ex post facto test is not at issue because
the district court presumed that the Parole Board retrospectively applied a
new parole regulation when it delayed plaintiff's reconsideration hearing
for three years.

C.A.10 (Okla.), 1993.

Brooks v. Okl. Pardon & Parole Bd.

ENTERED ON DOCKET

DATE 6-22-94

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

F I L E D

JUN 22 1994

SAMUEL J. TOBIAS

Plaintiff(s),

v.

RUSSELL LEWIS, et al,

Defendant(s).

94-C-0045-B

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

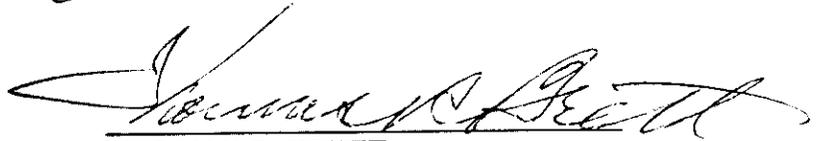
The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed May 26, 1994 in which the Magistrate Judge recommended Defendant Glanz's Motion to Dismiss or in the Alternative for Summary Judgment (docket #4) and Defendant Palmer's Motion for Summary Judgment or in the Alternative to Dismiss (docket #6) be **granted** and judgment be entered for both Defendants, Glanz and Palmer, on all issues and against Plaintiff.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

SO ORDERED THIS 22nd day of June, 1994.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett".

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 6-22-94

F I L E D

JUN 20 1994

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

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

RANDY AND PATTY MARTIN,)
)
Plaintiffs,)
)
v.)
)
SHELTER GENERAL INSURANCE)
COMPANY, a Missouri Corporation,)
)
Defendant.)

Case No. 93-C-977-E ✓

JUDGMENT

This action having been tried, and the jury having rendered a verdict in favor of Plaintiffs in the amount of \$132,372.45 in contract damages and \$10,000.00 in bad faith damages, the court adjusts the award of contract damages by crediting the amount of \$8,000.00 previously paid by Defendant for additional living expenses (ALE) and by crediting the amount of \$92,671.91 unconditionally paid by Defendant during the litigation, and finds that judgment should be entered in favor of the Plaintiffs in the amount of \$41,700.54.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Plaintiffs in the amount of \$41,700.54, plus costs and post-judgment interest on that amount at the rate of 5.28% from the date of this judgment until payment is made.

Dated this 20th day of June, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Martin.jud

ENTERED ON DOCKET

DATE 6-22-94

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

FILED

BRYAN K. ARMSTRONG,)
)
 Plaintiff,)
)
 v.)
)
 GEORGE L. WALKER, an)
 individual; FAYE POLVADORE)
 TRUCKING CO., a Texas)
 corporation; PLAINS LIVESTOCK)
 TRANSPORTATION, INC.; and)
 OCCIDENTAL FIRE & CASUALTY)
 COMPANY OF NORTH CAROLINA,)
)
 Defendants.)

No. 93-C-509

K

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUN 21 1994

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 21 day of June, 1994, it
appearing to the Court that this matter has been compromised and
settled, this case is herewith dismissed with prejudice to the
refiling of a future action.

/s/ TERRY C. KERN

UNITED STATES MAGISTRATE/JUDGE

ENTERED ON DOCKET

DATE 6-22-94

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

METROPOLITAN LIFE INSURANCE)
COMPANY, a New York corporation,)
)
Plaintiff,)

vs.)

Case No. 93-C-1108-E

STEPHEN C. BURNETT; MICHAEL F.)
NICHOLS and CAMILLA KAY NICHOLS,)
Guardians for Alan M. Burnett and)
Elizabeth Alice Burnett; ALAN M.)
BURNETT, individually; BENJAMIN F.)
GORRELL, SR. and MILDRED B. GORRELL,)
husband and wife; BENJAMIN F. GORRELL,)
JR; and JOHN GORRELL,)
)
Defendants.)

F I L E D
JUN 23 1994
Richard J. ...
U. S. ...
NORTHWEST ... OKLAHOMA

ORDER AND JUDGMENT

Upon joint application of Plaintiff, Metropolitan Life Insurance Company ("MetLife"), and Defendants Michael F. Nichols and Camilla Kay Nichols, guardians of Elizabeth Alice Burnett, and Alan M. Burnett, individually (collectively "Defendants"), for entry of an order sustaining interpleader, based upon the stipulations of fact by the parties, the filing of Waivers and Disclaimers in this case and upon judicial notice of a proceeding in Tulsa County District Court, State of Oklahoma v. Stephen C. Burnett, Case No. CF-93-3131, the Court hereby finds and determines as follows:

1. MetLife is a corporation organized under and by virtue of the laws of the State of New York.
2. Defendant Stephen C. Burnett ("Burnett") is a resident of the State of Oklahoma.
3. Defendants Michael F. and Camilla Kay Nichols, guardians for Elizabeth Alice Burnett, are residents of the State of South Carolina.

4. Defendant Alan M. Burnett is a resident of Tulsa, Oklahoma.
5. Defendants Benjamin F. Gorrell, Sr. and Mildred B. Gorrell, husband and wife, are residents of Tulsa, Oklahoma.
6. Defendant Benjamin F. Gorrell, Jr. is a resident of Tulsa, Oklahoma.
7. Defendant John Gorrell is a resident of Sand Springs, Oklahoma.
8. MetLife issued group policy No. 33613-G (the "Policy") to The Williams Companies, Inc. to provide certain life insurance benefits under The Williams Companies' group insurance plan (the "Plan"). The Plan is an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001 et seq. ("ERISA").
9. Elizabeth A. Burnett, an employee of The Williams Companies, Inc. who now is deceased, was an insured participant under the Plan. Elizabeth A. Burnett designated her husband, Defendant Stephen Burnett, as her beneficiary under the Policy. Under the terms of the Policy, if no designated beneficiary is entitled to benefits, then MetLife may pay such benefits to: (a) spouse; (b) child; (c) parent; (d) brother; or (e) sister.
10. Elizabeth A. Burnett died as a result of a gunshot wound of the chest between July 2, 1993 and July 10, 1993. Her husband, Defendant Stephen Burnett, subsequently was charged in Tulsa County with first degree murder in connection with her death.
11. At the time of her death, Elizabeth A. Burnett was survived by two children from her marriage to Stephen Burnett, Alan M. Burnett ("Alan"), now age 18, and Elizabeth Alice Burnett ("Lisa"), now age 16. The Defendants Michael F. Nichols and Camilla Kay Nichols were appointed guardians of Alan and Lisa Burnett after the death of Elizabeth A. Burnett. The guardianship of Alan Burnett was terminated on May 4, 1994. Elizabeth A. Burnett also was survived by her parents, Defendants Benjamin F. Gorrell, Sr. and Mildred B. Gorrell, and by her brothers, Defendants Benjamin F. Gorrell, Jr. and John Gorrell. Elizabeth A. Burnett had no sisters at the time of her death.

12. Alan and Lisa Burnett have submitted Claim Statements to MetLife requesting payment of benefits under the Policy. Defendant Benjamin F. Gorrell, Jr. also has submitted a Claim Statement to MetLife requesting payment of benefits under the Policy.

13. On June 2, 1994, State Bank & Trust, N.A., was appointed Guardian of the Property of Elizabeth Alice Burnett.

14. On April 26, 1994, Stephen C. Burnett pleaded guilty to first degree murder in the murder of his wife, Elizabeth A. Burnett, and was sentenced to life in prison in State of Oklahoma v. Stephen C. Burnett, Case No. CF-93-3131 (Tulsa County District Court). By reason of these acts, Defendant Burnett is disqualified as a beneficiary of the life insurance benefits on the life of Elizabeth A. Burnett under the Policy.

15. Disclaimers and Waivers were filed herein on the following dates by the following named Defendants:

Stephen C. Burnett	4/11/94
Benjamin F. Gorrell, Sr.	4/12/94
Mildred B. Gorrell	4/12/94
Benjamin F. Gorrell, Jr.	4/12/94
John Gorrell	4/12/94

16. The remaining Defendants, Alan Burnett and Lisa Burnett, by and through her guardians, have agreed that the insurance benefits at issue herein, which equal \$272,000 plus 6% simple interest from date of death to date of payment, should be divided equally between Alan and Lisa Burnett.

17. MetLife is ready, willing and able to pay the insurance proceeds of \$272,000 plus 6% simple interest as this Court directs.

18. MetLife is entitled to an award of its costs in the sum of \$372.60 and a reasonable attorney's fee in the sum of \$3,500 to be deducted from said insurance benefits in equal amounts.

WHEREFORE, premises considered, the Court hereby ORDERS as follows:

1. That Defendants Alan M. Burnett and Elizabeth Alice Burnett are entitled to the interpled funds, which total \$272,000 plus 6% simple interest from date of death to date of payment, in equal shares as against the other Defendants.

2. That MetLife shall be and hereby is awarded the sum of \$3,872.60 out of the interpled funds as its allowance for its costs and attorney's fees, which allowance may be withheld by MetLife from its payment of the interpled funds to Alan M. Burnett and Elizabeth Alice Burnett in equal shares.

3. That MetLife is hereby ordered and directed to pay to Alan M. Burnett and to State Bank & Trust, N.A., Guardian of the Property of Elizabeth Alice Burnett, in equal shares, the sum of one-half of \$272,000 plus 6% simple interest from date of death to date of payment minus attorney's fees and costs of \$3,872.60.

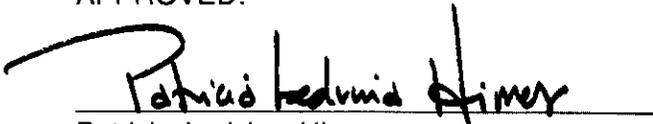
4. That MetLife be and it hereby is discharged from any and all liability to each and every Defendant as a result of its payment of the interpled funds to Alan M. Burnett and Elizabeth Alice Burnett.

SO ORDERED this 24 day of June, 1994.

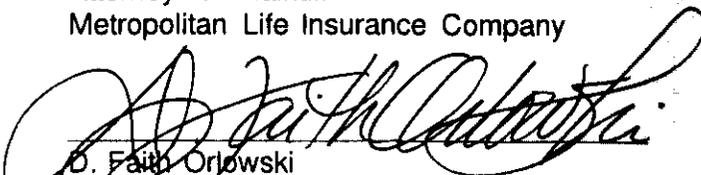
BY JAMES O. ELLISON

United States District Court Judge

APPROVED:



Patricia Ledvina Himes
Attorney for Plaintiff
Metropolitan Life Insurance Company



D. Faith Orłowski
Attorney for Defendants
Michael F. Nichols and Camilla Kay Nichols,
Guardians for Elizabeth Alice Burnett, and
Alan M. Burnett, Individually

DATE 6-22-94

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

JOHN DAVID OWEN, JOHN DOYLE)
OWEN, and BEVERLY OWEN,)

Plaintiffs,)

vs.)

GENERAL MOTORS CORPORATION,)
INC., and BUICK MOTOR DIVISION,)

Defendants.)

JUN 22 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 93-C-820-~~E~~ BZ

ORDER OF DISMISSAL WITHOUT PREJUDICE

Now on this 22nd day of June, 1994, the above matter comes on for hearing before the undersigned United States District Judge for the Northern District of Oklahoma upon the Plaintiffs' Application for Dismissal Without Prejudice; and the Court being fully advised in the premises, and upon consideration thereof, finds that the Plaintiffs' Application should be granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the Plaintiffs' Application for Dismissal Without Prejudice be and it is hereby granted.

/ MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

Gary L. Richardson, OBA #7547
Fred E. Stoops, OBA #8666
RICHARDSON, STOOPS & KEATING
6846 South Canton, Suite 200
Tulsa, Oklahoma 74136
(918) 492-7674

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JUN 21 1994

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JAMES K. MOREFIELD aka)
 JAMES KENNETH MOREFIELD;)
 DENISE E. MOREFIELD aka DENISE)
 EILEEN MOREFIELD; STATE OF)
 OKLAHOMA ex rel. OKLAHOMA TAX)
 COMMISSION; COUNTY TREASURER,)
 Tulsa County, Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

JUN 21 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C 462B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20 day of June, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendants, **James K. Morefield aka James Kenneth Morefield and Denise E. Morefield aka Denise Eileen Morefield**, appear not, having previously filed their disclaimer; and the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, appears not, having previously filed its disclaimer.

The Court being fully advised and having examined the court file finds that the Defendant, **Denise E. Morefield**, waived

NOTE: THIS ORDER IS TO BE MAILED TO THE CLERK'S OFFICE IMMEDIATELY UPON RECEIPT.

service of summons on May 8, 1994; and the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission** acknowledged receipt of summons and complaint by virtue of receipt for certified mail on May 6, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on May 23, 1994; that the Defendants, **James K. Morefield aka James Kenneth Morefield and Denise E. Morefield aka Denise Eileen Morefield**, filed their Suggestion of Bankruptcy and Disclaimer on May 26, 1994; and that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Disclaimer on May 27, 1994.

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

**Lot One (1), Block One (1), SHANNON PARK
THIRD, an Addition in the City and County of
Tulsa, State of Oklahoma, according to the
recorded Plat thereof.**

**a/k/a 11923 E 23 St
Tulsa, OK 74129**

The Court further finds that on May 22, 1987, the Defendants, **James K. Morefield aka James Kenneth Morefield and Denise E. Morefield aka Denise Eileen Morefield**, executed and delivered to **MORTGAGE CLEARING CORPORATION** their mortgage note in the amount of \$46,917.00, payable in monthly installments, with interest thereon at the rate of eight and one-half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, James K. Morefield aka James Kenneth Morefield and Denise E. Morefield aka Denise Eileen Morefield, executed and delivered to MORTGAGE CLEARING CORPORATION a mortgage dated May 22, 1987, covering the above-described property. Said mortgage was recorded on May 26, 1987, in Book 5025, Page 1109, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1988, MORTGAGE CLEARING CORPORATION assigned the above-described mortgage note and mortgage to TRIAD BANK, N.A. This Assignment of Mortgage was recorded on July 18, 1989, in Book 5195, Page 644, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 5, 1990, TRIAD BANK, N.A. assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., HIS SUCCESSORS OR ASSIGNS. This Assignment of Mortgage was recorded on October 9, 1990, in Book 5281, Page 2175, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 1, 1990, the Defendants, James K. Morefield aka James Kenneth Morefield and Denise E. Morefield aka Denise Eileen Morefield, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on July 1, 1991.

The Court further finds that the Defendants, James K. Morefield aka James Kenneth Morefield and Denise E. Morefield aka

Denise Eileen Morefield, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **James K. Morefield aka James Kenneth Morefield and Denise E. Morefield aka Denise Eileen Morefield**, are indebted to the Plaintiff in the principal sum of \$61,147.29, plus interest at the rate of 8.5 percent per annum from April 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the personal liability of the Defendants, **James K. Morefield aka James Kenneth Morefield and Denise E. Morefield aka Denise Eileen Morefield**, on the debt represented by the subject note and mortgage was discharged in United States Bankruptcy Court for the Northern District of Oklahoma, Case Number 92-1998C, a Chapter 7 Bankruptcy which had been opened on June 4, 1992, and was closed on January 14, 1993.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$27.00 which became a lien on the property as of June 26, 1992; and a claim against the property in the amount of \$21.00 for the tax year 1993. Said lien and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, **James K. Morefield aka James Kenneth Morefield, Denise E. Morefield aka Denise Eileen Morefield and State of Oklahoma ex rel Oklahoma Tax Commission**, disclaim any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. § 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **James K. Morefield aka James Kenneth Morefield and Denise E. Morefield aka Denise Eileen Morefield**, in the principal sum of \$61,147.29, plus interest at the rate of 8.5 percent per annum from April 1, 1994 until judgment, plus interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action, 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 Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and

recover judgment in the amount of \$48.00 for personal property taxes for the years 1991 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, James K. Morefield aka James Kenneth Morefield, Denise E. Morefield aka Denise Eileen Morefield, State of Oklahoma ex rel Oklahoma Tax Commission and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, James K. Morefield aka James Kenneth Morefield and Denise E. Morefield aka Denise Eileen Morefield, to satisfy the in rem judgment of the Plaintiff 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 according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of

\$48.00, personal property taxes which are currently due and owing.

The surplus from said sale, 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 pursuant to 12 U.S.C. § 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

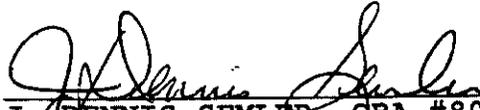
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

For Paul Russell
NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 462B

NBK:lg

owned the real estate on which JWS operated its facility. The Defendant was general partner of Council Oaks and the president and principal shareholder of JWS. The shareholders of JWS correlated identically in number and in interest owned as to the partnership interests of Council Oaks. Seawright was the president, director and owner of 85% of the outstanding shares of the JWS stock. Seawright was also the general partner and the owner of 85% of Council Oaks.

4. The Second Amended Plan of Reorganization ("the Plan") was confirmed by the United States Bankruptcy Court for the Northern District of Oklahoma on September 30, 1991.

5. The Plan provided for substantive consolidation of JWS and Council Oaks. Thus, pursuant to the Plan, the assets and liabilities of Council Oaks merged into the corresponding equity interests in the corporation JWS. Under the Plan, JWS canceled all of its existing stock and issued 500 shares in the Reorganized Debtor to Seawright in exchange for Seawright's payment of \$10,000.00. The Reorganized Debtor was named Council Oaks Learning Campus, Inc.

6. Although the total amount of the SBA claim was \$488,632.49, the allowed secured claim of the SBA under the Plan was \$62,923.25, which was to be paid out over twenty (20) years. The remainder of the SBA claim was relegated to the General Unsecured Class of claims and was deemed impaired.

7. Demand was made on the Defendant under the terms of the guarantee, but the Defendant has failed and refused to pay.

In addition to the foregoing, the Court finds as follows:

1. A review of the guaranty agreement reveals that Verd-Ark-Ca Development Corporation is the "lender"; Broken Arrow Learning Campus No. 1/Limited Partnership d/b/a Council Oaks Learning Campus is the "debtor" and the "undersigned" is designated in the agreement in the paragraphs set forth below:

"The term "Undersigned" as used in this agreement shall mean the signer or signers of this agreement, and such signers, if more than one, shall be jointly and severally liable hereunder. The Undersigned further agrees that all liability hereunder shall continue notwithstanding the incapacity, lack of authority, death, or disability of any one or more of the Undersigned, and that any failure by Lender or its assigns to file or enforce a claim against the estate of any of the Undersigned shall not operate to release any other of the Undersigned from liability hereunder. The failure of any other person to sign this guaranty shall not release or affect the liability of any signer hereof."

"In case the debtor shall fail to pay all or any part of the liabilities when due, whether by acceleration or otherwise, according to the terms of said note, the undersigned, immediately upon the written demand of lender, will pay to lender the amount due and unpaid by the debtor as aforesaid, in like manner as if such amount constituted the direct and primary obligation of the undersigned."

"The undersigned agrees to furnish lender, or the holder of the aforesaid note of the debtor, upon demand, but not more often than semiannually, so long as any part of the indebtedness under such note remains unpaid, a financial statement setting forth, in reasonable detail, the assets, liabilities, and net worth of the undersigned." (Emphasis added.)

2. The signature block on the guaranty agreement appears as follows:

James W. Seawright (signature)

James W. Seawright, Sole General Partner

Just below the signature line, the guaranty agreement displays the following language:

NOTE -- Corporate guarantors must execute guaranty in corporate name, by duly authorized officer, and seal must be affixed and duly attested; partnership guarantors must execute guaranty in firm name, together with signature of a general partner. ...

Mr. Seawright argues that under the facts on this record he is not personally liable because he signed merely in his official capacity as general partner for the debtor.

The Court is not persuaded. It is axiomatic that the intent of the parties with regard to a guaranty must be ascertained from a reading of the entire agreement. See, Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1545 (10th Cir. 1988). It is also settled that the document should be construed in favor of the lender who has relied on the guarantor's promise. Riverside Nat. Bank v. Manolakis, 613 P.2d 438 (Okla. 1980); Founders Bank and Trust Co. v. Upsher, 830 P.2d 1358 (Okla. 1990).

In Ricker v. B-W Acceptance Corp., 349 F.2d 892 (10th Cir. 1965) this Circuit adopted the doctrine of descriptio personae which is applicable to the instant case. In Ricker a guarantor signed his name followed by the designation "PRES." The Court found that where the content of the agreement manifested an unambiguous intent to bind the guarantor personally the designation "Pres." was simply descriptio personae and did not create an ambiguity as to the parties intent nor did it compel a different

interpretation. Similarly, in the instant case, it is clear from the language of the agreement that the parties intended a personal guaranty; indeed, it would appear irrational for the SBA to require the debtor to guarantee its own debt. Accordingly the Court finds that the words "sole general partner" as they appear in the signature block are merely descriptive; the Defendant signed in his individual capacity.

Defendant has also argued that the guaranty was also released pursuant to the debtor's Chapter 11 Second Plan of Reorganization. (see, stipulated facts 3-6 above). Cases cited by Defendant in support of this construction of the provisions of the Plan are distinguishable. In the instant case, the guarantee agreement was not identified in the Plan. Because a guarantee is a separate and independent obligation of the guarantor the Court declines to infer that it was discharged by the Plan under the terms "claims" or "obligations". For the reasons set forth above, Plaintiff's Motion for Summary Judgment is GRANTED. Defendant's Motion for Summary Judgment is DENIED. Judgment is entered in favor of Plaintiff and against the Defendant.

ORDERED this 20th day of June, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
JUN 21 1994

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID LYNN JONES;
MARGIE ANN JONES;
STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION;
CITIZENS BANK
fka Citizens National Bank;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C-318-E

FILED

JUN 21 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20 day
of June, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, COUNTY TREASURER, Tulsa County,
Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF
OKLAHOMA, ex rel. OKALHOMA TAX COMMISSION, appears not having
previously filed its Disclaimer; the Defendant, CITIZENS BANK fka
Citizens National Bank, appears not having previously filed its
Disclaimer; and the Defendants, David Lynn Jones and Margie Ann
Jones, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, David Lynn Jones,

NOTE: THE
BY MAIL TO THE CLERK AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

acknowledged receipt of Summons and Complaint on April 11, 1994; that the Defendant, Margie Ann Jones, acknowledged receipt of Summons and Complaint on April 11, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on April 5, 1994; that the Defendant, Citizens Bank fka Citizens National Bank acknowledged receipt of Summons and Complaint on April 7, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 8, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 4, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 25, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Disclaimer of Interest on April 26, 1994; that the Defendant, CITIZENS BANK fka Citizens National Bank, filed its Disclaimer of Interest on June 3, 1994; and that the Defendants, David Lynn Jones and Margie Ann Jones, have failed to answer and default has therefore been entered by the Clerk of this Court.

The Court further finds that on February 6, 1992, David Lynn Jones and Margie Ann Jones filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-375-C. On May 27, 1992, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor, and the case was subsequently closed on September 4, 1992.

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

**LOT FOUR (4), BLOCK FOUR (4), CUNNINGHAM
ADDITION TO TULSA, TULSA COUNTY, STATE OF
OKLAHOMA, ACCORDING TO THE RECORDED PLAT
THEREOF.**

The Court further finds that on October 28, 1987, the Defendants, David Lynn Jones and Margie Ann Jones, executed and delivered to First Security Mortgage Company their mortgage note in the amount of \$33,678.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, David Lynn Jones and Margie Ann Jones, executed and delivered to First Security Mortgage Company, a mortgage dated October 29, 1987, covering the above-described property. Said mortgage was recorded on November 4, 1987, in Book 5062, Page 10, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 28, 1987, First Security Mortgage Company, assigned the above-described mortgage note and mortgage to Federal National Mortgage Association. This Assignment of Mortgage was recorded on March 26, 1988, in Book 5311, Page 28, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 2, 1988, First Security Mortgage Company, assigned the above-described mortgage note and mortgage to Citizens National Bank. This Assignment of Mortgage was recorded on November 3, 1988, in Book 5137, Page 2570, in the records of Tulsa County, Oklahoma. This mortgage assignment is ineffective due to the grantor's previous assignment to Federal National Mortgage Association, however it does cloud title to the property.

The Court further finds that on March 27, 1991, Federal National Mortgage Association, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on April 5, 1991, in Book 5313, Page 1444, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1991, the Defendants, David Lynn Jones and Margie Ann Jones, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, David Lynn Jones and Margie Ann Jones, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, David Lynn Jones and Margie Ann Jones, are indebted to the Plaintiff in the principal sum of \$49,045.83, plus interest at the rate of Ten and

One-Half percent per annum from February 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further **finds** that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has multiple liens on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$1.00 which became a lien on the property as of June 20, 1991, \$15.00 which became a lien on the property as of June 26, 1992, and \$7.00 which became a lien on the property as of June 25, 1993, and a claim in the amount of \$7.00 for unpaid taxes in 1993. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further **finds** that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, CITIZENS BANK fka Citizens National Bank, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, claim no right, title or interest in the subject real property.

The Court further **finds** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, David Lynn Jones and

Margie Ann Jones, in the principal sum of \$49,045.83, plus interest at the rate of Ten and One-Half percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action, and 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 Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$30.00 for personal property taxes for the years 1990- 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, CITIZENS BANK fka Citizens National Bank, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, David Lynn Jones and Margie Ann Jones, to satisfy the judgment of the Plaintiff 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 according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$30.00, personal property taxes which are currently due and owing.

The surplus from said sale, 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 pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

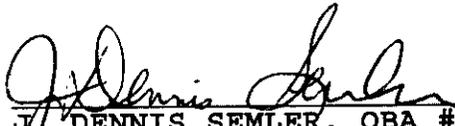
S/ THOMAS R. BRETT,

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

for 
NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


DENNIS SEMLER, OBA #8076
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406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-318-E

NBK:flv

JUN 21 1994

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
)
 Plaintiff,)
)
 vs.)
)
)
 WILLIAM S. OSBORN; DAWN M.)
 OSBORN; ASSOCIATES FINANCIAL)
 SERVICES COMPANY OF OKLAHOMA,)
 INC.; COUNTY TREASURER, Tulsa)
 County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

FILED

JUN 21 1994

**Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA**

CIVIL ACTION NO. 94-C 242B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20 day of June, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, **William S. Osborn, Dawn M. Osborn, and Associates Financial Services Company of Oklahoma, Inc.**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, **William S. Osborn and Dawn M. Osborn**, acknowledged receipt of Summons and Complaint on March 30, 1994; that the Defendant, **Associates Financial Services Company of Oklahoma, Inc.**, was served with Summons and Complaint

NOTE:
BY U.S. MARSHAL SERVICE AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

on May 4, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 21, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 16, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on April 5, 1994; and that the Defendants, **William S. Osborn, Dawn M. Osborn, and Associates Financial Services Company of Oklahoma, Inc**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Seven (7), Block Three (3), ANELEN HEIGHTS SECOND ADDITION to Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on March 5, 1979, the Ronald L. Smith and Connie E. Smith, executed and delivered to MAGER MORTGAGE COMPANY their mortgage note in the amount of \$24,100.00, payable in monthly installments, with interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Ronald L. Smith and Connie E. Smith, husband and wife, executed and delivered to MAGER MORTGAGE COMPANY a mortgage dated March 5, 1979, covering the above-described property. Said mortgage was recorded on March 9, 1979, in Book 4386, Page 312, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 12, 1989, Brumbaugh & Fulton Company, formerly Mager Mortgage Company, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C. This Assignment of Mortgage was recorded on May 15, 1989, in Book 5183, Page 635, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, William S. Osborn and Dawn M. Osborn, currently hold the fee simple title to the property by virtue of a General Warranty Deed dated December 13, 1982, recorded in Book 4656, Page 498, in the records of Tulsa County, Oklahoma, and that the Defendants, William S. Osborn and Dawn M. Osborn, are the current assumptors of the subject indebtedness.

The Court further finds that on May 1, 1989, the Defendants, William S. Osborn and Dawn M. Osborn, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on January 1, 1990.

The Court further finds that the Defendants, William S. Osborn and Dawn M. Osborn, made default under the terms of the

aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **William S. Osborn and Dawn M. Osborn**, are indebted to the Plaintiff in the principal sum of \$35,187.76, plus interest at the rate of 9.5 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$2.00 which became a lien on the property as of June 25, 1993; a lien in the amount of \$17.00 which became a lien on June 26, 1992; a lien in the amount of \$2.00 which became a lien on July 2, 1990; a lien in the amount of \$3.00 which became a lien on July 5, 1989; and a claim against the subject property in the amount of \$2.00 for the tax year 1993. Said liens and claims are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, **William S. Osborn, Dawn M. Osborn and Associates Financial Services Company of Oklahoma, Inc.**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. § 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **William S. Osborn and Dawn M. Osborn**, in the principal sum of \$35,187.76, plus interest at the rate of 9.5 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action, 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 Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$26.00 for personal property taxes for the years 1988, 1989, and 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **William S. Osborn, Dawn M. Osborn, Associates Financial Services Company of Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, William S. Osborn and Dawn M. Osborn, to satisfy the money judgment of the Plaintiff 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 according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$26.00, personal property taxes which are currently due and owing.

The surplus from said sale, 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 pursuant to 12 U.S.C. § 1710(1) there shall be no right of redemption (including in all instances any right to possession

based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 242B

NBK:lg

FILED ON DOCKET
JUN 21 1994

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
 JOSE MARRERO, JR.; PENELOPE ANN)
 MARRERO, aka ANN MARRERO; CITY OF)
 GLENPOOL, Oklahoma;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

JUN 21 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C 186B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20 day
of June, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,**
Oklahoma, and **Board of County Commissioners, Tulsa County,**
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; and the Defendants, **JOSE**
MARRERO, JR., PENELOPE ANN MARRERO aka ANN MARRERO, and **CITY OF**
GLENPOOL, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendants, **JOSE MARRERO and PENELOPE**
ANN MARRERO aka ANN MARRERO, were served with Summons and
Complaint on April 22, 1994; that the Defendant, **CITY OF**
GLENPOOL, Oklahoma, acknowledged receipt of Summons and Complaint
on or about March 24, 1994; that Defendant, **COUNTY TREASURER,**

**NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.**

Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 3, 1994; and Defendant, **BOARD OF COUNTY COMMISSIONER, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 2, 1994.

It appears that the Defendants, **COUNTY TREASURER, Tulsa County, Oklahoma**, and **BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma**, filed their Answer on March 21, 1994; and that the Defendants, **JOSE MARRERO, JR., PENELOPE ANN MARRERO aka ANN MARRERO**, and **CITY OF GLENPOOL, Oklahoma**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Twenty-Two (22), Block Seven (7),
GLENPOOL PARK, an Addition in the Town of
Glenpool, Tulsa County, State of Oklahoma,
according to the Recorded Amended Plat
thereof.

The Court further finds that on October 7, 1986, the Defendants, **JOSE MARRERO, JR. and PENELOPE ANN MARRERO aka ANN MARRERO**, husband and wife, executed and delivered to Bank of Glenpool their mortgage note in the amount of \$44,841.00, payable in monthly installments, with interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, JOSE MARRERO, JR. and PENELOPE ANN MARRERO aka ANN MARRERO, husband and wife, executed and delivered to Bank of Glenpool a mortgage dated October 7, 1986, covering the above-described property. Said mortgage was recorded on October 10, 1986, in Book 4975, Page 1809, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 13, 1986, Bank of Glenpool assigned the above-described mortgage note and mortgage to Mortgage Clearing Corporation. This Assignment of Mortgage was recorded on October 20, 1986, in Book 4977, Page 497, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 20, 1987, Mortgage Clearing Corporation assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on December 3, 1987, in Book 5067, Page 2419, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 1, 1987, the Defendant, JOSE MARRERO, JR., entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on March 1, 1989 and September 1, 1989.

The Court further finds that the Defendants, JOSE MARRERO, JR. and PENELOPE ANN MARRERO aka ANN MARRERO, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements,

by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **JOSE MARRERO, JR. and PENELOPE ANN MARRERO aka ANN MARRERO**, are indebted to the Plaintiff in the principal sum of \$67,426.15, plus interest at the rate of 9.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **COUNTY TREASURER, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$34.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$24.00 which became a lien on June 25, 1993; and a claim against the subject property in the amount of \$30.00 for tax year 1993. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, **JOSE MARRERO, JR., PENELOPE ANN MARRERO aka ANN MARRERO, and CITY OF GLENPOOL, Oklahoma**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of

redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, JOSE MARRERO, JR. and PENELOPE ANN MARRERO aka ANN MARRERO, in the principal sum of \$67,426.15, plus interest at the rate of 9.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.28 percent per annum until paid, plus the costs of this action 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 Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$88.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, JOSE MARRERO, JR., PENELOPE ANN MARRERO aka ANN MARRERO, CITY OF GLENPOOL, Oklahoma, and the BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, JOSE MARRERO, JR. and PENELOPE ANN MARRERO aka ANN MARRERO, to satisfy the money judgment of the Plaintiff 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 according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$88.00, personal property taxes which are currently due and owing.

The surplus from said sale, 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 pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants

and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

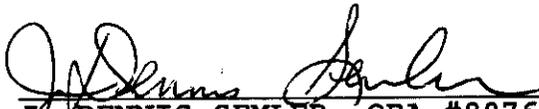
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 186B

NBK:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JUN 21 1994

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MICHAEL O. NSIEN; DARLENE NSIEN;)
 NEIGHBORHOOD SERVICES OF)
 AMERICA, INC.; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

FILED

JUN 21 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C 216B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20 day
of June, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,**
Oklahoma, and **Board of County Commissioners, Tulsa County,**
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, **Neighborhood
Housing Services of America, Inc.** appears not, having previously
filed its disclaimer; and the Defendants, **Michael O. Nsien,**
Darlene Nsien, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendants, **Michael O. Nsien** and
Darlene Nsien, acknowledged receipt of Summons and Complaint on
March 28, 1994; that the Defendant, **Neighborhood Housing Services
of America, Inc.,** acknowledged receipt of Summons and Complaint

NOTE: THIS CASE IS FILED IN FILED
BY THE CLERK OF COURT. COUNSEL AND
PARTY SEVERALS IMMEDIATELY
UPON RECEIPT.

on April 6, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 14, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 11, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on March 23, 1994; that the Defendant, **Neighborhood Housing Services of America, Inc.**, filed its disclaimer on May 26, 1994; and that the Defendants, **Michael O. Nsien and Darlene Nsien**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Seventeen (17), Block One (1), ADAMS RESUBDIVISION of Lots 5 to 19 inclusive, in Block 1 and Lots 1 to 17 inclusive in Block 2, in Cliness Crest, An Addition to the City of Tulsa, Tulsa County, Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on August 21, 1981, the Defendants, **Michael O. Nsien and Darlene Nsien**, husband and wife, executed and delivered to **Freedom Mortgage Company** their mortgage note in the amount of **\$27,250.00**, payable in monthly installments, with interest thereon at the rate of sixteen and one-half percent (16.5%) per annum.

The Court further **finds** that as security for the payment of the above-described note, the Defendants, Michael O. Nsien and Darlene Nsien, husband and wife, executed and delivered to Freedom Mortgage Company a mortgage dated August 21, 1981, covering the above-described property. Said mortgage was recorded on August 27, 1981, in Book 4565, Page 1557, in the records of Tulsa County, Oklahoma.

The Court further **finds** that on October 20, 1981, Freedom Mortgage Company assigned the above-described mortgage note and mortgage to Federal National Mortgage Association. This Assignment of Mortgage was recorded on October 26, 1991, in Book 4576, Page 1857, in the records of Tulsa County, Oklahoma.

The Court further **finds** that on March 4, 1985, Federal National Mortgage Association assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C. and his successors in office. This Assignment of Mortgage was recorded on April 8, 1985, in Book 4854, Page 889, in the records of Tulsa County, Oklahoma.

The Court further **finds** that on December 1, 1989, the Defendants, Michael O. Nsien and Darlene Nsien, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further **finds** that the Defendants, Michael O. Nsien and Darlene Nsien, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make

the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Michael O. Nsien and Darlene Nsien**, are indebted to the Plaintiff in the principal sum of \$48,867.58, plus interest at the rate of 16.5 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$3.00 which became a lien on the property as of July 5, 1989; and a lien in the amount of \$10.00 which became a lien on the property as of June 25, 1993; and a claim against the property for \$10.00 and for \$56.00 for the tax year 1993. Said liens and claims are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendant, **Neighborhood Housing Services of America, Inc.**, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, **Michael O. Nsien and Darlene Nsien**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. § 1710(1) there shall be no right of redemption (including in all

instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **Michael O. Nsien and Darlene Nsien**, in the principal sum of **\$48,867.58**, plus interest at the rate of 16.5 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action, 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 Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of **\$79.00** for personal property taxes for the years 1988, 1992, and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Michael O. Nsien, Darlene Nsien, Neighborhood Housing Services of America, Inc. and the Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Michael O. Nsien and Darlene**

Nsien, to satisfy the money judgment of the Plaintiff 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 according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$79.00, personal property taxes which are currently due and owing.

The surplus from said sale, 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 pursuant to 12 U.S.C. § 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 216B

NBK:lg

ENTERED ON DOCKET

DATE 6-21-94

FILED
JUN 21 1994

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

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KIMBERLEE K. CRAWFORD,

Plaintiff,

vs.

Case No. 94-C-554-B

K-LAN COMPANY INC.,
a Texas Corporation,

Defendants.

NOTICE OF
DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Kimberlee K. Crawford, and dismisses without prejudice the above named action in its entirety in accordance with Fed.R.Civ.P. Rule 41(a)(1)(i).

Respectfully submitted this 17 day of June, 1994.

DAVID GARRETT LAW OFFICE, P.C.

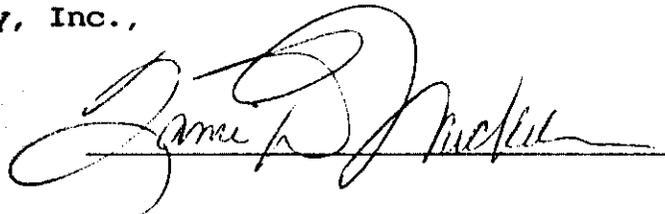


David M. Garrett, OBA #3255
Mitchell A. Lee, OBA #5337
Tami D. Mickelson, OBA #13400
436 Court Street
Muskogee, Oklahoma 74401
(918) 683-3288

CERTIFICATE OF MAILING

I hereby certify that on this 17 day of June, 1994, a true and correct copy of the above and foregoing instrument was sent by U.S. Mail, with proper postage fully pre-paid thereon to:

W.E. Lancaster
Service Agent for K-Lan Company, Inc.,
1207 N.W. 1st
Amarillo, Texas 79101



ENTERED ON DOCKET

DATE JUN 21 1994

FILED

JUN 21 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

RESOLUTION TRUST CORPORATION,)

Plaintiff,)

vs.)

Case No. 92-C-1043-W ✓

LOUIS W. GRANT, et al.,)

Defendants.)

ORDER

This matter comes before the Court upon the motion of the defendants, Edward H. Hawes, James R. Malone and Robert B. Riss, for summary judgment pursuant to Rule 56, Fed. R. Civ. P. The defendant Donald Bergman has adopted and joined in the motion. The defendants, in their motion, contend that the plaintiff, Resolution Trust Corporation, may only pursue claims against the defendants based upon a gross negligence standard of liability and that the plaintiff's disclosure reports fail to raise any facts which establish gross negligence on the part of the defendants. On April 1, 1994, United States Magistrate Judge John L. Wagner issued an Order requiring the plaintiff to initially respond to the defendants' motion regarding the applicable standard of care. In the Order, Magistrate Judge Wagner stated that the Court would proceed with making a determination on that issue and that the plaintiff would not be required to respond to the remaining issues in the defendants' motion until twenty (20) days after the defendants supplemented their motion. The plaintiff, in accordance with the April 1, 1994 Order, has filed its first response to the defendants' motion and the defendants have replied thereto. Upon

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careful consideration of the parties' submissions, the Court makes its determination.

The issue for determination is whether the standard of care applicable to officers and directors of a failed federally chartered financial institution in a civil damages action is gross negligence or simple negligence. Section 1821(k) of Title 12 of the United States Code, which codifies section 212(k) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989), provides

A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by, on behalf of, or at the request or direction of the Corporation, . . . for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.

12 U.S.C. § 1821(k).

The defendants contend that section 1821(k) preempts federal common law and establishes a gross negligence standard of liability for officers and directors of failed federally chartered financial institutions in civil damages action. The defendants rely upon the Seventh Circuit's recent decision in RTC v. Gallagher, 10 F.3d 416 (7th Cir. 1993). In that case, the Seventh Circuit held that gross negligence is the standard to be applied to the conduct of officers and directors of a failed federally chartered financial institution. In examining the language of section 1821(k), the Seventh Circuit concluded that Congress made a definitive statement

that a gross negligence standard of liability applies to cases brought against officers and directors of failed financial institutions and that federal common law, which may allow officers and directors to be held liable for less culpable conduct, must yield to Congress' statement. Id. at 420. The Court concluded that the "savings clause" of section 1821(k) which states, "[n]othing . . . shall impair or affect any right of the Corporation under other applicable law," was drafted simply to preserve the Resolution Trust Corporation's ability to take other regulatory actions based on simple negligence. Id. at 420. Furthermore, the Court concluded that the legislative history of section 1821(k) as well as the Supreme Court's decision in City of Milwaukee v. Illinois, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981), supported a finding of preemption of federal common law. Id. at 421-424. Based upon the holding of Gallagher, the defendants maintain that section 1821(k) preempts federal common law and creates a cause of action against officers and directors solely for gross negligence.

In response, the plaintiff argues that section 1821(k) does not preempt federal common law claims predicated upon conduct amounting to less than gross negligence. As support for its position, the plaintiff primarily relies on the decisions of FDIC v. McSweeney, 976 F.2d 532 (9th Cir. 1992), and FDIC v. Canfield, 967 F.2d 443 (10th Cir. 1992). In McSweeney, the Ninth Circuit held that section 1821(k) does not preempt the Federal Deposit Insurance Corporation's right to sue officers and directors of

failed financial institutions for ordinary negligence under state law. In its opinion, however, the Ninth Circuit additionally indicated that federal common law was not preempted. Like state law, the Court concluded that federal common law was preserved by the language of the "savings clause" of section 1821(k). *Id.* at 538. In *Canfield*, the Tenth Circuit likewise held that § 1821(k) does not preclude the Federal Deposit Insurance Corporation from alleging causes of action against bank officers and directors for simple negligence under state law. In reaching its decision, the Tenth Circuit concluded that the term "may" in the first sentence of section 1821(k) was a permissive term and did not imply a limitation on the standards of officer and director liability. It also indicated that the phrase "other applicable law" in the last sentence of the statute meant "all 'other applicable law'" including state and federal law. *Id.* at 446 and n. 4. (emphasis in original).

In determining whether section 1821(k) preempts federal common law, the Court is mindful that there is an assumption "that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Milwaukee*, 451 U.S. at 317. The Court, however, is equally mindful that there is a "longstanding . . . principle that 'statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" In such cases, Congress does not write upon a clean slate. In order to abrogate

a common law principle, the statute must 'speak directly' to the question addressed by the common law." U.S. v. Texas, __ U.S. __, 113 S.Ct. 1631, 1634, 123 L.Ed.2d 245 (1993)(citations omitted).

In FDIC v. Black, 777 F.Supp. 919, 921-22 (W.D. Okla. 1991), this Court in interpreting section 1821(k) concluded that the first sentence of section 1821(k) was not exclusive and that the phrase "other applicable law" referred to both state and federal laws. Although the primary issue before the Court in Black was whether state law was preempted, the Court in addressing the arguments of the defendants also interpreted section 1821(k) to allow the FDIC to pursue an action under federal law which provides for a lesser standard of fault. The Court, upon reexamining the case law and the plain language of section 1821(k), again concludes that federal common law is not preempted by section 1821(k). The Court believes that its conclusion is bolstered by the Tenth Circuit's analysis of section 1821(k) in Canfield. The Tenth Circuit stated

[W]e believe that "other applicable law" means all "other applicable law." Under [1821(k)] then, any other law providing that an officer or director may be held liable for simple negligence survives; such a law would be an "other applicable law," and construing the statute to bar its application would "impair" the FDIC's rights under it.

Id. at 446 (emphasis in original).

In support of its statement, the Tenth Circuit specifically cited to Patterson v. Shumate, __ U.S. __, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992), wherein the Supreme Court interpreted the phrase "applicable nonbankruptcy law" as including "any relevant bankruptcy law," both state and federal law. Id. at 2247. The

Tenth Circuit in Canfield noted that the same principle applies with "equal force" to the phrase "other applicable law" in section 1821(k). Canfield, 967 F.2d at 446, n. 4. This Court thus concludes that "other applicable law" should be read to include all relevant law, including federal common law.

The defendants, in their motion, argue that the phrase "other applicable law" refers to federal regulatory actions, other than actions seeking civil damages. The Court notes, however, that the Tenth Circuit in Canfield, rejected a similar argument.

Defendants urge that the "other applicable law" language refers to the FDIC's rights in other contexts. By this they apparently mean rights of the FDIC against officers and directors, under state or federal law, to seek remedies other than personal damages. Any other interpretation of the last sentence, they reason, would eviscerate the attempt to create a national standard of liability. The problem with this argument is that it limits the statutory language by fiat. Nowhere does the statute announce its intention to create a national standard of liability, and the vehemence of the assertions to the contrary made by defendants will not persuade us to interpret the statute in light of a fiction.

Id. at 447 (emphasis in original).

Based upon the Canfield Court's analysis of section 1821(k) and this Court's previous analysis of section 1821(k) in Black, the Court concludes that section 1821(k) does not preempt civil actions for simple negligence under state or federal common law.

In their motion, the defendants further argue that even if section 1821(k) does not preempt federal common law, the standard of liability under federal common law is gross negligence. The plaintiff, on the other hand, contends that the applicable standard is simple negligence. Having reviewed the applicable cases, the

Court finds that the standard of liability under federal common law is ordinary negligence. Briggs v. Spaulding, 141 U.S. 132, 11 S.Ct. 924, 35 L.Ed. 662 (1891); FDIC v. Bierman, 2 F.3d 1424 (7th Cir. 1993); McSweeney, 976 F.2d at 538 and n. 7. The Court further finds that federal law rather than state law governs the liability of the defendants who are outside directors of a federally chartered financial institution. RTC v. Hess, 820 F.Supp. 1359, 1362 (D.Utah 1993); FSLIC v. Olano, 1989 WL 54226 at *1 (E.D. La. May 17, 1989); Eureka Federal Savings and Loan Association v. Kidwell, 672 F.Supp. 436, 439-41 (N.D. Cal. 1987). As a result, the Court declines to address the constitutionality of Okla. Stat. Ann. tit. 6, § 712 (West 1993).

Based upon the foregoing, the Court DENIES the Motion for Summary Judgment of Outside Directors Edward H. Hawes, James R. Malone and Robert B. Riss filed on March 10, 1994 and adopted by Outside Director Donald Bergman on March 31, 1994 on the issue of the applicable standard of liability for officers and directors of a failed federally chartered financial institution in a civil damages action. The remaining issues in the Motion shall be addressed by the Court after briefing of the issues is complete.

ENTERED this 21 day of June, 1994.


LEE R. WEST
UNITED STATES DISTRICT JUDGE