

ENTERED ON DOCKET  
DATE JUL 29 1994

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

**FILED**

JUL 28 1994

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

R.L. GRANTHAM, SANDRA GRANTHAM,  
DAVID GRANTHAM, STEVEN GRANTHAM,  
and LACKNER PAGANO, LTD.,  
  
Plaintiffs,  
  
v.  
  
THE OHIO CASUALTY COMPANY,  
  
Defendant.

Case No. 93-C-787-K

**ORDER**

Now before the Court for its consideration are the motions of the plaintiffs and the defendant for summary judgment on plaintiffs' claims against the defendant. Plaintiffs bring this action pursuant to 28 U.S.C. §2201 for a declaratory judgment as to the parties' rights pursuant to a contract of insurance. Both pending motions essentially seek the Court's ruling on whether the insurance policy issued by defendant to plaintiff Lackner Pagano Ltd. ("Lackner") covers the personal and property damages sustained by the Granthams in an automobile accident which occurred on December 22, 1992 in Tulsa, Oklahoma. Plaintiffs Grantham have sued Lackner in the District Court of Tulsa County, Oklahoma, Case No. CJ-93-03748, alleging negligence.

The basic facts are not disputed by the parties. An automobile owned and driven by Patrick Pagano ("Pagano") collided with an auto occupied by the Granthams. Pagano was killed in that

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accident and the Granthams were seriously injured. At the time of his death, Pagano was the president and principal stockholder of Lackner, a company engaged in the business of selling and installing cabinets.

The exact timing of Pagano's activities on the night of December 22 are disputed by the parties. However, the parties generally agree upon the following course of action taken by Pagano on that night. Pagano had invited a friend, James Frohnapfel, to a Christmas party given by one of Pagano's customers, Cowen Construction, Inc. ("Cowen"). Pagano met Frohnapfel at the Brookside Bar; Frohnapfel left his car at the bar and they drove to the Cowen Christmas party in Pagano's car. Pagano and Frohnapfel made plans to go out to dinner together after the Cowen party. However, Frohnapfel decided to leave the Cowen party before Pagano, and caught a ride back to the Brookside Bar, while Pagano stayed at the party. Pagano then went back to the Brookside Bar to pick up Frohnapfel for their planned dinner together. Upon his arrival at the bar, Pagano discovered that Frohnapfel had left the bar to go home. Pagano then left the Brookside Bar. Pagano collided with the Granthams' vehicle around 9:45 p.m.

The parties differ in their interpretation of Pagano's intended destination after leaving the Brookside Bar. Defendant argues that Pagano was on a personal mission in going to see his mother, citing a phone call Pagano's mother received from him around 7 p.m., in which Pagano promised to visit his mother that night if he had time. Plaintiffs argue that Pagano left the

Brookside Bar intending to return to the Cowen Christmas party.

Lackner carries a Business Owner's Liability Policy with defendant, which contains the following exclusion of coverage:

g. "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

Defendant contends that this exclusion is applicable to bar the plaintiffs' claims against it, in that the cause of action in state court arises out of the use and operation of an automobile. Alternatively, defendant argues that Pagano was on a personal mission, unrelated to Lackner's business, at the time of the accident, and thus cannot be deemed to have been acting within the scope of his employment to evoke coverage under the policy.

Plaintiffs argue that Pagano was not an "insured" under the policy so that the exclusion does not apply in this case.<sup>1</sup>

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<sup>1</sup> The policy defines an "insured" in the following pertinent paragraphs (emphasis added):

C. WHO IS AN INSURED

1. If you are designated in the Declarations as:

\* \* \* \*

c. An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. Your shareholders are also insureds, but only with respect to their liability as stockholders.

2. Each of the following is also an insured:

a. Your employees, other than your executive officers, but only for acts within the scope of their employment by you.

Plaintiffs concede that Pagano was an executive officer of Lackner, but argue that the policy language "with respect to their duties as your officers" should be distinguished from an employee's "scope of employment" and therefore the exclusionary language of Paragraphs C(1)(c) and C(2)(a) is not applicable. Plaintiffs contend that "[w]hile mere employees of Plaintiff Lackner under the policy are defined as "insureds" for all of the acts committed within the scope of their employment, the same is not true of executive officers. The policy specifically says that executive officers are insureds, but only with respect to their duties as officers." (Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment at 5-6). Plaintiffs go on to assert that "the fact that Patrick Pagano drove from a Christmas party to another location was clearly within the scope of his employment. However, it had absolutely nothing to do with his duties as an executive officer." (Id. at 9). Plaintiffs are not clear as to how the distinction which they stress would be applied in a case such as this. They say that an officer's duties "would only extend to those actions or failures to act which involve the executive officer's special position as an executive officer." (Id. at 8). If by "special position" they mean merely attending board meetings or signing corporate checks and documents, the Court declines to make such a narrow interpretation. An officer is not a mere employee; however, the "duties" of an officer's position are roughly equivalent to the "scope of employment" of a lower-level employee. The interpretation urged by plaintiffs would amount to a "forced"

or "strained" construction, which is not to be indulged. Dodson v. St. Paul Ins. Co., 812 P.2d 372, 376 (Okla.1991).

The determining factor in interpreting an insurance contract is the intention of the parties to the contract. Torres v. Kansas City Fire & Marine Ins. Co., 849 P.2d 407, 412 (Okla.1993). The parties plainly intended to exclude automobile accidents from coverage. While somewhat inartful language was used in the definition of "insured", under the facts of this case the ambiguity which plaintiffs argue does not exist. Even accepting plaintiffs' speculative proposition that Pagano was headed back to the Christmas party, the Court concludes as a matter of law that traveling to a social event involving a business customer falls within the various "duties" of an executive officer and that therefore the policy's exclusionary language applies to Pagano as an "insured."<sup>2</sup>

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of

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<sup>2</sup> Defendant has stated that whether Pagano is or is not an insured under the policy "is not an issue in this case." (Reply of Ohio Casualty Company to Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment at 2). The Court disagrees.

proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

Here, plaintiffs have alleged that Pagano was acting in the scope of his employment as an employee, rather than an officer, of Lackner. With this allegation, plaintiffs attempt to defeat defendant's argument that the automobile accident was not covered under the policy either because of the policy's exclusionary clause, or because Pagano was on a personal mission. However, plaintiffs have not supported their assertion by pointing to any specific fact which might clarify for the Court how Pagano's duties as an employee of Lackner may be distinguished from his duties as an officer of Lackner. The bare conclusion that Pagano's actions at the time of the accident were not within his undefined duties as an officer is insufficient to raise a factual issue to submit to a jury. See Metro Oil Co. v. Sun Refining & Marketing, 936 F.2d 501, 504 (10th Cir. 1991) (faced with motion for summary judgment, nonmovant had "obligation to come forward with evidence, more than mere conclusory allegations"); Bruce v. Martin-Marietta Corp., 544 F.2d 442, 445 (10th Cir. 1976) ("Conclusory allegations do not establish an issue of fact under Rule 56."). Therefore, not only should plaintiffs' motion for summary judgment be denied, but defendant's motion for summary judgment should be granted.

In the interest of thoroughness, the Court will address the other major issue argued by the parties: if a factual issue exists

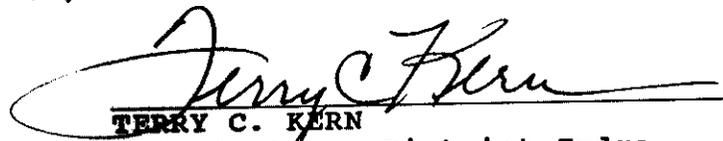
as to whether Pagano was acting within the scope of his employment at the time of the accident. Defendant argues that even assuming that Pagano was on a mission of business during the time that he was at the Cowen Construction Company Christmas party, which assumption defendant rejects, the mission ended when Pagano left the party to go to the Brookside Bar to pick up his friend, Frohnapfel, for dinner. From that point forward, defendant contends, Pagano was on his own personal mission. The Court agrees. Plaintiffs' assertion that Pagano was acting within the scope of his employment as an employee of Lackner at the time of the accident is contrary to Oklahoma law. In Heard v. McDonald, 43 P.2d 1026 (1935), the Oklahoma Supreme Court held that an employee who abandons his employer's mission for his own separate and independent mission cannot be deemed to be in the employer's service to render the employer responsible for the employee's acts, until the employee returns to the place where he abandoned the employer's mission, and then resumes that mission. Id. at 1027. See also Palmer v. Bassett, 95 P.2d 872, 874 (1939) (when employee returns to point where he had abandoned employer's mission for his own mission, and resumes employer's mission, the employer is then responsible for the employee's actions.)

Here, even if the Court accepts plaintiff's theory that Pagano was on a business-related mission in attending the Cowen Christmas party, it is clear that Pagano abandoned that mission when he left the party and drove to the Brookside Bar to pick up his friend for dinner. Under the cited Oklahoma law, Pagano could not be deemed

to have been in the scope of his employment for Lackner until he returned to the point where he had abandoned his employer's mission, which was the party. That Pagano may have been en route to the party, as argued by plaintiffs, does not go far enough to "close" the "hiatus in service" under Oklahoma law. Palmer, 95 P.2d at 876.

For these reasons, the Court finds as a matter of law that Pagano was not within the scope of his employment at the time of the accident on December 22, 1992, and the damages sustained by the Granthams in that automobile accident are therefore not covered under the policy issued to plaintiff Lackner by defendant. The Court accordingly finds that the defendant's motion for summary judgment should be **GRANTED**, and the plaintiffs' motion for summary judgment should be **DENIED**.

IT IS SO ORDERED this 28<sup>th</sup> day of July, 1994.

  
**TERRY C. KERN**  
United States District Judge

ENTERED ON DOCKET  
DATE JUL 29 1994

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

**F I L E D**

R.L. GRANTHAM, SANDRA GRANTHAM,  
DAVID GRANTHAM, STEVEN GRANTHAM,  
and LACKNER PAGANO, LTD.,  
  
Plaintiffs,  
  
vs.  
  
THE OHIO CASUALTY COMPANY,  
  
Defendant.

JUL 28 1994

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

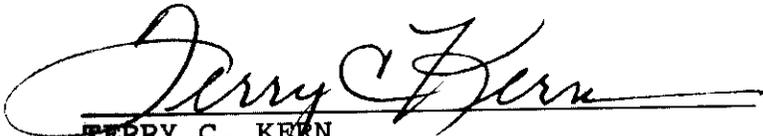
No. 93-C-787-K

**JUDGMENT**

This matter came before the Court for consideration of the parties' motions for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for defendant and against the plaintiffs.

ORDERED this 28<sup>th</sup> day of July, 1994.

  
PERRY C. KERN  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE JUL 29 1994

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE UNKNOWN HEIRS, EXECUTORS,  
ADMINISTRATORS, DEVISEES,  
TRUSTEES, SUCCESSORS AND  
ASSIGNS OF ARTHUR FIELDS aka  
ARTHUR R. FIELDS, SR., Deceased;  
THE UNKNOWN HEIRS, EXECUTORS,  
ADMINISTRATORS, DEVISEES,  
TRUSTEES, SUCCESSORS AND  
ASSIGNS OF EVA LOIS FIELDS  
NORDWALL, Deceased;  
THE UNKNOWN HEIRS, EXECUTORS,  
ADMINISTRATORS, DEVISEES,  
TRUSTEES, SUCCESSORS AND  
ASSIGNS OF ARTHUR FIELDS, JR.,  
Deceased;  
JAMES E. FIELDS aka JAMES EDWARD  
FIELDS, individually;  
JAMES E. FIELDS aka JAMES EDWARD  
FIELDS, Administrator of the  
Estate of Ahnawake M. Fields aka  
Ahnawake Martha Fields, Deceased;  
JAMES E. FIELDS aka JAMES EDWARD  
FIELDS, Administrator With Will  
Annexed of the Estate of Arthur  
Fields aka Arthur R. Fields, Sr.,  
Deceased;  
GWEN LOIS NORDWALL TINKER;  
RICHARD RALPH NORDWALL;  
AHNAWAKE ROSE NORDWALL YANDELL;  
RAYMOND CURTIS NORDWALL;  
ARTHUR FIELDS, III;  
LISA FIELDS;  
LYLE FIELDS;  
MICHAEL SCOTT FIELDS;  
RAMONA DELORES FIELDS  
aka RAMONA CASTLEBERRY;  
CHARLES BUCHANAN FIELDS;  
RICHARD D. FIELDS;  
RAYMOND C. FIELDS;  
HARRISON O. FIELDS;  
STATE OF OKLAHOMA ex rel.  
Oklahoma Tax Commission;  
COUNTY TREASURER, Pawnee County,  
Oklahoma; and  
BOARD OF COUNTY COMMISSIONERS,  
Pawnee County, Oklahoma,

Defendants.

FILED

JUL 28 1994

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

CIVIL ACTION NO. 93-C-487-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28 day of July, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears not, having previously filed its Disclaimer; the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Arthur Fields aka Arthur R. Fields, Sr., Deceased; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Eva Lois Fields Nordwall, Deceased; Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Arthur Fields, Jr., Deceased; James E. Fields aka James Edward Fields, individually; James E. Fields aka James Edward Fields, Administrator of the Estate of Ahnawake M. Fields aka Ahnawake Martha Fields, Deceased; James E. Fields aka James Edward Fields, Administrator With Will Annexed of the Estate of Arthur Fields aka Arthur R. Fields, Sr., Deceased; Gwen Lois Nordwall Tinker; Richard Ralph Nordwall; Ahnawake Rose Nordwall Yandell; Raymond Curtis Nordwall; Arthur Fields, III; Lisa Fields; Lyle Fields; Michael Scott Fields; Ramona Delores Fields aka Ramona Castleberry; Charles Buchanan Fields; Richard D. Fields; Raymond C. Fields; Harrison O. Fields; County Treasurer, Pawnee

County, Oklahoma; and Board of County Commissioners, Pawnee County, Oklahoma; appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, James E. Fields aka James Edward Fields, individually, acknowledged receipt of Summons and Complaint on June 10, 1993; that the Defendant, James E. Fields aka James Edward Fields, Administrator of the Estate of Ahnawake M. Fields aka Ahnawake Martha Fields, Deceased, was served with Summons and Amended Complaint on December 16, 1993; that the Defendant, James E. Fields aka James Edward Fields, Administrator With Will Annexed of the Estate of Arthur Fields aka Arthur R. Fields, Sr., Deceased, was served with Summons and Amended Complaint on December 16, 1993; that the Defendant, Raymond Curtis Nordwall, was served with Summons and Complaint on July 8, 1993; that the Defendant, Arthur Fields, III, executed a Waiver of Service of Summons on May 25, 1994; that the Defendant, Lisa Fields, was served with Summons and Complaint on July 26, 1993; that the Defendant, Lyle Fields, was served with Summons and Complaint on July 6, 1993; that the Defendant, Ramona Delores Fields aka Ramona Castleberry, was served with Summons and Complaint on July 26, 1993; that the Defendant, Charles Buchanan Fields, was served with Summons and Complaint on August 31, 1993; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint on May 26, 1993; that Defendant, County Treasurer, Pawnee County,

Oklahoma, acknowledged receipt of Summons and Complaint on May 26, 1993; and that Defendant, Board of County Commissioners, Pawnee County, Oklahoma, acknowledged receipt of Summons and Complaint on or about June 1, 1993.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Arthur Fields aka Arthur R. Fields, Sr., Deceased; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Eva Lois Fields Nordwall, Deceased; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Arthur Fields, Jr., Deceased; Gwen Lois Nordwall Tinker; Richard Ralph Nordwall; Ahnawake Rose Nordwall Yandell; Michael Scott Fields; Richard D. Fields; Raymond C. Fields; and Harrison O. Fields, were served by publishing notice of this action in the Pawnee Chief, a newspaper of general circulation in Pawnee County, Oklahoma, once a week for six (6) consecutive weeks beginning March 23, 1994, and continuing through April 27, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Arthur Fields aka Arthur R. Fields, Sr., Deceased; The Unknown Heirs, Executors,

Administrators, Devisees, Trustees, Successors and Assigns of **Eva Lois Fields Nordwall, Deceased**; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of **Arthur Fields, Jr., Deceased**; **Gwen Lois Nordwall Tinker**; **Richard Ralph Nordwall**; **Ahnawake Rose Nordwall Yandell**; **Michael Scott Fields**; **Richard D. Fields**; **Raymond C. Fields**; and **Harrison O. Fields**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of **Arthur Fields aka Arthur R. Fields, Sr., Deceased**; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of **Eva Lois Fields Nordwall, Deceased**; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of **Arthur Fields, Jr., Deceased**; **Gwen Lois Nordwall Tinker**; **Richard Ralph Nordwall**; **Ahnawake Rose Nordwall Yandell**; **Michael Scott Fields**; **Richard D. Fields**; **Raymond C. Fields**; and **Harrison O. Fields**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff,

United States of America, acting through the Farmers Home Administration, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Disclaimers on June 28, 1993 and December 2, 1993; that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Arthur Fields aka Arthur R. Fields, Sr., Deceased; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Eva Lois Fields Nordwall, Deceased; Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Arthur Fields, Jr., Deceased; James E. Fields aka James Edward Fields, individually; James E. Fields aka James Edward Fields, Administrator of the Estate of Ahnawake M. Fields aka Ahnawake Martha Fields, Deceased; James E. Fields aka James Edward Fields, Administrator With Will Annexed of the Estate of Arthur Fields aka Arthur R.

Fields, Sr., Deceased; Gwen Lois Nordwall Tinker; Richard Ralph Nordwall; Ahnawake Rose Nordwall Yandell; Raymond Curtis Nordwall; Arthur Fields, III; Lisa Fields; Lyle Fields; Michael Scott Fields; Ramona Delores Fields aka Ramona Castleberry; Charles Buchanan Fields; Richard D. Fields; Raymond C. Fields; Harrison O. Fields; County Treasurer, Pawnee County, Oklahoma; and Board of County Commissioners, Pawnee County, 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 promissory note and for foreclosure of a mortgage securing said promissory note upon the following described real property located in Pawnee County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Two (2) in Block One (1) in HILLCREST ADDITION to the City of Pawnee, Pawnee County, State of Oklahoma, according to the recorded plat thereof.  
SUBJECT, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations and mineral conveyances of record.

The Court further finds that this is a suit brought for the further purpose of judicially determining the deaths of Arthur Fields aka Arthur R. Fields, Sr. and Ahnawake M. Fields aka Ahnawake Martha Fields; for judicially terminating joint tenancy of Arthur Fields aka Arthur R. Fields, Sr. and Ahnawake M. Fields aka Ahnawake Martha Fields; and of judicially determining the heirs of Arthur Fields aka Arthur R. Fields, Sr.

The Court further finds that Arthur Fields aka Arthur R. Fields, Sr. (hereinafter referred to by either of these names) and Ahnawake M. Fields aka Ahnawake Martha Fields (hereinafter referred to by either of these names) became the record owners of the real property involved in this action by virtue of that certain Warranty Deed dated April 12, 1976, from Richard L. Grimes and Judy Grimes, husband and wife, to Arthur Fields and Ahnawake Martha Fields, husband and wife, as joint tenants, and not as tenants in common, with the right of survivorship, the whole estate to vest in the survivor in event of the death of either, which Warranty Deed was filed of record on April 12, 1976, in Book 179, Page 181, in the records of the County Clerk of Pawnee County, Oklahoma.

The Court further finds that Ahnawake Martha Fields died on February 13, 1978. Upon the death of Ahnawake Martha Fields, the subject property vested in her surviving joint tenant, Arthur Fields, by operation of law. Certificate of Death No. 04664 issued by the Oklahoma State Department of Health certifies Ahnawake Martha Fields' death.

The Court further finds that Arthur R. Fields, Sr. died on November 13, 1983, while seized and possessed of the real property being foreclosed. Certificate of Death No. 25209 issued by the Oklahoma State Department of Health certifies Arthur R. Fields, Sr.'s death.

The Court further finds that on April 12, 1976, Arthur Fields and Ahnawake M. Fields aka Ahnawake Martha Fields, now deceased, who were then husband and wife, executed and delivered to the United States of America, acting through Farmers Home Administration, their promissory note in the amount of \$20,700.00, payable in monthly installments, with interest thereon at the rate of 8.50 percent per annum.

The Court further finds that as security for the payment of the above-described note, Arthur Fields and Ahnawake M. Fields aka Ahnawake Martha Fields, now deceased, who were then husband and wife, executed and delivered to the United States of America, acting through Farmers Home Administration, a real estate mortgage dated April 12, 1976, covering the above-described property, situated in the State of Oklahoma, Pawnee County. This mortgage was recorded on April 12, 1976, in Book 179, Page 182, in the records of Pawnee County, Oklahoma.

The Court further finds that Arthur Fields aka Arthur R. Fields, Sr., now deceased, and Ahnawake M. Fields aka Ahnawake Martha Fields, now deceased, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$20,578.54, plus accrued interest in the amount of \$5,294.22 as of November 27, 1992, plus

interest accruing thereafter at the rate of 8.50 percent per annum or \$4.7922 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$509.96 (\$127.56 fees for service of Summons and Complaint, \$372.40 publication fees, \$10.00 fee for recording Notice of Lis Pendens).

The Court further finds that Plaintiff, United States of America, is entitled to the judicial determination of the deaths of Arthur R. Fields, Sr. and Ahnawake Martha Fields, the judicial termination of the joint tenancy of Arthur Fields and Ahnawake Martha Fields, and the judicial determination of the heirs of Arthur Fields aka Arthur R. Fields, Sr.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Arthur Fields aka Arthur R. Fields, Sr., Deceased; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Eva Lois Fields Nordwall, Deceased; Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Arthur Fields, Jr., Deceased; James E. Fields aka James Edward Fields, individually; James E. Fields aka James Edward Fields, Administrator of the Estate of Ahnawake M. Fields aka Ahnawake Martha Fields,

Deceased; James E. Fields aka James Edward Fields, Administrator With Will Annexed of the Estate of Arthur Fields aka Arthur R. Fields, Sr., Deceased; Gwen Lois Nordwall Tinker; Richard Ralph Nordwall; Ahnawake Rose Nordwall Yandell; Raymond Curtis Nordwall; Arthur Fields, III; Lisa Fields; Lyle Fields; Michael Scott Fields; Ramona Delores Fields aka Ramona Castleberry; Charles Buchanan Fields; Richard D. Fields; Raymond C. Fields; Harrison O. Fields; County Treasurer, Pawnee County, Oklahoma; and Board of County Commissioners, Pawnee County, Oklahoma, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment in rem in the principal sum of \$20,578.54, plus accrued interest in the amount of \$5,294.22 as of November 27, 1992, plus interest accruing thereafter at the rate of 8.50 percent per annum or \$4.7922 per day until judgment, plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus the costs of this action in the amount of \$509.96 (\$127.56 fees for service of Summons and Complaint, \$372.40 publication fees, \$10.00 fee for recording Notice of Lis Pendens), 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 death of Ahnawake Martha Fields be and the same is hereby judicially determined to have occurred on February 13, 1978, in the City of Tulsa, County of Tulsa, State of Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the joint tenancy of Arthur Fields and Ahnawake Martha Fields in the above-described real property be and the same is hereby judicially terminated as of the date of the death of Ahnawake M. Fields aka Ahnawake Martha Fields on February 13, 1978.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the death of Arthur R. Fields, Sr. be and the same is hereby judicially determined to have occurred on November 13, 1983, in the City of Tulsa, County of Tulsa, State of Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the only known heirs of Arthur Fields aka Arthur R. Fields, Sr., Deceased, are James E. Fields aka James Edward Fields, Gwen Lois Nordwall Tinker, Richard Ralph Nordwall, Ahnawake Rose Nordwall Yandell, Raymond Curtis Nordwall, Arthur Fields, III, Lisa Fields, Lyle Fields, Michael Scott Fields, Ramona Delores Fields aka Ramona Castleberry, Charles Buchanan Fields, Richard D. Fields, Raymond C. Fields, Harrison O. Fields, and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of Arthur Fields aka Arthur R. Fields, Sr.,

Deceased, have been discovered and it is hereby judicially determined that James E. Fields aka James Edward Fields, Gwen Lois Nordwall Tinker, Richard Ralph Nordwall, Ahnawake Rose Nordwall Yandell, Raymond Curtis Nordwall, Arthur Fields, III, Lisa Fields, Lyle Fields, Michael Scott Fields, Ramona Delores Fields aka Ramona Castleberry, Charles Buchanan Fields, Richard D. Fields, Raymond C. Fields, Harrison O. Fields are the only known heirs of Arthur Fields aka Arthur R. Fields, Sr., Deceased, and that Arthur Fields aka Arthur R. Fields, Sr., Deceased, has no other known heirs, executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Certificate of Publication and Mailing filed on May 6, 1994 regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Arthur Fields aka Arthur R. Fields, Sr., Deceased; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Eva Lois Fields Nordwall, Deceased; Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Arthur Fields, Jr., Deceased; James E. Fields aka James Edward Fields, individually; James E. Fields aka James Edward Fields, Administrator of the Estate of Ahnawake M. Fields aka Ahnawake Martha Fields, Deceased; James E. Fields aka James Edward Fields, Administrator With Will Annexed of the Estate of Arthur Fields

aka Arthur R. Fields, Sr., Deceased; Gwen Lois Nordwall Tinker; Richard Ralph Nordwall; Ahnawake Rose Nordwall Yandell; Raymond Curtis Nordwall; Arthur Fields, III; Lisa Fields; Lyle Fields; Michael Scott Fields; Ramona Delores Fields aka Ramona Castleberry; Charles Buchanan Fields; Richard D. Fields; Raymond C. Fields; Harrison O. Fields; State of Oklahoma ex rel. Oklahoma Tax Commission; County Treasurer, Pawnee County, Oklahoma; and Board of County Commissioners, Pawnee County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that 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.

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

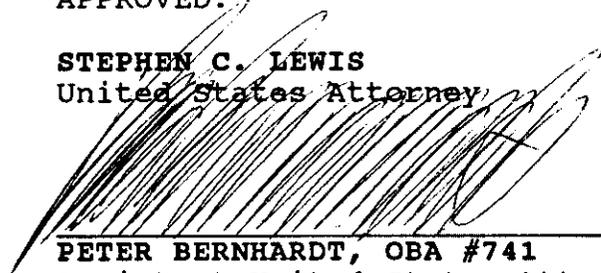
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

s/ **TERRY C. KEVIN**

UNITED STATES DISTRICT JUDGE

APPROVED:

**STEPHEN C. LEWIS**  
United States Attorney

---

**PETER BERNHARDT, OBA #741**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

Judgment of Foreclosure  
Civil Action No. 93-C-487-B

PB:css

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

ERNEST EUGENE HARPER,  
Petitioner,  
vs.  
LEROY L. YOUNG, et al.,  
Respondent.

No. 93-C-948-BV ✓

ENTERED ON DOCKET

DATE JUL 29 1994

ORDER

FILED  
28  
U.S. DISTRICT COURT

Petitioner's pro-se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now at issue before the Court. The Respondent has filed a Rule 5 response.

Before proceeding with this action, the Respondent shall supplement his Rule 5 Response with the following information regarding the Preparole Conditional Supervision Program:

- (1) a copy of the regulations implementing Okla. Stat. Ann. tit. 57, § 365 (West Supp. 1994); and
- (2) a copy of Pardon and Parole Board Procedure No. 004-11, effective August 8, 1991, entitled "Pre-Parole Conditional Supervision," cited in Harper v. Young, 852 P.2d 164, 165 (Okla. Crim. App. 1993).

The Respondent shall also address whether the regulations implementing section 365 and/or Procedure No. 004-11 are possible sources of a state-created liberty interest.

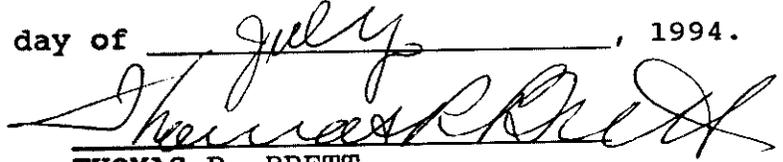
**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) The Respondent shall supplement his Rule 5 response as outlined above on or before fifteen (15) days from the

date of entry of this order; and

(2) Petitioner shall **reply** within fifteen (15) days thereafter.

SO ORDERED THIS 28 day of July, 1994.



**THOMAS R. BRETT**  
**UNITED STATES DISTRICT JUDGE**

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

FILED  
JUL 28 1994

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

AUSTIN HANSEN

Plaintiff,

vs.

KIMBERLY-CLARK CORPORATION

Defendant.

Case No. 93-C-860-B

ENTERED ON DOCKET

DATE JUL 29 1994

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Kimberly-Clark Corporation, and against the Plaintiff, Austin Hansen. Plaintiff shall take nothing on his claim. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 54.1, and each party is to pay its own respective attorney's fees.

Dated, this 28<sup>th</sup> day of July, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**  
JUL 28 1994

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

AUSTIN HANSEN )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 KIMBERLY-CLARK CORPORATION )  
 )  
 Defendant. )

Case No. 93-C-860-B

ENTERED ON DOCKET

DATE JUL 29 1994

ORDER

Before the Court for consideration is Defendant Kimberly-Clark Corporation's ("Kimberly-Clark") Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56 (Docket #14) filed on May 13, 1994. Following a thorough review of the record, the parties' arguments, and the legal authority, the Court concludes the Defendant's Motion for Summary Judgment should be GRANTED.

Plaintiff, Austin Hansen ("Hansen"), is a former employee of the Defendant. Plaintiff alleges that Kimberly-Clark required him to "confess his sins" to large groups of employees, subjected him to a "trial" by fellow employees over unspecified allegations, and terminated his employment after torturing him emotionally. On or about August 6, 1993, Plaintiff filed the instant action, alleging that Kimberly-Clark intentionally and/or negligently inflicted emotional distress upon him. On May 13, 1994, the Defendant filed the subject summary judgment motion.

LA

### STATEMENT OF UNDISPUTED FACTS<sup>1</sup>

1. Kimberly-Clark operates a manufacturing facility located in Jenks, Oklahoma (the "Jenks facility"). See Affidavit of Jim Taylor ("Taylor Affid.") The Jenks facility is in the business of manufacturing, packaging and distributing toilet paper. Taylor Affid. at ¶3.

2. Work at the Jenks facility is accomplished through self-managed teams that accept responsibility for the operation of the manufacturing process at the facility. Taylor Affid. at ¶4. See also Austin Hansen deposition transcript ("Hansen Depo.") at p. 83 and Affidavit of Steven L. Rahhal.

3. On or about June 23, 1989, Plaintiff was offered and accepted a position at the Jenks facility. Hansen Depo. at pp. 40-41. Upon employment, Plaintiff was assigned to Line 2 of the J Team. Hansen Depo. at p. 55.

4. The self-managed teams are delegated tasks, including provision of peer reviews and feedback to other members of the team, responsibility for quality control, and the initial responsibility for handling disciplinary issues. Taylor Affid. at 5; Hansen Depo. at pp. 91-93, 105, 107. The task of handling a judicial review of an employee's performance and/or behavior is

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<sup>1</sup> Plaintiff's response to Defendant's Motion for Summary Judgment failed to comply with Local Rule 56.1 and thus all material facts set forth in Defendant's statement of undisputed facts are deemed admitted. Plaintiff's response simply restated Plaintiff's affidavit under a heading of "Facts" and did not "contain a concise statement of material facts as to which [Plaintiff] contends a genuine issue exists." Local Rule 56.1(B).

also delegated to the teams. Taylor Affid. at ¶5; Hansen Depo. at p. 106.

5. Work at the Jenks facility is guided by Norms and Understandings. Taylor Affid. at ¶6. The Norms and Understandings is a set of written guidelines that set forth, among other things, the expected behavior of all employees at Kimberly-Clark's Jenks facility. Taylor Affid. at ¶6.

6. When a team member is perceived by the team to be violating one of the Norms and Understandings, the first choice of action is to handle the matter as informally as possible within the team, possibly including a meeting of the immediate work team or even the entire shift team. Taylor Affid. at ¶7; Hansen Depo. at pp. 95-96, 111.

7. If the alleged violation could potentially result in time off or termination, a team member can request a judicial review. Taylor Affid. at ¶8. Upon such request, a judicial team is formed. Taylor Affid. at ¶8; Hansen Depo. at pp. 96-97. The judicial team which conducts the judicial review consists of six fellow employees. Taylor Affid. at ¶8; Hansen Depo. at p. 97.

8. During a judicial review, a judicial team will examine facts. Taylor Affid. at ¶9; Hansen Depo. at pp. 113-114. If reason for corrective action is found, a judicial team will recommend appropriate action up to and including discharge. Taylor Affid. at ¶9; Hansen Depo. at p. 101.

9. The recommendation will be given to a team leader. Taylor Affid. at ¶10; Hansen Depo. at p. 114. The team leader will

review the appropriateness of the recommendation and will take action accordingly. Taylor Affid. at ¶10.

10. During the months of May, June, and July 1993, Plaintiff was involved in four investigations regarding the failure to accurately perform quality inspections of product being manufactured at the Jenks facility. Hansen Depo. at pp. 139, 152-153, 155-156, 161, 164, 183, 186-187, 189-190, 198, 205-208. Plaintiff failed to accurately perform quality inspections of product being manufactured at the Jenks facility during this time. Id.

11. During this same time period, Plaintiff began experiencing personal problems relating to the dissolution of his second marriage. Hansen Depo. at p. 231. Specifically, the July 4 weekend was sentimental to the Plaintiff because he and his wife would traditionally vacation at the lake on that weekend each year. Hansen Depo. at p. 231. Plaintiff's personal life was admittedly affecting his work performance. Hansen Depo. at p. 231.

12. On July 3, 1993, Mr. Danny Martin, a co-worker and team member of the Plaintiff, requested a quality investigation regarding the Plaintiff's past performance. See Affidavit of Danny Martin ("Martin Affid."); Hansen Depo. at p. 213. The investigation began on July 3, 1993, and was attended by the Plaintiff, Mr. Jim Schoenholtz, the weekend coach at the Jenks facility, and other members of the Line 2 of J Team. Martin Affid. at ¶3; Hansen Depo. at p. 216. Plaintiff had previously participated in quality investigation meetings. Hansen Depo. at p.

221.

13. During the investigation, Plaintiff's co-workers began to discuss deficiencies in Plaintiff's work performance. Martin Affid. at ¶4. Plaintiff then stood up, stated that he was sick of this, took off his utility belt and put it on the table, and walked out of the room where the investigation was taking place. Hansen Depo. at p. 225; Martin Affid. at ¶4. While Plaintiff was walking out of the room, he was advised that he needed to come back so that the quality issues could be discussed. Hansen Depo. at p. 240; Martin Affid. at ¶4. Martin and others admonished Plaintiff that Line 2 of the J Team would request a judicial review of the Plaintiff's past performance if he walked out of the investigations. Martin Affid. at ¶4; Hansen Depo. at pp. 226, 241. Plaintiff continued to walk out of room. Martin Affid. at ¶4; Hansen Depo. at p. 226. Plaintiff went to the security desk of the Jenks facility, removed his Kimberly-Clark identification badge, gave the identification badge to the security guard, and left the facility. Hansen Depo. at pp. 226, 242-243.

14. Plaintiff later voluntarily returned to the facility and the room where the quality investigation was taking place. Martin Affid. at ¶5; Hansen Depo. at p. 230. For the first time, Plaintiff advised of his personal problems. At such time, Plaintiff was advised that he would not be allowed to return to work until Taylor, the facility Manager, had been notified of the events. Martin Affid. at ¶5; Hansen Depo at pp. 235, 239, 256. Indeed, Plaintiff was aware that walking off the job was grounds

for immediate termination. Hansen Depo. at p. 268. Plaintiff was instructed to go home and return to work on Wednesday, July 7, 1993, to discuss the matter with Taylor. Martin Affid. at ¶5; Hansen Depo. at pp. 235, 239, 256.

15. On July 7, 1993, a meeting was held between Taylor and Plaintiff to discuss Plaintiff's overall performance and the specifics of the incident on Saturday, July 3, 1993, which resulted in Plaintiff's leaving the Jenks facility. Taylor Affid. at ¶11; Hansen Depo. at pp. 256-257. During the meeting, Taylor discussed the serious nature of Plaintiff's walking away from the job and unwillingness to confront issues with his team members. Taylor Affid. at ¶11. Plaintiff stated that he was sorry for his behavior and poor quality performance. Taylor Affid. at ¶11; Hansen Depo. at p. 275. Plaintiff also stated that he was dealing with personal problems. Taylor Affid. at ¶11. Taylor noted that Plaintiff's actions of walking off the job were grounds for discharge and while he empathized with Plaintiff's personal situation, Taylor could not condone or accept Plaintiff's behavior and level of performance. Taylor Affid. at ¶11; Hansen Depo at p. 277. Taylor advised Plaintiff that the only way he would agree to allow Plaintiff to remain on the job was to obtain Plaintiff's voluntary commitment to a corrective action plan and to issue Plaintiff time off without pay to send a clear message to the Jenks facility employees that it is not acceptable to walk away from the job. Taylor Affid. at ¶11. Plaintiff agreed to meet with the Jenks facility teams and communicate the incident and actions taken. Taylor Affid. at ¶11;

Hansen Depo. at p. 272.

16. On July 8, 1993, members of Line 2 of the J Team requested a judicial review regarding the Plaintiff's performance. Taylor Affid. at ¶12; Martin Affid. at ¶6.

17. On July 8 and 9, 1993, Plaintiff participated in three communications to the Jenks facility workforce. Taylor Affid. at ¶13. Plaintiff agreed to participate in the communiques. Taylor Affid. at ¶13; Hansen Depo. at p. 279. During the communications, Plaintiff discussed the fact that personal problems were affecting his work performance. Taylor Affid. at ¶13; Hansen Depo. at pp. 287, 299. Specially, Plaintiff advised the shift teams that he had been experiencing stress because of his divorce. Hansen Depo. at pp. 287, 299. Plaintiff also stated that he had participated in Kimberly-Clark's Employee Assistance Program earlier that day. Hansen Depo. at pp. 287, 299. Plaintiff also stated that he was going to become more focused on his job to be a better employee. Hansen Depo. at pp. 287, 299. Plaintiff admitted he "felt great", "real good", and "positive" after each communication. Hansen Depo. at pp. 293, 302.

18. On July 9, 1993, the judicial review that had been requested by Plaintiff's co-workers was conducted regarding Plaintiff's performance. Taylor Affid. at ¶13. At the conclusion of the review, the judicial review board which was comprised of Plaintiff's co-workers recommended that the Plaintiff be separated from the Jenks facility workforce. Taylor Affid. at ¶13; Hansen Depo. at p. 328. Mr. Don Cupp, the judicial review leader,

concurring with the recommendation. Taylor Affid at ¶13; Hansen Depo. at p. 329. Taylor, the facility Manager, affirmed the recommendation. Taylor Affid. at ¶13.

#### STANDARD FOR SUMMARY JUDGMENT

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980). A recent Tenth Circuit Court of Appeals decision in Committee for the First

Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

"Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .

"A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

#### LEGAL ANALYSIS AND CONCLUSION

In order to establish a prima facie case of intentional infliction of emotional distress, Plaintiff must establish the following four elements: (1) Kimberly-Clark acted intentionally or recklessly; (2) Kimberly-Clark's conduct was extreme and outrageous; (3) Hansen actually experienced emotional distress; and (4) the emotional distress was severe. Katzer v. Baldor Elec. Co., 969 F.2d 935, 939 (10th Cir. 1992). Defendant contends the undisputed conduct of Kimberly-Clark does not qualify as "extreme and outrageous" and thus Defendant is entitled to summary judgment on Plaintiff's claims.

It is the responsibility of the court to initially determine

whether the conduct of the defendant may reasonably be regarded as sufficiently extreme and outrageous. Eddy v. Brown, 715 P.2d 74 (Okla. 1986) and Breeden v. League Servs. Corp., 575 P.2d 1374, 1376 (Okla. 1978). The Oklahoma Supreme Court has articulated the standard for evaluating whether conduct is extreme and outrageous.

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'outrageous!'.

Eddy, 715 P.2d at 77.

Plaintiff contends the Defendant required him to meet with each of the employee shift teams and communicate the circumstances of the incident that had gotten him in trouble and why it had happened. Plaintiff states that the Defendant knew this would require Plaintiff to discuss the personal problems he was experiencing and in fact Jim Taylor, the facility manager, was present as the Plaintiff told his story to each of the shift teams. Plaintiff further contends it was his understanding that he would be allowed to keep his job if he spoke with each of the employee

teams as required by the facility manager.<sup>2</sup>

Viewing the evidence and inferences in a light most favorable to the Plaintiff, the Court concludes Plaintiff has failed to make a showing sufficient to establish that Kimberly-Clark's conduct was extreme and outrageous. Although the Court is unaware of any case authority with facts similar to the instant case, the Court is confident that the facts asserted by Plaintiff, along with all reasonable inferences therefrom, do not establish conduct on the part of the Defendant that goes beyond all possible bounds of decency or that could be regarded as atrocious, and utterly intolerable in a civilized community. See generally, Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3rd Cir. 1988) ("It is extremely rare to find conduct in the employment context that gives rise to a level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress.") For this reason, Defendant's Motion for Summary Judgment should be and is hereby GRANTED as to Plaintiff's claim of intentional infliction of emotional distress.

The tort of negligent infliction of emotional distress is not well defined in Oklahoma. However, it does not appear that Oklahoma has recognized an independent cause of action for negligent

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<sup>2</sup> Defendant asserts that Taylor specifically admonished Plaintiff during the July 7, 1994, meeting that participation in the communications to all shift teams did not assure Plaintiff's continued employment, that a judicial review could still be requested by Plaintiff's co-workers and the judicial review board could recommend termination based on Plaintiff's past performance.

infliction of emotional distress in the employer/employee setting. Other courts have refused to recognize such a claim. See e.g., Fiorenza v. First City Bank, 710 F.Supp. 1104, 1105 (E.D. Tex. 1988) ("The Texas Supreme Court does not yet recognize a separate cause of action in the employee/employer relationship for negligent infliction of emotional distress."); Summers v. Western Idaho Potato Processing, 479 P.2d 292 (1970) (employee's claim for physical injuries was barred by the worker's compensation law and there is no common law right of recovery for purely emotional trauma).

The tort of negligent infliction of emotional distress has most often been recognized where the Plaintiff was in the "zone of danger" and witnessed injuries negligently inflicted on another, Cimino v. Milford Keg, Inc., 431 N.E.2d 920,927 (Mass. 1982), or where emotional distress was caused by a defective product or service, Obieli v. Campbell Soup Co., 623 F.2d 668 (10th Cir. 1980) (Plaintiff suffered emotional distress that engendered a stomach disorder after eating a can of cockroach contaminated chicken noodle soup); Ellington v. Coca Cola Bottling Company or Tulsa, Inc., 717 P.2d 109 (Okla. 1986) (Plaintiff who became physically ill upon perceiving foreign substance, which she thought was a worm, in her soft drink, permitted to recover for mental pain and anguish.); Richardson v. J.C. Penny Company, Inc., 649 P.2d 565 (Okla. 1982) (Plaintiff allowed to recover for nervous disorders resulting from a negligent brake repair). The instant case does not fall into either of these categories and this Court should not be

the one to extend this cause of action to the employer/employee setting. Thus, the Court concludes Plaintiff has failed to make a sufficient showing to establish the existence of the elements of a claim for negligent infliction of emotional distress and Defendant's motion for summary judgment as to this claim should also be GRANTED.

IT IS SO ORDERED THIS 28 DAY OF JULY, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 UNKNOWN HEIRS, EXECUTORS, )  
 ADMINISTRATORS, DEVISEES, )  
 TRUSTEES, SUCCESSORS )  
 AND ASSIGNS OF DAVID EARL )  
 COLLINS a/k/a DAVID E. )  
 COLLINS, Deceased; UNKNOWN )  
 HEIRS, EXECUTORS, )  
 ADMINISTRATORS, DEVISEES, )  
 TRUSTEES, SUCCESSORS AND )  
 ASSIGNS OF LILLIAN LUCILLE )  
 COLLINS a/k/a LILLIAN L. )  
 COLLINS, Deceased; DAVID EARL )  
 COLLINS, JR., Individually, )  
 and As Personal )  
 Representative of the Estate )  
 of DAVID EARL COLLINS, )  
 Deceased; BRIDGETTE MICHELLE )  
 LONG, Individually and As )  
 Personal Representative of the )  
 Estate of LILLIAN LUCILLE )  
 COLLINS, Deceased; LORNA )  
 DENISE LONG; OSTEOPATHIC )  
 HOSPITAL FOUNDERS ASSOCIATION, )  
 a corporation, d/b/a OKLAHOMA )  
 OSTEOPATHIC HOSPITAL n/k/a )  
 TULSA REGIONAL MEDICAL CENTER; )  
 HILLCREST MEDICAL CENTER; )  
 STATE OF OKLAHOMA ex rel. )  
 OKLAHOMA TAX COMMISSION; )  
 COUNTY TREASURER, Tulsa )  
 County, Oklahoma; and )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma, )  
 )  
 Defendants. )

CIVIL ACTION NO. 93-C-486-K

FILED

JUL 28 1994

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

ENTERED IN THE CLERK'S OFFICE

DATE JUL 29 1994

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28 day  
of July, 1994. The Plaintiff appears by Stephen C.  
Lewis, United States Attorney for the Northern District of  
Oklahoma, through Wyn Dee Baker, Assistant United States

Attorney; the Defendant, Osteopathic Hospital Founders Association, a corporation, dba Oklahoma Osteopathic Hospital nka Tulsa Regional Medical Center, appears through Steven W. Simcoe, Esq.; the Defendant, Hillcrest Medical Center, appears through Fred A. Pottorf, Esq.; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears not, having previously filed a Disclaimer; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, appears not, having previously claimed no right, title or interest in the subject property; the Defendant, County Treasurer, Tulsa County, Oklahoma, appears by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of David Earl Collins a/k/a David E. Collins, Deceased; Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Lillian Lucille Collins a/k/a Lillian L. Collins, Deceased; Lorna Denise Long; David Earl Collins, Jr., Individually, and as Personal Representative of the Estate of David Earl Collins aka David E. Collins, Deceased; and Bridgette Michelle Long, Individually, and as Personal Representative of the Estate of Lillian Lucille Collins aka Lillian L. Collins, Deceased, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, David Earl Collins Jr., individually, and as Personal Representative of the Estate of David Earl Collins aka David E. Collins, Deceased, was served with Summons and Amended Complaint on November 23, 1993; that the

Defendant, Bridgette Michelle Long, Individually and as Personal Representative of the Estate of Lillian Lucille Collins aka Lillian L. Collins, Deceased, was served with Summons and Amended Complaint on December 8, 1993; that the Defendant, Osteopathic Hospital Founders Association, a corporation, dba Oklahoma Osteopathic Hospital nka Tulsa Regional Medical Center, acknowledged receipt of Summons and Complaint on May 26, 1993; that the Defendant, Hillcrest Medical Center, acknowledged receipt of Summons and Complaint on May 25, 1993; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint on May 25, 1993; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on May 28, 1993; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on May 27, 1993.

The Court further finds that the Defendants, Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of David Earl Collins a/k/a David E. Collins, Deceased; Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Lillian Lucille Collins a/k/a Lillian L. Collins, Deceased; and Lorna Denise Long, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning February 3, 1994, and continuing to March 10, 1994, as more fully appears from the verified proof of publication duly filed herein;

and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of David Earl Collins a/k/a David E. Collins, Deceased; Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Lillian Lucille Collins a/k/a Lillian L. Collins, Deceased; and Lorna Denise Long, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of David Earl Collins a/k/a David E. Collins, Deceased; Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Lillian Lucille Collins a/k/a Lillian L. Collins, Deceased; and Lorna Denise Long. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through

Wyn Dee Baker, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, filed his Answer on June 8, 1993; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on June 8, 1993, disclaiming any right, title or interest in the subject property; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Disclaimer on June 14, 1993; that the Defendant, Osteopathic Hospital Founders Association, a corporation, dba Oklahoma Osteopathic Hospital nka Tulsa Regional Medical Center, filed its Answers on June 10, 1993, October 12, 1993 and November 22, 1993; that Defendant, Hillcrest Medical Center, filed its Answers on June 2, 1993 and October 12, 1993; and that the Defendants, Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of David Earl Collins a/k/a David E. Collins, Deceased; Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Lillian Lucille Collins a/k/a Lillian L. Collins, Deceased; Lorna Denise Long; David Earl Collins, Jr., Individually, and as Personal Representative of the Estate of David Earl Collins aka David E. Collins, Deceased; and Bridgette

Michelle Long, Individually, and as Personal Representative of the Estate of Lillian Lucille Collins aka Lillian L. Collins, Deceased, 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 Five (5), Block Eleven (11), FAIRHILL SECOND ADDITION, a Subdivision to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that Plaintiff is entitled to a judicial determination of the heirs of David Earl Collins aka David E. Collins, Deceased, and to a judicial determination of the heirs of Lillian Lucille Collins aka Lillian L. Collins, Deceased.

The Court further finds that on March 27, 1975, David E. Collins and Lillian L. Collins, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$11,500.00, payable in monthly installments, with interest thereon at the rate of 8.5 percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, David E. Collins and Lillian L. Collins, executed and delivered to the

United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated March 27, 1975, covering the above-described property. Said mortgage was recorded on April 4, 1975, in Book 4159, Page 1848, in the records of Tulsa County, Oklahoma.

The Court further finds that on or about December 28, 1992, Lillian Lucille Collins aka Lillian L. Collins died intestate.

The Court further finds that on or about December 28, 1992, David Earl Collins aka David E. Collins died intestate.

The Court further finds that on information and belief, Lillian Lucille Collins aka Lillian L. Collins predeceased David Earl Collins aka David E. Collins.

The Court further finds that Bridgette Michelle Long was appointed Personal Representative of Lucille Lillian Collins, Deceased, and that David Earl Collins, Jr. was appointed Personal Representative of David Earl Collins, Deceased, by Orders Appointing Personal Representative and Letters of Administration filed April 28, 1993 in Case No. P-93-299 and Case No. P-93-298, respectively, in the District Court In and For Tulsa County, State of Oklahoma.

The Court further finds that on April 30, 1993, Bridgette Michelle Long, Personal Representative of the Estate of Lillian Lucille Collins, Deceased, filed an action against David Earl Collins, Jr., Personal Representative of the Estate of David Earl Collins, Deceased, Case No. CJ 93-01990, In the District Court In and For Tulsa County, State of Oklahoma, regarding the

alleged felonious taking of Lillian Lucille Collins' life by David Earl Collins, her husband and joint tenant and alleging that the entire interest in all of their jointly held property was owned by Lillian Lucille Collins upon the moment of her death.

The Court further finds that the Defendants, David Collins aka David E. Collins and Lillian Collins aka Lillian L. Collins, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, and that by reason thereof the Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$8,181.17, plus interest at the rate of 8.5 percent per annum from October 1, 1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$411.16 (\$3.96 fees for service of Summons and Complaint, \$407.20 publication fees).

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 \$19.00 which became a lien on the property as of June 26, 1992 for the year of 1991; and by virtue of a claim in the amount of \$12.00 for the year of 1992. 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 Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, disclaims any right, title or interest in the **subject** real property.

The Court further **finds** that the Defendants, Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of David Earl Collins a/k/a David E. Collins, Deceased; Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Lillian Lucille Collins a/k/a Lillian L. Collins, Deceased; Lorna Denise Long; David Earl Collins, Jr., Individually, and as Personal Representative of the Estate of David Earl Collins aka David E. Collins, Deceased; and Bridgette Michelle Long, Individually, and as Personal Representative of the Estate of Lillian Lucille Collins aka Lillian L. Collins, Deceased, **are** in default and have no right, title or interest in the **subject** real property.

The Court further **finds** that the Defendant, Osteopathic Hospital Founders Association, a corporation, dba Oklahoma Osteopathic Hospital nka Tulsa Regional Medical Center, has a lien on the property which is the subject matter of this action by virtue of an Execution dated March 5, 1990, Case No. CS-85-00464 and recorded on March 8, 1990 in the records of Tulsa County, Oklahoma in Book 5240 at Page 434 in the amount of \$2,571.86. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Hillcrest Medical Center, has a lien on the property which is the subject matter of this action by virtue of an Affidavit of Judgment dated May 15, 1990, Case No. CJ-90-01548 and recorded May 21, 1990 in the records of Tulsa County, Oklahoma in Book 5254 at Page 637 in the amount of \$17,646.08, court costs, together with interest thereon at the rate of 12.350% per annum from the date of judgment until paid, and for an attorney's fee in the sum of \$3,530.00, for Plaintiff's attorney of record, Works, Lentz & Pottorf, Inc., together with all costs of this action, both accrued and accruing, and all other proper and equitable relief that this Court may grant. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Osteopathic Hospital Founders Association, a corporation, dba Oklahoma Osteopathic Hospital nka Tulsa Regional Medical Center, has a lien on the property which is the subject matter of this action by virtue of an Execution dated October 8, 1990, Case No. CJ-85-06390 and recorded on October 10, 1990 in the records of Tulsa County, Oklahoma in Book 5282, Page 468 in the amount of \$19,793.88.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment in rem in the principal sum of \$8,181.17, plus interest at the rate of 8.5 percent per annum from October 1, 1992 until judgment, plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus the costs of this action in the amount of \$411.16 (\$3.96

fees for service of Summons and Complaint, \$407.20 publication fees) 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 only known heirs of David Earl Collins aka David E. Collins, Deceased, and Lillian Lucille Collins aka Lillian L. Collins, Deceased, are David Earl Collins, Jr., Bridgette Michelle Long and Lorna Denise Long and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of David Earl Collins aka David E. Collins, Deceased, and Lillian Lucille Collins aka Lillian L. Collins, Deceased, have been discovered and it hereby judicially determined that David Earl Collins, Jr., Bridgette Michelle Long and Lorna Denise Long are the only known heirs of David Earl Collins aka David E. Collins, Deceased, and Lillian Lucille Collins aka Lillian L. Collins, Deceased, and they have no other known heirs, executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Amended Certificate of Publication and Mailing filed by Plaintiff regarding said heirs.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$ 43.00 for personal property taxes, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission,

disclaims any right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, Osteopathic Hospital Founders Association, a corporation, dba Oklahoma Osteopathic Hospital nka Tulsa Regional Medical Center, have and recover judgment for an Execution dated March 5, 1990, Case No. CS-85-00464 and recorded on March 8, 1990 in the records of Tulsa County, Oklahoma in Book 5240 at Page 434 in the amount of \$2,571.86.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, Hillcrest Medical Center have and recover judgment for an Affidavit of Judgment dated May 15, 1990, Case No. CJ-90-01548 and recorded May 21, 1990 in the records of Tulsa County, Oklahoma in Book 5254 at Page 637 in the amount of \$17,646.08, court costs, together with interest thereon at the rate of 12.350% per annum from the date of judgment until paid, and for an attorney's fee in the sum of \$3,530.00, for Plaintiff's attorney of record, Works, Lentz & Pottorf, Inc., together with all costs of this action, both accrued and accruing, and all other proper and equitable relief that this Court may grant.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, Osteopathic Hospital Founders Association, a corporation, dba Oklahoma Osteopathic Hospital nka Tulsa Regional Medical Center, have and recover judgment for an Execution dated

October 8, 1990, Case No. CJ-85-06390 and recorded on October 10, 1990 in the records of Tulsa County, Oklahoma in Book 5282, Page 468 in the amount of \$19,793.88.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that 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, Osteopathic Hospital Founders Association, a corporation, dba Oklahoma Osteopathic Hospital nka Tulsa Regional Medical Center, for an Execution dated March 5, 1990, Case No. CS-85-00464 and recorded on March 8, 1990 in the records of Tulsa County, Oklahoma in Book 5240 at Page 434 in the amount of \$2,571.86.

**Fourth:**

In payment of Defendant, Hillcrest Medical Center, for an Affidavit of Judgment dated May 15, 1990, Case No. CJ-90-01548 and recorded May 21, 1990 in the records of Tulsa County, Oklahoma in Book 5254 at Page 637 in the amount of \$17,646.08, court costs, together with interest thereon at the rate of 12.350% per annum from the date of judgment until paid, and for an attorney's fee in the sum of \$3,530.00, for Plaintiff's attorney of record, Works, Lentz & Pottorf, Inc., together with all costs of this action, both accrued and accruing, and all other proper

and equitable relief that this Court may grant.

**Fifth:**

In payment of Defendant, Osteopathic Hospital Founders Association, a corporation, dba Oklahoma Osteopathic Hospital nka Tulsa Regional Medical Center, for an Execution dated October 8, 1990, Case No. CJ-85-06390 and recorded on October 10, 1990 in the records of Tulsa County, Oklahoma in Book 5282, Page 468 in the amount of \$19,793.88.

**Sixth:**

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$ 43.00 for 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.

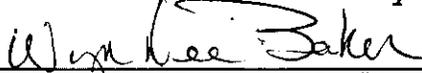
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

  
WYN DEE BAKER, OBA #465  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

  
STEVEN W. SIMCOE, OBA #15349  
BARKLEY, RODOLF & MCCARTHY  
2700 Mid Continent Tower  
401 South Boston Ave.  
Tulsa, OK 74103  
Attorney for Defendant,  
Osteopathic Hospital Founders Association,  
a corporation, dba Oklahoma Osteopathic Hospital  
nka Tulsa Regional Medical Center

FRED A. POTTORF, OBA #7248  
Mapco Plaza Building  
1717 South Boulder, Suite 200  
Tulsa, OK 74119  
Attorney for Defendant,  
Hillcrest Medical Center

J. DENNIS SEMLER, OBA #8076  
Assistant District Attorney  
Attorney for Defendant,  
County Treasurer,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
USA v. Unknown Heirs...of David Earl Collins, et al.  
Civil Action No. 93-C-486-K

WDB/esf

STEVEN W. SIMCOE, OBA #15349  
BARKLEY, RODOLF & MCCARTHY  
2700 Mid Continent Tower  
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a corporation, dba Oklahoma Osteopathic Hospital  
nka Tulsa Regional Medical Center



FRED A. POTTORF, OBA #7248 DAN WEBB #11003  
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Tulsa, OK 74119  
Attorney for Defendant,  
Hillcrest Medical Center

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Judgment of Foreclosure  
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Tulsa, OK 74119  
Attorney for Defendant,  
Hillcrest Medical Center



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J. DENNIS SEMLER, OBA #8076  
Assistant District Attorney  
Attorney for Defendant,  
County Treasurer,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
USA v. Unknown Heirs...of David Earl Collins, et al.  
Civil Action No. 93-C-486-K

WDB/esf

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

**FILED**

JUL 28 1994

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

JAMES ANDREW THOMAS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SECRETARY OF THE ARMY, )  
 )  
 Defendant. )

Case No. 94-C-400-K ✓

ORDER

Now before the Court is the Motion of the Plaintiff James Andrew Thomas (Thomas) for Summary Judgment (Docket #2) and the Motion of the Defendant Secretary of the Army (Secretary) to Dismiss Plaintiff's Complaint (Docket #10).

Between 1950 and 1981, Thomas was employed, at different times, by both the Regular Army and the Army Reserve. In 1981, he became an instructor for the ROTC program at Southwest Missouri State University. After friction arose between Thomas and his commanding officer, he was given the option of voluntarily requesting reassignment without prejudice or being relieved of duties due to unsatisfactory performance. Thomas requested reassignment. The circumstances of reassignment were investigated by an Inspector General in June, 1982, and a Report of Investigation (ROI) was made finding no improprieties in the actions relating to Thomas. At this point, Thomas was ordered to remain at SMSU. Instead, he returned to Tulsa where he continued to receive pay but performed no military duties. When he was subsequently reassigned to North Carolina, he refused to go.

ENTERED ON DOCKET

DATE 7-29-94

Subsequently, he was classified as "AWOL," then "deserter," and eventually "Dropped From The Rolls of the Army."

In June 1984, Thomas applied to the Army Board for Correction of Military Records (ABCMR) to obtain a discharge certificate. The ABCMR concluded that he should not have been reassigned against his wishes in 1982, and issued plaintiff an honorable discharge certificate. The ABCMR also determined that plaintiff had been administratively AWOL until such time as he was discharged.

In October, 1986, Thomas requested a complete record of the June 1982 ROI. In November, 1986, he was provided with portions of the record of the ROI, but not the entire record. In this action<sup>1</sup>, Thomas complains of the endorsement and illegal withholding of the ROI by the Defendant Secretary. Shortly after filing his Complaint, Thomas filed a Motion for Summary Judgment, wherein he asserts that the ROI was illegal and improperly withheld.

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<sup>1</sup> These facts have formed the basis of numerous other claims by Thomas, including a claim that the Regular Army conspired to drive him off his reserve active duty tour as an ROTC instructor (Thomas v. Weinberger and Marsh, No. 85-C-1118-E); that the actions of the ABCMR were arbitrary and capricious (Thomas v. Weinberger and Marsh, No. 87-C-378-E); that the Inspector General of the Army improperly denied his request for a complete record of the ROI (Thomas v. Department of the Army, No. 88-C-1539-E); that the Inspector General of the Army violated his due process rights by withholding evidence pursuant to the Privacy Act (Thomas v. Marsh, Doctor, Kinneer, and Henry, No. 89-1981PHXC, filed in the District Court for the District of Arizona); and that the Department of the Army violated his due process rights by withholding evidence critical to his ABCMR application (Thomas v. United States, No. 92-1641, filed in the District Court for the District of Columbia). Case No. 87-C-378-E was appealed to the Court of Appeals for the Federal Circuit, which was denied, as was a petition for writ of certiorari. The other claims, with the exception of the one filed in the District of Columbia, which is still pending, were dismissed.

Defendant filed a Motion to Dismiss Plaintiff's claims, arguing that venue is improper, that the claims are barred by the statute of limitations, res judicata, and/or collateral estoppel, and that the Court lacks subject matter jurisdiction. The Court will first consider Defendant's Motion to Dismiss.

#### 1. Venue

The Plaintiff has the burden of establishing proper venue. Monarch Normandy v. Normandy Square, 817 F. Supp. 899, 903 (D.Kan.1993). The Defendant argues that venue is improper under the general venue statute, 28 U.S.C. §1391(e), which provides:

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except other wise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

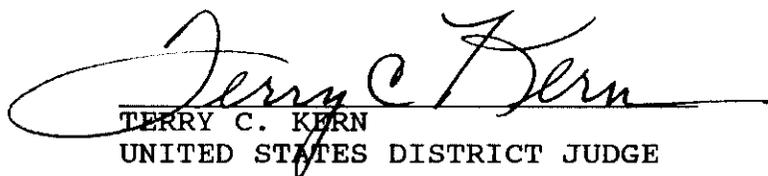
Plaintiff asserts in his complaint that he is a resident of Colorado. Defendant is a resident of Virginia. Defendant argues that venue is therefore not appropriate in the Northern District of Oklahoma.

In response, Plaintiff argues that the cause of action arose in Oklahoma, because he maintained his residency in Tulsa Oklahoma at the time the cause of action arose. However, this argument does not satisfy the requisites of §1391(e). It does not follow that "a substantial part of the events or omissions giving rise to the claim occurred" in the Northern District of Oklahoma simply because

Plaintiff "maintained residency" in Tulsa Oklahoma at the time the claim arose. In fact, although Plaintiff might have "maintained residency" in Tulsa, he was teaching in Missouri at the time the claim arose. Moreover, in his complaint, Plaintiff "requests judicial review of the activities of the Secretary of the Army concerning the creation, conduct and endorsements at all levels through and including the directing authority of the investigation conducted by the Office of the Inspector General on or about 13 May 1982 at Southwestern Missouri State University." Neither this statement nor the rest of the Complaint supports a finding that a substantial part of the events giving rise to the claim occurred in the Northern District of Oklahoma.

Defendant's Motion to Dismiss based on improper venue is granted. Because of this ruling, the Court declines to address the other issues raised in Defendant's Motion to Dismiss or Plaintiff's Motion for Summary Judgment.

IT IS SO ORDERED THIS 27<sup>th</sup> DAY OF JULY, 1994.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JUL 28 1994

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

PIPELINE INDUSTRY PENSION FUND )  
4845 South 83rd East Avenue )  
Post Office Box 470950 )  
Tulsa, Oklahoma 74147-0950, )

Plaintiff, )

vs. )

UNITED STATES OF AMERICA, ex rel )  
INTERNAL REVENUE SERVICE )  
Post Office Box 467 )  
Rice Lake, Wisconsin 54868 )

and )

MICHAEL J. MILLER )  
301 Bernard Street )  
Hurley, Wisconsin 54534-1050, )

Defendants. )

Case No. 94-C 500-E

ENTERED ON DOCKET  
DATE 7-29-94

**DISMISSAL**

COMES NOW the Plaintiff, Pipeline Industry Pension Fund, and  
dismisses the above styled and numbered cause with prejudice.

Respectfully submitted:

*Sondra F. Houston*  
SONDRA FOGLEY HOUSTON, OBA NO. 4392  
1640 South Boston Avenue  
Tulsa, Oklahoma 74119-4416  
(918) 583-2624

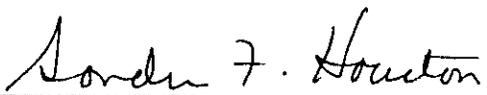
Attorney for Plaintiff, Pipeline  
Industry Benefit Fund

**CERTIFICATE OF MAILING**

The undersigned hereby certifies that on the 27 day of July, 1994, a true and correct copy of the above and foregoing Dismissal was mailed, first-class mail, proper postage thereon fully prepaid, to:

Ms. Carolyn Jones  
Department of Justice, Tax Division  
P. O. Box 7238  
Ben Franklin Station  
Washington, D.C. 20044

Michael J. Miller  
301 Bernard Street  
Hurley, Wisconsin 34534-1050

  
\_\_\_\_\_  
SONDRA FOGLEY HOUSTON

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

ENTERED ON DOCKET  
DATE JUL 28 1994

**FILED**

JUL 27 1994

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

BIZJET INTERNATIONAL SALES  
& SUPPORT, INC.,

Plaintiff,

v.

IMPERIAL AIR SERVICES, INC.;  
and TANGO LIMA, INC.

Defendants.

Case No. 94-C-243K

**NOTICE OF DISMISSAL**

Plaintiff, BizJet International Sales & Support, Inc., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, does hereby dismiss its Complaint against the defendants with prejudice to the refiling of same.

Respectfully submitted,



Joe L. Wohlgemuth, OBA #9811  
R. Jay Chandler, OBA #1603  
Thomas M. Ladner, OBA #5161  
**NORMAN & WOHLGEMUTH**  
2900 Mid-Continent Tower  
Tulsa, OK 74103-4023  
(918) 583-7571

ATTORNEYS FOR PLAINTIFF, BIZJET  
INTERNATIONAL SALES & SUPPORT, INC.

**CERTIFICATE OF MAILING**

I hereby certify that on the 28th day of July, 1994, a true and correct copy of the above and foregoing instrument was mailed, with proper postage thereon, to:

Laurence L. Pinkerton, Esq.  
PINKERTON & ASSOCIATES  
907 Philtower Building  
Tulsa, Oklahoma 74103

Thomas S. Neuberger, Esq.  
200 W. Ninth St., Suite 702  
Wilmington, DE 19801

Steven J. Stirparo, Esq.  
200 W. Ninth St., Suite 702  
Wilmington, DE 19801



---

R. Jay Chandler

bj.imp.dis/mdc

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 WALTER A. DEAN; GWENDOLYN ALFRED )  
 DEAN; COUNTY TREASURER, Tulsa )  
 County, Oklahoma; BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma, )  
 )  
 Defendants. )

ENTERED ON DOCKET  
JUL 26 1994  
DATE \_\_\_\_\_

CIVIL ACTION NO. 94-C-128-B

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 27 day of July, 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, WALTER A. DEAN and GWENDOLYN ALFRED DEAN, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on February 22, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on February 17, 1994.

The Court further finds that the Defendants, WALTER A. DEAN and GWENDOLYN ALFRED DEAN, were served by publishing notice

NOTE: THIS CASE IS TO BE FILED IN THE  
BY THE CLERK OF COURT  
PRO SE AND  
UPON RECEIPT OF THE FILING FEE

of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning April 28, 1994, and continuing through June 2, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, WALTER A. DEAN and GWENDOLYN ALFRED DEAN, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, WALTER A. DEAN and GWENDOLYN ALFRED DEAN. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The

Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on March 10, 1994; that the Defendants, WALTER A. DEAN and GWENDOLYN ALFRED DEAN, have failed to answer and default has therefore been entered by the Clerk of this Court.

The Court further finds that on November 8, 1991, the personal liability of the Defendant, GWENDOLYN ALFRED DEAN, on the debt represented by the subject note and mortgage was Discharged in the United States Bankruptcy Court for the Northern District of Oklahoma, Case Number 91-02485-C, a Chapter 7 Bankruptcy.

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 Eighteen (18), Block Eight (8), OAK CLIFF  
ADDITION to the City of Tulsa, Tulsa County,  
State of Oklahoma, according to the recorded  
Plat thereof.**

The Court further finds that on May 26, 1983, the Defendants, WALTER A. DEAN, and GWENDOLYN ALFRED, executed and delivered to Charles F. Curry Company, a mortgage note in the amount of \$43,000.00, payable in monthly installments, with

interest thereon at the rate of Twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, WALTER A. DEAN, then a single person, and GWENDOLYN ALFRED, then a single person, executed and delivered to Charles F. Curry Company, a mortgage dated May 26, 1983, covering the above-described property. Said mortgage was recorded on June 2, 1983, in Book 4695, Page 1731, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 15, 1988, Charles F. Curry Company, 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 22, 1988, in Book 5147, Page 958, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 1, 1989, the Defendants, WALTER A. DEAN and GWENDOLYN ALFRED DEAN, 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 February 1, 1990.

The Court further finds that the Defendants, WALTER A. DEAN and GWENDOLYN ALFRED DEAN, 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, WALTER A. DEAN and GWENDOLYN ALFRED DEAN, are indebted to the

Plaintiff in the principal sum of \$71,519.31, plus interest at the rate of Twelve 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 \$12.00 which became a lien on the property as of June 26, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, WALTER A. DEAN and GWENDOLYN ALFRED DEAN, 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, WALTER A. DEAN and GWENDOLYN ALFRED DEAN, in the principal sum of \$71,519.31, plus interest at the rate of Twelve percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current

legal rate of 5.49 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 \$12.00 for personal property taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, WALTER A. DEAN and GWENDOLYN ALFRED DEAN, 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, has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, WALTER A. DEAN and GWENDOLYN ALFRED DEAN, to satisfy the judgment In Rem 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  
\$12.00, 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-128-B

NBK:flv

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
JOSEPH WALTER PAVILANIS aka )  
JOSEPH W. PAVILANIS; CANDACE )  
L. PAVILANIS: MONTGOMERY WARD )  
CREDIT CORP.; COUNTY )  
TREASURER, Tulsa County, )  
Oklahoma; BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
Oklahoma, )  
Defendants. )

**FILED**

JUL 27 1994  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE JUL 28 1994

CIVIL ACTION NO. 94-C-445-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27 day of July, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney; the Defendant, Montgomery Ward Credit Corp, appears by John L. Collinsworth, Esq.; the Defendant, County Treasurer, Tulsa County, Oklahoma, appears by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, appears not, having previously claimed no right, title or interest in the subject property; and the Defendants, Joseph Walter Pavilanis aka Joseph W. Pavilanis and Candace L. Pavilanis, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Joseph Walter Pavilanis aka Joseph W. Pavilanis, executed his Waiver of Service of Summons on May 31, 1994; the Defendant, Candace L. Pavilanis, executed her

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UPON RECEIPT.

Waiver of Service of Summons on May 31, 1994; and the Defendant, Montgomery Ward Credit Corp., through its attorney, John L. Collinsworth, executed its Waiver of Service of Summons on May 5, 1994.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on May 19, 1994; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on May 19, 1994, claiming no right, title or interest in the subject property; that the Defendant, Montgomery Ward Credit Corp., filed its Answer on May 18, 1994; and that the Defendants, Joseph Walter Pavilanis aka Joseph W. Pavilanis and Candace L. Pavilanis, 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 Four (4), SOUTHBROOK IV, an Addition in the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on September 18, 1986, the Defendants, Joseph Walter Pavilanis and Candace L. Pavilanis, executed and delivered to Liberty Mortgage Company, their mortgage note in the amount of \$74,050.00, payable in monthly

installments, with interest thereon at the rate of 9.5 percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Joseph Walter Pavilanis and Candace L. Pavilanis, husband and wife, executed and delivered to Liberty Mortgage Company, a mortgage dated September 18, 1986, covering the above-described property. Said mortgage was recorded on September 19, 1986, in Book 4970, Page 2694, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 31, 1987, Liberty Mortgage Company executed and delivered an Assignment of Mortgage of Real Estate to Universal Savings Bank F.A. of Wisconsin, covering the subject property. This mortgage was recorded on December 31, 1987 in Book 5072, Page 1789 in the records of Tulsa County, Oklahoma.

The Court further finds that on April 22, 1991, Universal Savings Bank F.A. of Wisconsin, executed and delivered an Assignment of Mortgage to The Secretary of Veterans Affairs, an officer of the United States of America, his successors and future assigns, covering the subject property. This mortgage was recorded on May 16, 1991 in Book 5321, Page 2691 in the records of Tulsa County, Oklahoma.

The Court further finds that on March 26, 1991, the Secretary of Veterans Affairs reamortized the balance owed and reduced the interest rate to 7.5 percent per annum.

The Court further finds that the Defendants, Joseph Walter Pavilanis aka Joseph W. Pavilanis and Candace L. Pavilanis, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Joseph Walter Pavilanis aka Joseph W. Pavilanis and Candace L. Pavilanis, are indebted to the Plaintiff in the principal sum of \$79,437.10, plus interest at the rate of 7.5 percent per annum from March 1, 1993 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 \$20.00 which became a lien on the property as of June 26, 1992; and a claim for \$45.00 for the year of 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, Joseph Walter Pavilanis aka Joseph W. Pavilanis and Candace L. Pavilanis, are in default and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, Montgomery Ward Credit Corp., has a lien on the property which is the subject matter of this action by virtue of an Affidavit of Judgment, dated August 5, 1993, and recorded in the records of Tulsa County, Oklahoma on August 9, 1993 in Book 5531, Page 0517 in the amount of \$ 859.10 . Said lien is inferior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Joseph Walter Pavilanis aka Joseph W. Pavilanis and Candace L. Pavilanis, in the principal sum of \$79,437.10, plus interest at the rate of 7.5 percent per annum from March 1, 1993 until judgment, plus interest thereafter at the current legal rate of 5.49 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 \$ 105.00 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, Joseph Walter Pavilanis aka Joseph W. Pavilanis and

Candace L. Pavilanis, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Montgomery Ward Credit Corp., have and recover judgment in the amount of \$ 859.10 .

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Joseph Walter Pavilanis aka Joseph W. Pavilanis and Candace L. Pavilanis, 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 \$ 20.00 for 1991 personal property taxes which are currently due and owing.

**Fourth:**

In payment of Defendant, Montgomery Ward Credit Corp., in the amount of \$ 859.10.

**Fifth:**

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$ 45.00 for 1993 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 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.

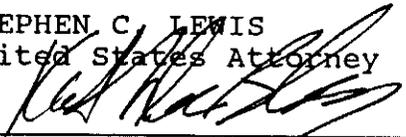
**S/ THOMAS R. BRETT**

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UNITED STATES DISTRICT JUDGE

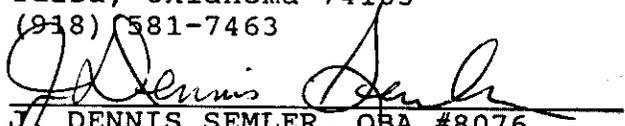
APPROVED:

STEPHEN C. LEWIS  
United States Attorney

---

KATHLEEN BLISS, OBA #13625  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

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J. DENNIS SEMLER, OBA #8076  
Assistant District Attorney  
Attorney for Defendant,  
County Treasurer,  
Tulsa County, Oklahoma  
406 Tulsa County Courthouse  
Tulsa, OK 74103



JOHN L. COLLINSWORTH, OBA #1818  
Attorney for Defendant,  
Montgomery Ward Credit Corp.  
1224 North Shartel Ave.  
Oklahoma City, OK 73103-2433

Judgment of Foreclosure  
USA v. Pavilanis, et al.  
Civil Action No. 94-C-445-B  
KBA/esf

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

**FILED**

JUL 20 1994

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

WILLIAM BROWN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 K MART CORPORATION, A )  
 Michigan Corporation, )  
 )  
 Defendant. )

Case No. 93-C-573-BU

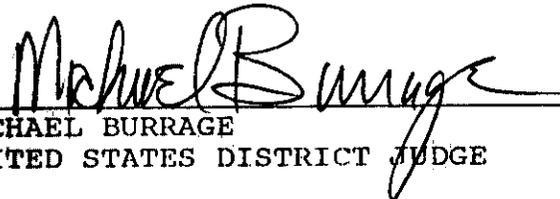
ENTERED ON DOCKET  
DATE JUL 28 1994

ORDER

As it appears that the parties have reached a settlement and compromise of this matter, it is hereby ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of the date of this Order for the purpose of obtaining a final determination, the plaintiff's action shall be deemed dismissed with prejudice.

ENTERED this 26 day of July, 1994.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

7/20

8-327

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

ENTERED ON DOCKET  
DATE JUL 27 1994

LEON LEVERN DICKEY )

Plaintiff, )

vs. )

Case No. 93-C-1101-K

CITY OF COLLINSVILLE, OKLAHOMA )

a Municipal Corporation, OFFICER )

DARREL K. MEEKS and OFFICER )

DANNY L. KEEN, )

Defendants. )

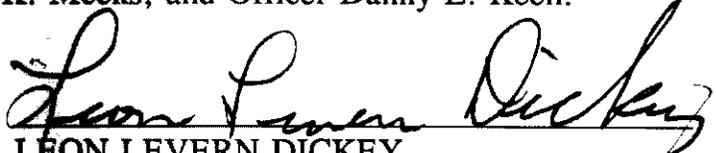
JUL 26 1994

JUL 26 1994

CLERK OF DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**DISMISSAL WITH PREJUDICE**

COMES NOW the Plaintiff, Leon Levern Dickey, and hereby dismisses the above-entitled cause with prejudice as to Defendants, City of Collinsville, Oklahoma a Municipal Corporation, Officer Darrel K. Meeks, and Officer Danny L. Keen.

  
LEON LEVERN DICKEY

  
STEVEN W. VINCENT, Attorney

DARRELL RAY BRIGGS,  
Petitioner,  
vs.  
MICHAEL CARR,  
Respondent.

No. 93-C-317-K

**FILED**

JUL 26 1994

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

**ORDER**

Petitioner's pro-se application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now before the Court for a decision. Respondent has filed a Rule 5 response and Petitioner has filed a reply. As set out more fully below, the Court concludes that Petitioner's application for a writ of habeas corpus should be dismissed as procedurally barred.

**I. BACKGROUND**

In this proceeding, Petitioner Darrell Ray Briggs ("Briggs") challenges his April 18, 1989 guilty plea for First Degree Rape, First Degree Burglary, Assault and Battery with a Dangerous Weapon, and Rape by Instrumentation, in the District Court of Tulsa County, State of Oklahoma, Case No. CRF-88-4346. After sentencing Briggs to fifteen years imprisonment on each count, the district court advised him as follows:

- Q. You have the right to request immediate transportation to the penitentiary or wait ten days.
  - A. May I speak with my attorney?
  - Q. Sure.
  - A. I'll exercise my ten-day right, sir.
- THE COURT: Show the Defendant requests to wait ten days in the Tulsa County Jail.

(By the Court)

(Doc. # 13, Tr. at 8.) The district court then advised Briggs of his right to a direct appeal and of the procedure for completing the same. (Id. at 8-9.) Briggs, however, did not move to withdraw his guilty plea or otherwise attempt to appeal his conviction within the applicable time periods.

In April 1992, Briggs filed a petition for post-conviction relief in the District Court of Tulsa County, alleging among other issues that he was denied an appeal through no fault of his own. The district court denied relief stating as follows:

The court finds that, other than the self-serving statements of the petitioner, there is nothing to support petitioner's claim that petitioner was denied an appeal through no fault of his own. Petitioner alleges that during the ten days following his plea of guilty, while he was being held in Tulsa County Jail awaiting transport to the Department of Corrections, he sent a note to his attorney indicating he wanted to withdraw his plea, but his attorney did not respond to his note. Petitioner also alleges after arriving at the Department of Corrections, and still within the ten-day period, he sent his attorney a letter telling her he wanted to withdraw his plea, and again he claims, he did not receive a response to this letter. These allegations made by the petitioner are refuted in the affidavit of his attorney presented by the State in its Response. Clearly there are not facts present in petitioner's case which would invoke the holdings of Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991).

Therefore, the court finds that petitioner was advised of the right to appeal, yet, during the ten-day period following sentencing, petitioner made no attempts and gave no indications of wanting to contact counsel so as to discuss the possibility and/or perfect an appeal of petitioner's conviction. Nor, other than petitioner's unsupported statements, does the record reflect any attempts by the petitioner to contact the court in an attempt to appeal petitioner's conviction.

(Doc. #5, ex. C.) The Oklahoma Court of Criminal Appeals affirmed

the denial of post-conviction relief.

In the present application, Briggs alleges (1) that he was denied an appeal through no fault of his own; (2) that the state district court incorrectly overruled his motion to suppress the in-court identification of the Petitioner; (3) that the state district court incorrectly allowed the in-court identification of the Petitioner, although Petitioner had not been represented by counsel at the time of the lineup; (4) that the State improperly appealed the decision of the magistrate's ruling relating to the in-court identification of the Petitioner on less than the full record; (5) that there was insufficient evidence at Petitioner's preliminary hearing that Petitioner was guilty of the prior conviction; and (6) that the Petitioner's sentence was improperly enhanced by the use of an infirm prior conviction. (Doc. #1.)

In support of the claim that he was denied an appeal through no fault of his own, Briggs alleges that "he was not allowed to remain in the County Jail for 10 days to talk to his attorney" as the court had promised him after sentencing. He alleges that on Monday April 24, 1989 (six days after sentencing), he sent a note to the public defender through a Tulsa County jailer because his attorney had failed to visit him at the jail regarding the withdrawal of his guilty plea. The next day, however, Briggs was transported to Lexington Assessment and Reception Center (LARC). Although he contacted a law clerk immediately upon arrival at LARC, Briggs alleges that he was transported to Dick Conners Correctional Center (DCCC) before the documents necessary to withdraw his guilty

plea were ready. Once at DCCC, Briggs alleges that he wrote a letter to the Public Defender requesting to withdraw his guilty plea, but received no reply. Lastly, following the expiration of the ten-day period necessary to withdraw his guilty plea, Briggs alleges that he wrote the Public Defender requesting his court records. Briggs apparently received a response from the Public Defender along with his state records with no delay.

The Court notes that the record contains no reference of Briggs's April 24, 1989 note to the jailer or of the letter which Briggs allegedly wrote the Public Defender from DCCC within the ten-day period to withdraw his guilty plea. The documents attached to Briggs's reply brief show that Briggs mailed a letter to the Public Defender on May 23, 1989, more than a month after he pleaded guilty, and again on October 4, 1989. [Doc. #6, ex. C.]

Respondent objects to Briggs's petition, arguing Briggs procedurally defaulted his claims; the Oklahoma Court of Criminal Appeals rested its decision on an adequate and independent state procedural bar; and Briggs failed to show cause and prejudice, or a fundamental miscarriage of justice to excuse his procedural default. Respondent argues that Briggs's allegations are bare and unsupported and were clearly refuted by the Affidavit of Loretta Jackson, the state public defender. (Doc. #5.) Ms. Jackson attested in part as follows:

1. I am an Assistant Public Defender for Tulsa County, Oklahoma and was so employed during April 1989.
2. On April 28, 1989, I was representing Petitioner Darrell R. Briggs when he waived his right to trial, plead guilty, and was sentenced in Tulsa County Case No. CF-88-4346.

3. It is my practice when I receive a communication from one of my clients who is in custody wanting to file a motion to withdraw plea or to perfect an appeal, that I go to the jail to talk to that client about their desire to withdraw their plea or appeal their conviction.

4. I have no recollection of receiving any communication from petitioner during the ten days following his plea of guilty indicating that he wanted to withdraw his plea of guilty or seek to appeal his conviction and/or sentence.

5. I have reviewed my file of the petitioner's case, and do not find any notes or other communication petitioner sent to me during the ten days following his plea and sentencing indicating a desire to withdraw his plea of guilty or to appeal his conviction.

6. My file does contain some letters that I have received from the petitioner since he has been in the custody of the Department of Corrections; however none of these letters concern an appeal of his case. They all concern post-conviction relief.

(Doc. #11.)

In his reply, Briggs does not dispute that the decision of the Oklahoma Court of Criminal Appeals rested upon a state procedural bar. He argues, however, that "government interference" in transferring him to the Department of Corrections (DOC) before the expiration of the ten-day period impeded compliance with a state procedural rule, and thus, constitutes sufficient cause to excuse his default. He argues for the first time in his reply that, when he asked the Court "[m]ay I speak with my attorney" regarding the ten-day right, he requested that counsel "come see him after sentencing." (Doc. #6 at 4.) Without the assistance of counsel, Briggs argues that in effect he was denied his right to appeal his guilty plea.

## II. ANALYSIS

As a preliminary matter, the Court must determine whether the Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Respondent concedes, and this Court finds, that Briggs meets the exhaustion requirements under the law. The Court also finds 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), and that the Attorney General is not a proper party in this case because Briggs is presently in custody pursuant to the state judgment in question. See Rule 2(a) and (b) of the Rules Governing Section 2254 Cases.

The Court turns next to Respondent's argument that Briggs is procedurally barred from asserting his claims in the present petition. The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state

procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). The "cause and prejudice" standard applies to pro se prisoners just as it applies to prisoners represented by counsel. Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Briggs does not dispute and the Court finds that the decision of the Oklahoma Court of Criminal Appeals rested on a state procedural bar. Yves v. Nunmaker, 501 U.S. 797 (1991). Briggs argues, however, that "government interference" in transferring him to the Oklahoma Department of Corrections (DOC) before the

expiration of the ten-day period, and his counsel's failure to visit him at the Tulsa County jail constitute sufficient cause to excuse his default. Briggs also argues that he is actually innocent of the crime of which he was convicted.

A. Government interference

Under Oklahoma law, a challenge to a guilty plea may only be initiated by an application to withdraw the guilty plea filed within ten days from the date of pronouncement of a judgment and sentence. Okla. Stat, tit. 22, ch. 18, App., Rule 4.1.<sup>1</sup> "A motion

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<sup>1</sup>Rule 4.1 reads as follows;

To appeal from any conviction on a plea of guilty or nolo contendere, the defendant must have filed an application to withdraw the plea with ten (10) days from the date of the pronouncement of the judgment and sentence, setting forth in detail the grounds for the withdrawal of the plea and requesting an evidentiary hearing in the trial court.

A. **Evidentiary Hearing.** The trial court shall hold an evidentiary hearing and rule on the application within thirty (30) days from the date it was filed. No matter may be raised in the petition for a writ of certiorari unless the same has been raised in the application to withdraw the plea. PROVIDED, HOWEVER, if the trial court fails to hold the evidentiary hearing within thirty (30) days, petitioner may seek extraordinary relief with this Court.

B. **Motion for a New Trial.** No motion for a new trial is required.

C. **Notice of Intent to Appeal and Designation of Record.** A notice of intent to appeal and designation of record shall be filed in the trial court within ten (10) days from the date the application to withdraw the plea of guilty or nolo contendere is denied. See Section II, Rule 2.5(B), for procedures on counter-designation of record.

to withdraw a plea of guilty is directed to the sound discretion of the trial court." Elmore v. State, 624 P.2d 78, 80 (Okla. Crim. App. 1981). "The movant bears the burden of showing that the guilty plea was entered through inadvertence or ignorance, influence or without deliberation, and that there is a defense that should be presented to the jury." Id.

Because the first ten days following a judgment and sentence are so critical to timely perfect an appeal of a plea of guilty, State district judges customarily permit criminal defendants to remain in the county jail for that period of time to facilitate any contacts with their lawyers. See Haga v. State, 425 P.2d 483, 487 (Okla. Crim. App. 1967) (noting that the trial judge carefully advised the defendant of his right to appeal his guilty plea and in order to safeguard the exercise of those rights, directed that the defendant be retained in the Tulsa County jail for a period of at least ten days). The Court has not found, however, any authority to substantiate Briggs's claim that he had a federal right to remain at the Tulsa County jail for the ten-day period following his judgment and sentence. At the most, the Court notes that Briggs's argument would be based on a state rule which would not be actionable in a federal habeas corpus case where the federal courts look only to whether a federal right was violated. 28 U.S.C. § 2254(a); Hardiman v. Reynolds, 971 F.2d 500, 505 n.9 (10th Cir. 1992).

The Court also notes that Briggs has not shown that "some objective factor external to the defense" impeded his compliance

with Oklahoma's procedural rules. See McCleskey, 499 U.S. at 493. Although Briggs was indeed transferred to the Oklahoma Department of Corrections before the expiration of the ten-day period to file a motion to withdraw his guilty plea, he had reasonable access to, or notice of, Oklahoma appellate rules, if he wanted to contact the state court to perfect an appeal. Cf. Dulin v. Cook, 957 F.2d 758, 760 (10th Cir. 1992) (concluding that petitioner sufficiently alleged cause to excuse his procedural default when he claimed "that, due to his incarceration in Nevada, he had no reasonable access to, or notice of, Utah appellate rules"). Therefore, Petitioner's claim that he was transferred before the expiration of the ten-day period following his sentence is insufficient to establish cause. The Court will, thus, turn to Petitioner's ineffective-assistance-of-counsel claim.

B. Ineffective Assistance of Counsel

Except for the self-serving statements that Petitioner attempted to contact counsel by leaving a note between the bars at the Tulsa County Jail, by mailing her a letter during the ten-day period to appeal his guilty plea, and (in a belated argument in his reply) by asking her to visit him at the Tulsa County Jail following his plea, Briggs sets forth no contention that he ever instructed his attorney to appeal or even inquired as to whether he had a right to appeal. Briggs contends, however, that counsel was obligated to visit him at the Tulsa County Jail during the ten-day period within which to withdraw his guilty plea to discuss his

appeal rights, and that failure to do so amounts to ineffective assistance of counsel.

To prove ineffective assistance of counsel, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that if counsel had filed an appeal that petitioner would have had a reasonable probability of obtaining relief. Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993); Strickland v. Washington, 466 U.S. 668, 694 (1984). A federal habeas court need not consider whether a petitioner established the second prong of the Strickland test if it finds that counsel was constitutionally inadequate in failing to perfect an appeal--i.e., if the criminal defendant asked his lawyer to file an appeal and the lawyer failed to do so. See Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (holding that when a court has found counsel constitutionally inadequate because counsel failed to properly perfect an appeal, it need not consider the merits of arguments that the defendant might have made on appeal); see also Castellanos v. United States, \_\_\_ F.3d \_\_\_, Nos. 93-1287 & 93-1626, 1994 WL 247898 at \*2 (7th Cir. Jun. 10, 1994); Lozada v. Deeds, 964 F.2d 956, 958 (9th Cir. 1992). Under Strickland, this Court must first determine whether counsel had a duty to advise Petitioner of his right to appeal. If there is no such duty, the failure to advise cannot be ineffective assistance.

Although a defendant has a right to appeal a judgment entered on a guilty plea, failure to appeal an appealable judgment does not amount to ineffective assistance of counsel per se. See Oliver v.

United States, 961 F.2d 1339, 1342 (7th Cir.) cert. denied, 113 S. Ct. 469 (1992). "An attorney has no absolute duty in every case to advise a defendant of his limited right to appeal after a guilty plea." Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989) (citing Marrow v. United States, 772 F.2d 525, 527 (9th Cir. 1985); Carey v. Laverette, 605 F.2d 745, 746 (4th Cir.) (per curiam) (there is "no constitutional requirement that defendants must always be informed of their right to appeal following a guilty plea"), cert. denied, 444 U.S. 983 (1979)); see also Castellanos, 1994 WL 247898 at \*2; Davis v. Wainwright, 462 F.2d 1354 (5th Cir. 1972). Only "if a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right," counsel has a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock, 880 F.2d at 1188.

Laycock remains good law in spite of the more recent holding in Baker v. Kaiser, 929 F.2d 1495, 1499 (10th Cir. 1991), that the Sixth Amendment right to counsel continues to apply after a sentence is imposed and while the Defendant contemplates whether to file an appeal as of right.<sup>2</sup> Although it is unclear whether the

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<sup>2</sup>In Baker, the Tenth Circuit stated that counsel must fully explain the advantages and disadvantages of an appeal, provide the defendant with advice about the merits of an appeal and its probability of success, and inquire whether a defendant wishes to appeal the conviction. Id. at 1499. When the defendant requests an appeal--even one counsel believes to be frivolous--counsel must perfect the defendant's appeal so that the defendant may proceed pro se. Id. at 1499 n.3. See also Jones v. Cowley, \_\_\_ F.3d \_\_\_, No. 93-6277, slip op. at 5-11 (10th Cir. Jun. 30, 1994) (not yet released in the permanent law).

defendant in Baker was convicted following a trial as opposed to a guilty plea, the Tenth Circuit in Hardiman, 971 F.2d at 506, chose to remand on the ground set forth in Laycock--that a defendant who pleads guilty does not have a right to notice of his right to appeal in every case. But see United States v. Youngblood, 14 F.3d 38, 39-40 (10th Cir. 1994) (analyzing counsel's conduct under the Baker analysis although the defendant had pleaded guilty, but noting that the defendant had never affirmatively indicated any desire to appeal to his counsel or the district court); see also Randall v. State, 861 P.2d 314 (Okla. Crim. App. 1993) (holding that hearing on application to withdraw guilty plea is "critical stage" which invokes defendant's constitutional right to counsel).

After carefully reviewing the record in this case, the Court concludes that Briggs's counsel did not provide ineffective assistance when she did not advise Briggs of his limited right to appeal his guilty plea. See Marshall v. Cowley, 19 F.3d 1443, No. 93-5070, 1994 WL 56940 at \*1 (10th Cir. 1994) (unpublished opinion attached to this order) (counsel's failure personally to notify a defendant of his limited right to appeal a guilty plea did not constitute ineffective assistance of counsel). Briggs has neither alleged a constitutional claim of error which could result in setting aside his guilty plea or that he sufficiently inquired about his appeal right.

The alleged errors regarding the lineup, the in-court identification, the appeal from the suppression motion, are not adequate bases to challenge his guilty plea. See Marrow, 772 F.2d

at 529 (counsel need not advise a defendant of the right to appeal a conviction after a guilty plea if the claims of error would be foreclosed by the guilty plea). By entering a voluntary guilty plea,<sup>3</sup> Briggs waived all nonjurisdictional defenses. See United States v. Davis, 900 F.2d 1524, 1525-56 (10th Cir. 1990), cert. denied, 498 U.S. 856 (1990).

A guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Tollett v. Henderson, 411 U.S. 258, 267 (1973). Therefore, Briggs's guilty plea forecloses any review of the state district court's ruling regarding the lack of counsel at the lineup, the in-court identification, and the motion to suppress. See Davis, 900 F.2d at 1526 (plea of guilty foreclosed from review the trial court's earlier order denying the motion to suppress); Smith v. Smith, 433 F.2d 582, 583-84 (5th Cir. 1970) (valid guilty plea constitutes a waiver of alleged deficiencies as to failure to have assistance of counsel at pretrial lineup identification); Holmes v. Gagnon, 324 F.Supp. 180, 181 (E.D. Wis. 1971) (alleged errors regarding lineup were deemed waived by petitioner's guilty plea and thus were not, by themselves, an adequate basis to grant a writ of habeas corpus). Nor would Briggs's claims regarding the

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<sup>3</sup>Petitioner has not contested the fact that his guilty plea was voluntary. Moreover, the record reveals that the trial court ensured that Petitioner was entering his plea in a knowing, willing, and voluntary fashion. (Doc. #13, Tr. at 4-7.)

enhancement of his sentence on the basis of prior guilty pleas be sufficient to set aside Briggs's guilty plea to the current offense.

If counsel's failure personally to advise Petitioner of his limited right to appeal does not amount to ineffective assistance of counsel, the Court cannot conclude that counsel's failure to visit Petitioner at the Tulsa County Jail to advise him of the same limited right to appeal his guilty plea does so. Although Briggs argues for the first time in his reply that he did ask counsel to visit him at the Tulsa County Jail, this unsupported and belated argument is insufficient to establish that counsel provided ineffective assistance. Briggs has not argued in any of his pleadings that he told counsel he wished to appeal his guilty plea and that counsel failed to do so. Therefore, Petitioner's counsel rendered "reasonably effective assistance," and Petitioner has failed to show sufficient cause and prejudice to excuse his procedural default.

### C. Actual Innocence

As noted above there is a narrow exception to the cause and prejudice standard. Where a constitutional violation has probably resulted in the conviction of one who is actually innocent, the Supreme Court has stated that the cause and prejudice standard should not preclude consideration of a section 2254 petition for a writ of habeas corpus:

We remain confident that, for the most part, "victims of a fundamental miscarriage of justice will meet the cause-

and-prejudice standard." [Engle v. Isaac, 456 U.S. 107, 135 (1982)]. But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.

Murray, 477 U.S. at 495-96; see also Coleman, 111 S. Ct. at 2565.

The Court concludes that Briggs has not made a colorful showing that he is factually innocent of the underlying convictions. Although Briggs claims errors during the lineup procedure, these allegations show only legal innocence, which is insufficient to establish a fundamental miscarriage of justice. See Selsor v. Kaiser, 22 F.3d 1029, 1934 (10th Cir. 1994) (citing Sawyer v. Whitley, 112 S. Ct. at 2519 (1992)). In any event this case does not present a question of a "complete miscarriage of justice." See Oliver, 961 F.2d at 1342 n.2.

### III. CONCLUSION

Therefore, the Court concludes that Petitioner has failed to show cause and prejudice or a fundamental miscarriage of justice to excuse his procedural default. **ACCORDINGLY, IT IS HEREBY ORDERED:**

- (1) That the Attorney General for the State of Oklahoma be dismissed as a party in this case; and
- (2) That this petition for a writ of habeas corpus be

dismissed as procedurally barred.

IT IS SO ORDERED this 25<sup>th</sup> day of July, 1994.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

Citation 19 F.3d 1443 (Table)  
UNPUBLISHED DISPOSITION  
(CITE AS: 19 F.3D 1443, 1994 WL 56940 (10TH CIR.(OKL.)))

Copr.(C) West 1994 No claim to orig. U.S. Govt. works.  
Rank(R) R 1 OF 2  
Page(P) P 1 OF 4  
Database CTA10  
Mode PAGE

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.)

Billy Gene MARSHALL, Petitioner-Appellant,  
v.  
Jack COWLEY, and Attorney General of the State of Oklahoma, Respondents-  
Appellees.  
No. 93-5070.  
United States Court of Appeals,  
Tenth Circuit.

19 F.3d 1443 (Table)  
(CITE AS: 19 F.3D 1443, 1994 WL 56940 (10TH CIR.(OKL.)))  
Feb. 25, 1994.

Copr.(C) West 1994 No claim to orig. U.S. Govt. works.  
R 1 OF 2 P 2 OF 4  
CTA10 PAGE

ORDER AND JUDGMENT [FN1]

Before TACHA, BALDOCK and KELLY, Circuit Judges. [FN2]

KELLY

\*\*1 Petitioner-appellant Billy Gene Marshall, appearing pro se and in forma pauperis, appeals the dismissal of his habeas corpus petition alleging that a state procedural bar was inappropriately applied, the present conviction was enhanced by unconstitutional prior convictions, and counsel's failure to oppose the use of those convictions constituted ineffectiveness of counsel. Mr. Marshall pled guilty to robbery with firearms after former conviction of two or more felonies and did not take a direct appeal. He claims he was not properly made aware of this right. Our jurisdiction arises under > 28 U.S.C. 1291, 2253 and we affirm.

The error Mr. Marshall raises in the state post-conviction proceeding is not sufficient to raise a federally cognizable issue as to his underlying state criminal conviction. > See *Hopkinson v. Shillinger*, 866 F.2d 1185, 1219 (10th Cir.), aff'd on reh'g, > 888 F.2d 1286 (10th Cir.1989), cert. denied, > 497 U.S. 1010 (1990); > *Williams v. Missouri*, 640 F.2d 140, 143-44 (8th Cir.), cert. denied, > 451 U.S. 990 (1981). The Oklahoma Court of Criminal Appeals

19 F.3d 1443 (Table) Copr.(C) West 1994 No claim to orig. U.S. Govt. works.  
R 1 OF 2 P 3 OF 4 CTA10 PAGE  
(CITE AS: 19 F.3D 1443, 1994 WL 56940, \*\*1 (10TH CIR.(OKL.)))  
declined to review Mr. Marshall's claims because they were not brought on  
direct appeal. In order to avoid state procedural default, Mr. Marshall must  
demonstrate cause for his failure to raise these claims and resulting  
prejudice. See Murray v. Carrier, > 477 U.S. 478, 489-91 (1986).

Mr. Marshall asserts that cause for his failure to appeal is ineffective  
assistance of his counsel in apprising him of this right. The record reflects,  
however, that Mr. Marshall was duly advised by the court of his narrow right to  
appeal his guilty plea. Although he argues that his waiver was not a knowing  
one, the judge extensively advised Mr. Marshall of the procedure for an appeal  
and offered to provide counsel for one. The court also warned Mr. Marshall on  
the limiting effect of a guilty plea on an appeal. With respect to notice of  
his right to appeal, Mr. Marshall's showing is insufficient to discredit our  
reliance on the transcript of these proceedings. As an attorney has no  
absolute duty in every case to advise a defendant of his limited right to  
appeal a guilty plea, > Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th  
Cir.1989), failure of counsel personally to notify the defendant of this  
limited right normally will not constitute ineffective assistance.

Mr. Marshall's pro se status does not require a different standard than that  
applied to petitioners represented by counsel, > Rodriguez v. Maynard, 948  
F.2d 684, 687 (10th Cir.1991), and a party's pro se status and lack of legal  
training do not constitute "cause" under the cause and prejudice test. > Id.

9 F.3d 1443 (Table) Copr.(C) West 1994 No claim to orig. U.S. Govt. works.  
R 1 OF 2 P 4 OF 4 CTA10 PAGE  
CITE AS: 19 F.3D 1443, 1994 WL 56940, \*\*1 (10TH CIR.(OKL.)))  
at 688.

As Mr. Marshall makes no claim of actual innocence, we need not address the  
alternative of the "fundamental miscarriage of justice" in lieu of cause and  
prejudice. > See Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992).  
AFFIRMED.

FN1. This order and judgment is not binding precedent, except under the  
doctrines of law of the case, res judicata, and collateral estoppel. The  
court generally disfavors the citation of orders and judgments;  
nevertheless, an order and judgment may be cited under the terms and  
conditions of the court's General Order filed November 29, 1993. ---  
F.R.D. ----.

FN2. 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 therefore is ordered submitted without oral argument.  
C.A.10 (Okla.), 1994.

Billy Gene MARSHALL, Petitioner-Appellant, v. Jack COWLEY, and Attorney  
General of the State of Oklahoma, Respondents-Appellees.  
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IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED IN CLERK'S OFFICE  
JUL 27 1994

RICHARD W. BRYANT, )  
)  
Plaintiff, )  
)  
vs. )  
)  
J & D ACQUISITIONS, INC., an )  
Oklahoma corporation, d/b/a )  
JIM NORTON TOYOTA, )  
)  
Defendant. )

No. 93-C-856 K

FILED

JUL 26 1994

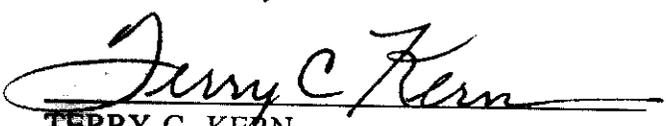
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL WITH PREJUDICE

The Court, having before it the written Stipulation for Dismissal With Prejudice signed by all parties to this litigation, finds that based upon the agreement of the parties, the case should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the litigation captioned herein, including all complaints, counterclaims, cross-complaints and causes of action of any type by any party, should be and the same is hereby dismissed with prejudice.

IT IS SO ORDERED this 25<sup>th</sup> day of July, 1994.

  
TERRY C. KERN  
Judge of the U.S. District Court

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

**F I L E D**

JUL 26 1994

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

CLIFFORD E. CRENSHAW

Plaintiff,

v.

WILLIAMS TELECOMMUNICATIONS  
GROUP, INC.,

Defendant.

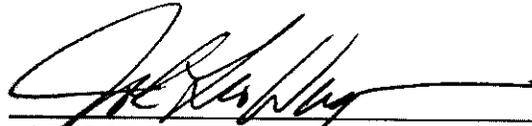
Case No. 93-C-929-B

DATE JUL 27 1994

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This order pertains to Defendant's Motion to Dismiss for Insufficiency of Service/Process (Docket #3)<sup>1</sup>. The motion should be granted.

Dated this 26<sup>th</sup> day of July, 1994.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

s:Crenshaw

<sup>1</sup> "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

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

**FILED**

SHERRI WHITEHEAD, )  
)  
Plaintiff, )  
)  
vs. )  
)  
DONNA SHALALA, SECRETARY )  
OF HEALTH AND HUMAN )  
SERVICES, )  
Defendant. )

JUL 26 1994

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

Case No. 93-C-209-B

ENTERED ON DOCKET

DATE JUL 27 1994

ORDER

This order pertains to Plaintiff's Complaint (Docket #1)<sup>1</sup> pursuant to § 205(g) of the Social Security Act, 42 U.S.C. § 405(g) and § 1383(c)(1), seeking review of a final decision of the Secretary of Health and Human Services denying her claim for waiver of recovery of overpaid supplemental security income benefits under § 204(b) of the Act, 42 U.S.C. § 404(b).

On January 22, 1990, the Social Security Administration (SSA) requested that plaintiff supply information about a bank account opened in her name with a \$2,000.00 balance (TR 45). She reported that the account balance consisted of wages from Emmanuel Temple and from her Supplemental Security income (SSI) disability checks. Plaintiff's checking account had been closed on February 6, 1989, with a balance of \$3,610.64 (TR 46-47).

On July 27, 1990, plaintiff met with a SSA official to discuss the nature of the checking account and determine the source of the money in the account (TR 50-51). Her

<sup>1</sup> "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

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statement on July 30, 1990 was that she could not remember the details of her banking activity in 1988 (TR 52-53). She accepted the balance listed on the account statement from her bank but was unsure how the account "jumped \$1500.00 in 12/88." (TR 52). She stated that she thought her great-grandmother gave her \$1,500.00 for her birthday in October of 1988, but she wasn't sure (TR 52). Contact was made with the grandmother, Frances Dodge, on September 28, 1990, and she stated she never gave plaintiff money (TR 57).

In a second statement on August 9, 1990, plaintiff indicated that Frances Dodge, a distant relative, gave her \$1,500.00 for her birthday in October 1988 and that she did not deposit the money until December 1988 (TR 54-55). She discussed a car which she apparently bought with the money, which was later impounded by the police for not being insured (TR 54). Contact was made with the Craig County Jail and the report states that she paid fines totaling \$469.00 in 1989 and 1990 (TR 56). The jail official reported that she was incarcerated for three days in August of 1989 and a whole month from September 12, 1989 to October 12, 1989 (TR 56). During this time, she received food and shelter and did not report the overpayment of benefits that she received.

On April 6, 1992, plaintiff testified at a hearing that she had been informed by the SSA that she had been overpaid (TR 25). She stated that she had approximately \$3,400.00 in her savings account from May 1988 to February 1989, consisting of \$1,900.00 in disability benefit checks and \$1,500.00 from her mother (TR 26). She said that, although she was aware that her resources were not to exceed \$1,900.00 for purposes of benefits eligibility, she felt that she did not need to report the \$1,500.00 gift from her

mother because it was her mother's money, not SSA's (TR 27, 32). She stated that she purchased an automobile with the money (TR 27-28). Plaintiff's mother, Wanda Hamilton, testified that she gave plaintiff \$1,500.00 sometime in 1988 because she wanted to buy an automobile (TR 36-37). Plaintiff also stated that she worked at a thrift store in 1990 and earned \$66.00, but did not report it (TR 29).

Plaintiff stated that she pays \$60.00 a month in rent and was in arrears on her electric bill (TR 31). She also admitted spending \$100.00 a month on clothing, especially shoes (TR 33).

Under 42 U.S.C. § 405(g), this court must determine whether substantial evidence in the record supports the decision of the Secretary. If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. Richardson v. Perales, 402 U.S. 389, 390 (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id. at 401. The burden of proof on these issues rests with the plaintiff. Viehman v. Schweiker, 679 F.2d 223, 228 (11th Cir. 1982).

Section 204(a)(1) of the Social Security Act, 42 U.S.C. § 404(a)(1), authorizes the recovery of overpayments made to a beneficiary under the federal old-age, survivors', or disability insurance programs. It permits the recoupment of erroneous overpayments by decreasing future payments to which the overpaid person is entitled.

Section 204(b), however, expressly limits the recoupment authority conferred by § 204(a)(1). Section 204(b), as set forth in 42 U.S.C. § 404(b), states: "there shall be no adjustment of payments to, or recovery by the United States from, any person who is

without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.<sup>12</sup>

Under federal regulations, "without fault" means that the recipient neither knew nor should have known that the overpayment or the information on which it was based was incorrect. 20 C.F.R. § 404.507. For example, a recipient who relies on erroneous information from an official source in the Social Security Administration is "without fault." § 404.510.

Under 20 C.F.R. § 416.552 (1976), when determining whether an SSI recipient is "without fault," it is necessary to consider

all the pertinent circumstances surrounding the overpayment in the particular case. The Social Security Administration considers the individual's understanding of the reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with the reporting requirements, opportunities to comply with the reporting requirements, understanding of the obligation to return checks which were not due, and ability to comply with the reporting requirements (e.g., age, comprehension, memory, physical and mental condition). Although the finding depends on all of the circumstances in the particular case, an individual will be found to have been at fault in connection with an overpayment when an incorrect payment resulted from one of the following:

- (a) [f]ailure to furnish information which the individual knew or should have known was material;
- (b) [a]n incorrect statement made by the individual which he knew or should have known was

---

<sup>2</sup>Section 1631(b) of the Social Security Act as amended, 42 U.S.C.A. § 1383(b), also provides that whenever the Secretary finds that an incorrect amount of benefits has been paid with respect to an individual, proper adjustment or recovery shall be made by appropriate adjustments in future payments, or by recovery from or payment to such individual or his eligible spouse.

incorrect . . . , or

- (c) [t]he individual **did not** return a payment which he knew or could **have** been expected to know was incorrect.

The regulations say that to "defeat the purpose of the subchapter" is to "deprive a person of income required for **ordinary and necessary** living expenses." § 404.508(a). Those expenses are defined to include, **among** other things, food, clothing, rent, utilities, and medical bills. §§ 404.508(a)(1) and (2).

If the government has reason to **believe** an overpayment under 204(a) has been made, it must notify the recipient of **that** determination, and the recipient may seek reconsideration to contest the **accuracy of the** determination or ask that the government forgive the debt and waive recovery **in accordance** with § 204(b). If the decision goes against the recipient, **recoupment begins**. The recipient's monthly benefits are reduced or terminated until the overpayment has **been** recouped. Only if the recipient continues to object is he given an opportunity to **present** his case in person in an evidential hearing before an independent hearing examiner. 20 C.F.R. §§ 404.917, 404.931 (1978). The recipient may seek subsequent review **by the Appeals Council** under § 404.945 and finally by a federal court under § 205(g) of the Act, 42 U.S.C. § 405(g).

In order to come within the **provisions** for waiver of adjustment or recovery to recoup overpayments, plaintiff must **make the** showing that he comes within such waiver provisions. Romero v. Harris, 675 F.2d 1100, 1103 (10th Cir. 1982).

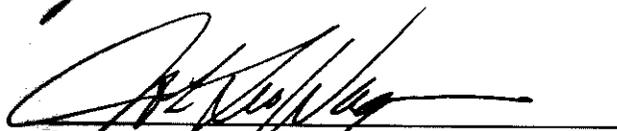
There is substantial evidence to **support** the finding of the Secretary that plaintiff was not without fault, as she clearly **knew** or should have known that she had been

overpaid based on incorrect information. The record reveals that plaintiff's checking account had a balance of \$3,610.64 when closed in February 1989. She first claimed that her great-grandmother, Frances Dodge, gave her \$1,500.00 for her birthday in October 1988, but Ms. Dodge indicated that she had never given any money. She then stated that the money was a gift from her mother to buy a car. She testified that she spent thirty days in jail in October of 1989 and that she earned \$66.00 working in 1990, but did not report these events. She stated that she understood that her resources were not to exceed \$1,900.00 and was notified of overpayment when it occurred.

Since plaintiff is not without fault, there is no need to make a determination of whether recovery of the overpayment would defeat the purpose of Title XVI because it deprives her of necessary living expenses, as she claims in her Brief in Support of Claim (Docket #5). This factor comes into play only if a recipient is without fault. Chlieb v. Heckler, 777 F.2d 842, 846 (2nd Cir. 1985).

The decision of the Secretary is AFFIRMED.

Dated this 26<sup>th</sup> day of July, 1994.

  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:whitehead

ENTERED ON DOCKET

DATE 7-27-94

**F I L E D**

JUL 27 1994

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

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

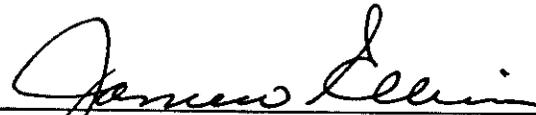
BRYAN DALAN JACQUAY, pro se, )  
Plaintiff, )  
vs. )  
GARY MAYNARD, et al., )  
Defendants. )

No. 91-C-896-E ✓

**JUDGMENT**

On the 11th day of May, 1994, the Court granted the Defendants' Motion for Summary Judgment. Accordingly, Judgment is hereby entered in favor of Defendants and against the Plaintiff. Plaintiff shall take nothing from this action.

ORDERED this 26<sup>th</sup> day of July, 1994.

  
\_\_\_\_\_  
JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT

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

**FILED**

JUL 26 1994

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAMELA J. HOLLAND and  
VERNON O. HOLLAND,

Defendants.

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

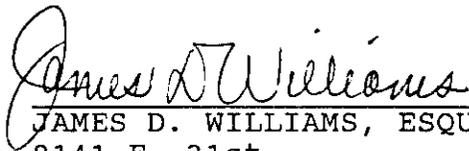
Civil No. 90-C-481-B

ENTERED FOR FILE

DATE JUL 26 1994

STIPULATION FOR JUDGMENT AGAINST  
DEFENDANT PAMELA J. HOLLAND

It is hereby stipulated and agreed that the United States be granted judgment against defendant, Pamela J. Holland for 1980 federal income taxes in the amount of \$29,817.00 plus additional interest and additions accruing pursuant to law after April 15, 1981, each party to bear their respective costs, including any possible attorneys' fees or other expenses of this litigation.

  
\_\_\_\_\_  
JAMES D. WILLIAMS, ESQUIRE  
8141 E. 31st  
Suite F  
Tulsa, Oklahoma 74145  
Attorney for Pamela J. Holland

  
\_\_\_\_\_  
CHRISTOPHER H. GRIGORIAN  
Trial Attorney  
Tax Division  
U.S. Department of Justice  
P.O. Box 7238  
Washington, D.C. 20044  
Attorney for the United States

IT IS SO ORDERED.

DATED: July 25, 1994

/s/ JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE  
\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

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

**FILED**  
JUL 25 1994  
Richard M. Lewis, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

TOBIN DON LEMMONS, et al.,  
Plaintiffs,  
vs.  
BRUCE DUNCAN, et al.,  
Defendants.

No. 93-C-363-B

ENTERED AND FILED

DATE JUL 26 1994

**JUDGMENT**

In accord with the Order granting Defendants' motion for summary judgment [docket #7], the Court hereby enters judgment in favor of Defendants Larry Fugate and the Creek County Sheriff's Office and against the Plaintiffs, Tobin Don Lemmons and Michelle Lemmons. Plaintiffs shall take nothing on their claims.

SO ORDERED THIS 25 day of July, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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**FILED**

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

**JUL 25 1994**

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

WANDA HAMPTON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CITY OF LOCUST GROVE, )  
 BOARD OF COUNTY COMMISSIONERS )  
 OF MAYES COUNTY, OKLAHOMA )  
 AND RONNIE BENIGHT, )  
 )  
 Defendants. )

Case No. 93-CV-878 BU

ENTERED ON DOCKET

DATE JUL 26 1994

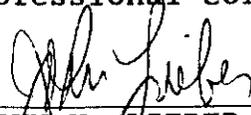
STIPULATION OF DISMISSAL WITH PREJUDICE

All the parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, City of Locust Grove and Ronnie Benight, are hereby dismissed with prejudice.

  
\_\_\_\_\_  
WANDA HAMPTON, PLAINTIFF

  
\_\_\_\_\_  
JERRY S. MOORE  
BAKER & BAKER  
303 West Keetoowah  
Tahlequah, OK 74464  
ATTORNEY FOR PLAINTIFF

ELLER AND DETRICH  
A Professional Corporation

By: 

JOHN H. LIEBER, OBA #5421  
2727 East 21st Street  
Suite 200, Midway Building  
Tulsa, Oklahoma 74114  
(918) 747-8900

ATTORNEY FOR DEFENDANTS,  
CITY OF LOCUST GROVE AND  
RONNIE BENIGHT

J.MAG\HAMPTON\STIPULAT.DIS

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

**FILED**  
JUL 26 1994

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

TOBIN DON LEMMONS, et al., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
BRUCE DUNCAN, et al., )  
 )  
Defendants. )

No. 93-C-363-B  
**ENTERED ON DOCKET**  
DATE JUL 26 1994

**ORDER**

Plaintiff's motion for leave to amend his complaint [docket #22] is not accompanied by an original proposed amended complaint as set out in Local Rule 9.3.C.<sup>1</sup>

**ACCORDINGLY, IT IS HEREBY ORDERED:**

- (1) That Plaintiff's motion for leave to amend the complaint [docket #22] be **denied without prejudice** at this time and that the Clerk shall **mail** to the Plaintiff a blank civil-rights-complaint form labeled "amended complaint";
- (2) That Plaintiff may **resubmit** his motion for leave to amend along with a proposed amended complaint, if he so wishes, on or before twenty (20) days from the date of entry of this order;

<sup>1</sup>Local Rule 9.3.C reads as follows:

Original proposed amended pleadings shall be signed and attached to any motion for leave to amend the pleading. Unless otherwise permitted by the court, every pleading to which an amendment is permitted as a matter of right or has been allowed by order of the court must be retyped or handwritten and filed so that it will be complete in itself including exhibits, without reference to the superseded pleading. All amended pleadings shall contain copies of all exhibits referred to such amended pleading.

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- (3) That Plaintiff's proposed amended complaint shall be complete in itself including all allegations previously alleged in his original complaint; and
- (4) That Plaintiff shall mail to the Defendants a copy of his proposed amended complaint.

SO ORDERED THIS 25 day of July, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JUL 2 1994

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

TOBIN DON LEMMONS, et al., )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 BRUCE DUNCAN, et al., )  
 )  
 Defendants. )

No. 93-C-363-B

DATE JUL 26 1994

**ORDER**

At issue before the Court for consideration are Defendants' motions for summary judgment and to dismiss Fugate and Nichols as misjoined [docket #7 and #39]. Plaintiff Tobin Don Lemmons has objected to Defendants' motion to dismiss, but not to Defendants' motion for summary judgment. [Docket 43.]

In both motions, Defendants seek the dismissal of Larry Fugate and the Creek County Sheriff's Department because they were not involved in any of the incidents which are the subject of this civil rights action. In his affidavit, Sheriff Doug Nichols attests that neither Larry Fugate nor any other employee of the Creek County Sheriff's Office was involved in the arrest, search or alleged assault of the Plaintiff and that Bruce Duncan was an employee of the Sapulpa Police Department, not of the Creek County Sheriff's Office.

After viewing the evidence in the light most favorable to the Plaintiff, the court concludes that Plaintiff has not come forward with any evidence to show that there remain any genuine issues of material fact that Larry Fugate or any of the employees of the

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Creek County Sheriff's Office were personally involved in any of the activities which are the subject of this action. 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). Plaintiff cannot defeat Defendants' well-supported motion without offering any controverting affidavits or evidence from which a reasonable jury could return a verdict in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Therefore, the Court concludes that Larry Fugate and the Creek County Sheriff's Department are entitled to judgment as a matter of law.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motions for summary judgment, to inform the court, and to dismiss [docket #7, #38, and #39] be granted.

SO ORDERED THIS 25<sup>th</sup> day of July, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JUL 27 1994

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

TOBIN DON LEMMONS, et al., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
BRUCE DUNCAN, et al., )  
 )  
Defendants. )

No. 93-C-363-B

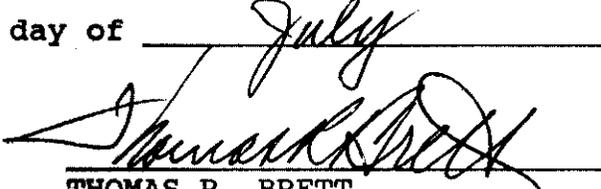
ENTERED IN DOCKET

DATE 7/27/94

**ORDER**

Plaintiff is hereby given notice that in ten (10) days the court will dismiss without prejudice defendant David Bates for failure to serve within 120 days after the filing of the complaint. See Fed. R. Civ. P. 4(m) (effective December 1, 1993).

SO ORDERED THIS 25 day of July, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**  
JUL 25 1994

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

RAYMOND DEVER,  
Petitioner,  
vs.  
MICHAEL CODY,  
Respondent.

No. 93-C-1151-B

ENTERED IN DOCKET  
DATE JUL 26 1994

**ORDER**

Petitioner's pro-se application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now before the Court for a decision. Respondent has filed a Rule 5 response and Petitioner has filed a reply. As set out more fully below, the Court concludes that Petitioner's application for a writ of habeas corpus should be dismissed as procedurally barred.

**I. BACKGROUND**

In this proceeding, Petitioner challenges his October 23, 1992 guilty plea conviction for robbery by force, after former conviction of two or more felonies, in Tulsa County District Court, Case No. CRF-92-4101. Although the district court advised the Petitioner of his right to a direct appeal and of the procedures for completing the same, the Petitioner failed to appeal his guilty plea within the applicable time periods. (Docket #8, Tr. at 8-9.)

In 1993, Petitioner filed an application for post-conviction relief and request for an appeal out of time in the District Court of Tulsa County. The District Court denied relief, finding that

Petitioner was advised of his right to appeal but that he took no steps to attempt to perfect a timely direct appeal and that he had offered no reason for his failure to appeal. The Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief because Petitioner had not established that his failure to file an appeal was through no fault of his own.

In the present application for a writ of habeas corpus, Petitioner raises a violation of the Equal Protection and Double Jeopardy Clause, ineffective assistance of counsel, and lack of jurisdiction. As to his first ground, Petitioner alleges that he is entitled to a shorter sentence because other defendants have received lower sentences in similar crimes.<sup>1</sup> He alleges next that using his prior convictions to force him to plead guilty and then to enhance his sentence on the basis of the same prior convictions amounts to double jeopardy. In support of his ineffective-assistance claim, Petitioner asserts that counsel failed to object to the use of the prior convictions, failed to develop and present mitigating evidence at sentencing, failed to obtain a psychiatric evaluation to determine if the Petitioner was competent to plead guilty, and failed to visit Petitioner during the ten-day period within which to withdraw his plea or file a direct appeal. Lastly, Petitioner asserts that the sentencing court lacked jurisdiction to accept his guilty plea because it failed to determine his mental

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<sup>1</sup> Petitioner's claim that he was entitled to counsel to assist him with his post-conviction application is meritless. See Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2568 (1991) (there is no constitutional right to counsel in a state post-conviction proceeding).

capacity and "did not follow mandated procedures." [Docket #1.]

Respondent objects to Petitioner's application on the ground that the Petitioner has procedurally defaulted his claims; the Oklahoma Court of Criminal Appeals rested its decision on an adequate and independent state procedural bar; and Petitioner failed to show cause and prejudice, or a fundamental miscarriage of justice to excuse his procedural default. [Docket #4.] Petitioner replies that "there can be no procedural bar when ineffective assistance of counsel is the cause of the procedural default" as in this case. He also replies that the Respondent should have addressed the merits of his claims. [Docket #5.]

## II. ANALYSIS

As a preliminary matter, the Court must determine whether the Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Respondent concedes, and this Court finds, that Petitioner meets the exhaustion requirements under the law. The Court also finds 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), and that the Attorney General is not a proper party in this case because Petitioner is presently in custody pursuant to the state judgment in question. See Rule 2(a) and (b) of the Rules Governing Section 2254 Cases.

The Court turns next to Respondent's argument that Petitioner is procedurally barred from asserting his claims in the present petition. The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). The "cause and prejudice" standard applies to pro se prisoners just as it applies to prisoners represented by counsel. Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and

interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner does not dispute that the decision of the Oklahoma Court of Criminal Appeals rested on a state procedural default. He argues, however, that ineffective assistance of counsel is sufficient cause to excuse his procedural default. He alleges his counsel refused to visit him during the ten days following his guilty plea and failed to file a timely notice of appeal.

To prove ineffective assistance of counsel, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that if counsel had filed an appeal that petitioner would have had a reasonable probability of obtaining relief. Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993); Strickland v. Washington, 466 U.S. 668, 694 (1984). A federal habeas court need not consider whether a petitioner established the second prong of the Strickland test if it finds that counsel was constitutionally inadequate in failing to perfect an appeal--i.e., if the criminal defendant asked his lawyer to file an appeal and the lawyer failed to do so. See Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (holding that when a court has found counsel constitutionally inadequate because counsel failed to

properly perfect an appeal, it need not consider the merits of arguments that the defendant might have made on appeal); see also Castellanos v. United States, \_\_\_ F.3d \_\_\_, Nos. 93-1287 & 93-1626, 1994 WL 247898 at \*2 (7th Cir. Jun. 10, 1994); Lozada v. Deeds, 964 F.2d 956, 958 (9th Cir. 1992). Under Strickland, this Court must first determine whether counsel had a duty to advise Petitioner of his right to appeal. If there is no such duty, the failure to advise cannot be ineffective assistance.

Although a defendant has a right to appeal a judgment entered on a guilty plea, failure to appeal an appealable judgment does not amount to ineffective assistance of counsel per se. See Oliver v. United States, 961 F.2d 1339, 1342 (7th Cir.), cert. denied, 113 S. Ct. 469 (1992). "An attorney has no absolute duty in every case to advise a defendant of his limited right to appeal after a guilty plea." Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989) (citing Marrow v. United States, 772 F.2d 525, 527 (9th Cir. 1985); Carey v. Laverette, 605 F.2d 745, 746 (4th Cir.) (per curiam) (there is "no constitutional requirement that defendants must always be informed of their right to appeal following a guilty plea"), cert. denied, 444 U.S. 983 (1979)); see also Castellanos, 1994 WL 247898 at \*2; Davis v. Wainwright, 462 F.2d 1354 (5th Cir. 1972). Only "if a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right," counsel has a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock, 880 F.2d at 1188.

Laycock remains good law in spite of the more recent holding in Baker v. Kaiser, 929 F.2d 1495, 1499 (10th Cir. 1991), that the Sixth Amendment right to counsel continues to apply after a sentence is imposed and while the Defendant contemplates whether to file an appeal as of right.<sup>2</sup> Although it is unclear whether the defendant in Baker was convicted following a trial as opposed to a guilty plea, the Tenth Circuit in Hardiman v. Reynolds, 971 F.2d 500, 506 (10th Cir. 1992), chose to remand on the ground set forth in Laycock--that a defendant who pleads guilty does not have a right to notice of his right to appeal in every case. But see United States v. Youngblood, 14 F.3d 38, 39-40 (10th Cir. 1994) (analyzing counsel's conduct under the Baker analysis although the defendant had pleaded guilty, but noting that the defendant had never affirmatively indicated any desire to appeal to his counsel or the district court); see also Randall v. State, 861 P.2d 314 (Okla. Crim. App. 1993) (holding that hearing on application to withdraw guilty plea is "critical stage" which invokes defendant's constitutional right to counsel).

After carefully reviewing the record in this case, the Court concludes that Petitioner's counsel did not provide ineffective

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<sup>2</sup>In Baker, the Tenth Circuit stated that counsel must fully explain the advantages and disadvantages of an appeal, provide the defendant with advice about the merits of an appeal and its probability of success, and inquire whether a defendant wishes to appeal the conviction. Id. at 1499. When the defendant requests an appeal--even one counsel believes to be frivolous--counsel must perfect the defendant's appeal so that the defendant may proceed pro se. Id. at 1499 n.3. See also Jones v. Cowley, \_\_\_ F.3d \_\_\_, No. 93-6277, slip op. at 5-11 (10th Cir. Jun. 30, 1994) (not yet released in the permanent law).

assistance when he did not advise Petitioner of the limited rights to appeal his guilty plea. See Marshall v. Cowley, 19 F.3d 1443, 1994 WL 56940 at \*1 (10th Cir. 1994) (unpublished opinion attached to this order) (counsel's failure personally to notify a defendant of his limited right to appeal a guilty plea does not constitute ineffective assistance of counsel). Petitioner has neither alleged a constitutional claim of error which could result in setting aside his guilty plea or that he asked his counsel to appeal his guilty plea.<sup>3</sup> The Court also notes that the state district court fully advised the Petitioner of his right to appeal and of the procedures for completing the same, and that Petitioner has not complained at any point that he was not aware about his appeal rights. (Docket #8, Tr. at 12.) If the failure to advise Petitioner of his limited right to appeal does not amount to ineffective assistance of counsel, the Court cannot conclude that counsel's failure to visit Petitioner at the Tulsa County Jail to advise him of the same limited right to appeal his guilty plea does so. Petitioner's counsel rendered "reasonably effective assistance," and therefore, Petitioner fails the first prong of the constitutional ineffectiveness inquiry.

As Petitioner makes no claim of actual innocence, the Court need not address the alternative of the fundamental miscarriage of

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<sup>3</sup>Petitioner erroneously relies in his reply on cases involving convictions following pleas of not guilty. It is well established that an individual who pleads not guilty and is convicted following a jury trial or a trial before the court must be informed of his right to appeal. See Baker, 929 F.2d at 1498-99; Carey, 605 F.2d at 746.

justice in lieu of cause and prejudice. See Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992).

**III. CONCLUSION**

Therefore, the Court concludes that Petitioner has failed to show cause and prejudice or a fundamental miscarriage of justice to excuse his procedural default. ACCORDINGLY, IT IS HEREBY ORDERED:

- (1) That the Attorney General for the State of Oklahoma be **dismissed** as a party in this case; and
- (2) That this petition for a writ of habeas corpus be **dismissed** as procedurally barred.

SO ORDERED THIS 25 day of July, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

Citation 19 F.3d 1443 (Table)  
UNPUBLISHED DISPOSITION  
TE AS: 19 F.3D 1443, 1994 WL 56940 (10TH CIR.(OKL.))

Copr.(C) West 1994 No claim to orig. U.S. Govt. works.  
Rank(R) Page(P) Database Mode  
R 1 OF 2 P 1 OF 4 CTA10 PAGE

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.)

Billy Gene MARSHALL, Petitioner-Appellant,  
v.  
Jack COWLEY, and Attorney General of the State of Oklahoma, Respondents-  
Appellees.  
No. 93-5070.  
United States Court of Appeals,  
Tenth Circuit.

19 F.3d 1443 (Table)  
(CITE AS: 19 F.3D 1443, 1994 WL 56940 (10TH CIR.(OKL.))  
Feb. 25, 1994.  
ORDER AND JUDGMENT [FN1]

Copr.(C) West 1994 No claim to orig. U.S. Govt. works.  
R 1 OF 2 P 2 OF 4 CTA10 PAGE

Before TACHA, BALDOCK and KELLY, Circuit Judges. [FN2]

KELLY

\*1 Petitioner-appellant Billy Gene Marshall, appearing pro se and in forma pauperis, appeals the dismissal of his habeas corpus petition alleging that a state procedural bar was inappropriately applied, the present conviction was enhanced by unconstitutional prior convictions, and counsel's failure to oppose the use of those convictions constituted ineffectiveness of counsel. Mr. Marshall pled guilty to robbery with firearms after former conviction of two or more felonies and did not take a direct appeal. He claims he was not properly made aware of this right. Our jurisdiction arises under > 28 U.S.C. 1291, 2253 and we affirm.

The error Mr. Marshall raises in the state post-conviction proceeding is not sufficient to raise a federally cognizable issue as to his underlying state criminal conviction. > See *Hopkinson v. Shillinger*, 866 F.2d 1185, 1219 (10th Cir.), aff'd on reh'g, > 888 F.2d 1286 (10th Cir.1989), cert. denied, > 497 U.S. 1010 (1990); > *Williams v. Missouri*, 640 F.2d 140, 143-44 (8th Cir.), cert. denied, > 451 U.S. 990 (1981). The Oklahoma Court of Criminal Appeals

declined to review Mr. Marshall's claims because they were not brought on direct appeal. In order to avoid state procedural default, Mr. Marshall must demonstrate cause for his failure to raise these claims and resulting prejudice. See Murray v. Carrier, > 477 U.S. 478, 489-91 (1986).

Mr. Marshall asserts that cause for his failure to appeal is ineffective assistance of his counsel in apprising him of this right. The record reflects, however, that Mr. Marshall was duly advised by the court of his narrow right to appeal his guilty plea. Although he argues that his waiver was not a knowing one, the judge extensively advised Mr. Marshall of the procedure for an appeal and offered to provide counsel for one. The court also warned Mr. Marshall on the limiting effect of a guilty plea on an appeal. With respect to notice of his right to appeal, Mr. Marshall's showing is insufficient to discredit our reliance on the transcript of these proceedings. As an attorney has no absolute duty in every case to advise a defendant of his limited right to appeal a guilty plea, > Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir.1989), failure of counsel personally to notify the defendant of this limited right normally will not constitute ineffective assistance.

Mr. Marshall's pro se status does not require a different standard than that applied to petitioners represented by counsel, > Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir.1991), and a party's pro se status and lack of legal training do not constitute "cause" under the cause and prejudice test. > Id.

Mr. Marshall makes no claim of actual innocence, we need not address the alternative of the "fundamental miscarriage of justice" in lieu of cause and prejudice. > See Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992).  
AFFIRMED.

FN1. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. ---  
F.R.D. ----.

FN2. 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 therefore is ordered submitted without oral argument.

C.A.10 (Okla.), 1994.  
Billy Gene MARSHALL, Petitioner-Appellant, v. Jack COWLEY, and Attorney General of the State of Oklahoma, Respondents-Appellees.  
ND OF DOCUMENT

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

**FILED**

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

WESLEY FENTON,  
Plaintiff,  
vs.  
KIMBALL'S PRODUCE, INC.,  
an Oklahoma Corporation,  
Defendant.

Case No. 94-C-75-B

ORDER OF DISMISSAL WITH PREJUDICE  
AND  
ORDER OF CONFIDENTIALITY

Now on this 25 day of July, 1994, the above styled and numbered matter comes on before this Court pursuant to Stipulation for Order of Dismissal filed herein by the parties hereto. Upon consideration of such Joint Stipulation for Dismissal the Court finds that the above styled and numbered matter should be dismissed with prejudice to the refiling of same. Further, the Court, based upon such Joint Stipulation of Dismissal finds that an Order of Confidentiality should be entered whereby both parties to this proceeding when referring to the resolution of this proceeding shall state only "the matter has been resolved".

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the foregoing findings be and same hereby are made Orders of this Court as if fully set forth hereinafter.

S/ THOMAS R. BRETT

The Honorable Thomas Brett  
United States District Judge

ENTERED ON DOCKET  
DATE 7-26-94

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

ORAL ROBERTS UNIVERSITY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CONSOLIDATED FITNESS )  
 ENTERPRISES, INC., d/b/a )  
 CV STRENGTH, a Texas )  
 corporation, )  
 )  
 Defendant. )

ENTERED ON DOCKET

DATE JUL 25 1994

Case No. 93-C-737-BU ✓

**FILED**

JUL 27 1994

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

**JUDGMENT BY DEFAULT**

This matter came before the Court upon the Application for Default Judgment (Docket No. 7) filed by the plaintiff, Oral Roberts University, and a Report and Recommendation having been issued on the application by the United States Magistrate Judge and the Report and Recommendation having been adopted and affirmed by the Court,

It is ORDERED and ADJUDGED that default judgment be entered in favor of the plaintiff, Oral Roberts University, and against the defendant, Consolidated Fitness Enterprises Inc., d/b/a CV Strength, in the sum of \$113,547.13 plus interest as allowed by law; and a reasonable attorney's fee in the sum of \$1,422.50; and costs in the sum of \$122.50.

DATED at Tulsa, Oklahoma, this 21<sup>st</sup> day of July, 1994.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

CARROLL WAYNE BRUMLEY,  
Plaintiff,

vs.

CELTIC LIFE INSURANCE COMPANY,  
Defendant.

Case No. 93-C-968-BU ✓

ENTERED ON DOCKET  
DATE JUL 25 1994

FILED

JUL 25 1994

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

ORDER

As it appears that the parties have reached a settlement and compromise of this matter, it is hereby ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of the date of this Order for the purpose of obtaining a final determination, the plaintiff's action shall be deemed dismissed with prejudice.

ENTERED this 21<sup>st</sup> day of July, 1994.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

18

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JAMES E. COLE; BETTY COLE; )  
 STATE OF OKLAHOMA, ex rel, )  
 OKLAHOMA TAX COMMISSION; STATE )  
 OF OKLAHOMA, ex rel, INSURANCE )  
 COMMISSION OF THE STATE OF )  
 OKLAHOMA, as Receiver for Quaker )  
 Life Insurance Company; )  
 COMMONWEALTH MORTGAGE COMPANY OF )  
 AMERICA, L.P.; COUNTY TREASURER, )  
 Tulsa County, Oklahoma; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma, )  
 )  
 Defendants. )

**FILED**

JUL 22 1994

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

7/25/94

CIVIL ACTION NO. 94-C-276-B

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 32<sup>nd</sup> day  
of July, 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. OKLAHOMA TAX COMMISSION, appears not having  
previously filed a Disclaimer of Interest; the Defendant, STATE  
OF OKLAHOMA, ex rel. INSURANCE COMMISSIONER of the State of  
Oklahoma, appears not having previously filed a Disclaimer of  
Interest; and the Defendants, JAMES E. COLE, SR; BETTY COLE; and

COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on March 24, 1994; the Defendant, STATE OF OKLAHOMA, ex rel. INSURANCE COMMISSIONER of the State of Oklahoma, acknowledged receipt of Summons and Complaint on April 7, 1994; that the Defendant, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., was served a copy of Summons and Complaint on May 2, 1994; that the Defendant, JAMES E. COLE, SR., was served with process a copy of Summons and Complaint on May 17, 1994; the Defendant, BETTY COLE, was served with process a copy of Summons and Complaint on May 17, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 28, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 24, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 12, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Disclaimer on June 22, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. INSURANCE COMMISSIONER of the State of Oklahoma, filed its Release of Lien on April 4, 1994 and its Disclaimer on April 12, 1994; and that the Defendants, JAMES E. COLE, SR., BETTY COLE and COMMONWEALTH MORTGAGE COMPANY OF

AMERICA, L.P., have failed to answer and 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 FIVE (5), BLOCK ONE (1), BRIARGLEN PARK AN  
ADDITION IN THE CITY OF TULSA, TULSA COUNTY,  
OKLAHOMA, ACCORDING TO THE RECORDED PLAT  
THEREOF**

The Court further finds that on September 2, 1980, Don E. Clay and Sherry S. Clay, husband and wife, executed and delivered to First Continental Mortgage Co., their mortgage note in the amount of \$62,300.00, payable in monthly installments, with interest thereon at the rate of Twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Don E. Clay and Sherry S. Clay, husband and wife, executed and delivered to First Continental Mortgage Co., a mortgage dated September 2, 1980, covering the above-described property. Said mortgage was recorded on September 4, 1980, in Book 4495, Page 702, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 20, 1987, Commonwealth Savings Association, successor by merger to First Continental Mortgage Co., assigned the above-described mortgage note and mortgage to Commonwealth Mortgage Company of America,

L.P. This Assignment of Mortgage was recorded on June 18, 1987, in Book 5032, Page 405, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 17, 1987, commonwealth Mortgage Corporation of America, 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 August 28, 1987, in Book 5048, Page 2046, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, JAMES E. COLE and BETTY COLE, currently hold the fee simple title to the property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on July 6, 1987, the Defendants, JAMES E. COLE and BETTY COLE, 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 September 1, 1988, June 1, 1990, and June 1, 1991.

The Court further finds that the Defendants, JAMES E. COLE and BETTY COLE, 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 E. COLE and BETTY COLE, are indebted to the Plaintiff in the

principal sum of \$112,336.17, plus interest at the rate of Twelve 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 Defendants, JAMES E. COLE, SR., BETTY COLE and COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, and STATE OF OKLAHOMA, ex rel. INSURANCE COMMISSIONER of the State of Oklahoma, 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 against the Defendants, JAMES E. COLE and BETTY COLE, in the principal sum of \$112,336.17, plus interest at the rate of Twelve percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.31 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 Defendants, JAMES E. COLE, SR., BETTY COLE and COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., have no right, title or interest in the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, and STATE OF OKLAHOMA, ex rel. INSURANCE COMMISSIONER of the State of 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 E. COLE and BETTY COLE, 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 appraisalment 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;

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.

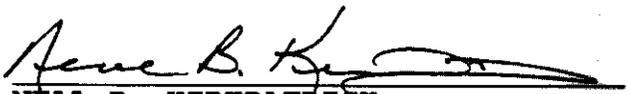
**S/ THOMAS R. BRETT**

---

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

Judgment of Foreclosure  
Civil Action No. 94-C-276-B  
NBK:flv

ENTERED ON DOCKET

DATE JUL 25 1994

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

**FILE I**

JUL 22 1994

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

VICTORIA WILSON,  
Plaintiff,  
vs.  
WASHINGTON NATIONAL INS. CO.,  
Defendant.

Case No. 93-C-812-BU

**ORDER**

As it appears that the parties have reached a settlement and compromise of this matter, it is hereby ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of the date of this Order for the purpose of obtaining a final determination, the plaintiff's action shall be deemed dismissed with prejudice.

ENTERED this 21<sup>st</sup> day of July, 1994.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

10

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

ENTERED ON DOCKET

T-BOY MUSIC PUBLISHING, INC.; )  
NAUGHTY MUSIC; BIG TREE )  
ENTERPRISES LTD.; NEXT PLATEAU )  
MUSIC, INC.; COLE/CLIVILLES )  
MUSIC; GUNS N' ROSES MUSIC; )  
WAROCK CORPORATION; MCA, INC.; )  
JERRY LEIBER AND MIKE STOLLER, )

DATE \_\_\_\_\_

Plaintiffs, )

No. 93-C-1093-BU ✓

v. )

MURPHY ENTERPRISES, INC., d/b/a )  
MURPHY BROS. MIDWAY; GERALD )  
L. MURPHY; GREGORY C. WALLACE; )  
SPECTACULAR ATTRACTIONS, INC.; )  
and KURT VOMBURG, )

**FILED**

JUL 22 1994

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

Defendants. )

ENTERED ON DOCKET  
JUL 25 1994

ORDER OF DISMISSAL WITH PREJUDICE DATE \_\_\_\_\_

The above styled and numbered cause comes before the Court pursuant to the plaintiffs' Application for Order of Dismissal with Prejudice. Upon review of the plaintiffs' Application, and for good cause shown, the Court finds the same should be, and hereby is, granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this case is hereby dismissed with prejudice to its refiling, with each party to bear their own costs.

*Michael B. ...*  
UNITED STATES DISTRICT JUDGE

19

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JAMES E. COLE; BETTY COLE; )  
 STATE OF OKLAHOMA, ex rel, )  
 OKLAHOMA TAX COMMISSION; STATE )  
 OF OKLAHOMA, ex rel, INSURANCE )  
 COMMISSION OF THE STATE OF )  
 OKLAHOMA, as Receiver for Quaker )  
 Life Insurance Company; )  
 COMMONWEALTH MORTGAGE COMPANY OF )  
 AMERICA, L.P.; COUNTY TREASURER, )  
 Tulsa County, Oklahoma; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma, )  
 )  
 Defendants. )

**FILED**

JUL 22 1994

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

DATE 7/25/94

CIVIL ACTION NO. 94-C-276-B

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 22<sup>nd</sup> day  
of July, 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. OKLAHOMA TAX COMMISSION, appears not having  
previously filed a Disclaimer of Interest; the Defendant, STATE  
OF OKLAHOMA, ex rel. INSURANCE COMMISSIONER of the State of  
Oklahoma, appears not having previously filed a Disclaimer of  
Interest; and the Defendants, JAMES E. COLE, SR; BETTY COLE; and

COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on March 24, 1994; the Defendant, STATE OF OKLAHOMA, ex rel. INSURANCE COMMISSIONER of the State of Oklahoma, acknowledged receipt of Summons and Complaint on April 7, 1994; that the Defendant, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., was served a copy of Summons and Complaint on May 2, 1994; that the Defendant, JAMES E. COLE, SR., was served with process a copy of Summons and Complaint on May 17, 1994; the Defendant, BETTY COLE, was served with process a copy of Summons and Complaint on May 17, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 28, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 24, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 12, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Disclaimer on June 22, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. INSURANCE COMMISSIONER of the State of Oklahoma, filed its Release of Lien on April 4, 1994 and its Disclaimer on April 12, 1994; and that the Defendants, JAMES E. COLE, SR., BETTY COLE and COMMONWEALTH MORTGAGE COMPANY OF

AMERICA, L.P., have failed to answer and 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 FIVE (5), BLOCK ONE (1), BRIARGLEN PARK AN  
ADDITION IN THE CITY OF TULSA, TULSA COUNTY,  
OKLAHOMA, ACCORDING TO THE RECORDED PLAT  
THEREOF**

The Court further finds that on September 2, 1980, Don E. Clay and Sherry S. Clay, husband and wife, executed and delivered to First Continental Mortgage Co., their mortgage note in the amount of \$62,300.00, payable in monthly installments, with interest thereon at the rate of Twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Don E. Clay and Sherry S. Clay, husband and wife, executed and delivered to First Continental Mortgage Co., a mortgage dated September 2, 1980, covering the above-described property. Said mortgage was recorded on September 4, 1980, in Book 4495, Page 702, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 20, 1987, Commonwealth Savings Association, successor by merger to First Continental Mortgage Co., assigned the above-described mortgage note and mortgage to Commonwealth Mortgage Company of America,

L.P. This Assignment of Mortgage was recorded on June 18, 1987, in Book 5032, Page 405, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 17, 1987, commonwealth Mortgage Corporation of America, 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 August 28, 1987, in Book 5048, Page 2046, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, JAMES E. COLE and BETTY COLE, currently hold the fee simple title to the property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on July 6, 1987, the Defendants, JAMES E. COLE and BETTY COLE, 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 September 1, 1988, June 1, 1990, and June 1, 1991.

The Court further finds that the Defendants, JAMES E. COLE and BETTY COLE, 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 E. COLE and BETTY COLE, are indebted to the Plaintiff in the

principal sum of \$112,336.17, plus interest at the rate of Twelve 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 Defendants, JAMES E. COLE, SR., BETTY COLE and COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, and STATE OF OKLAHOMA, ex rel. INSURANCE COMMISSIONER of the State of Oklahoma, 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 against the Defendants, JAMES E. COLE and BETTY COLE, in the principal sum of \$112,336.17, plus interest at the rate of Twelve percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.31 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 Defendants, JAMES E. COLE, SR., BETTY COLE and COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., have no right, title or interest in the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, and STATE OF OKLAHOMA, ex rel. INSURANCE COMMISSIONER of the State of 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 E. COLE and BETTY COLE, 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 appraisalment 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;

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

Judgment of Foreclosure  
Civil Action No. 94-C-276-B  
NBK:flv

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

ENTERED ON DOCKET  
DATE \_\_\_\_\_

RBG DOME MUSIC, COLE/CLIVILLES )  
MUSIC, FOREVERENDEAVOR MUSIC, )  
INC., BADCO MUSIC, INC., )  
CONTROVERSY MUSIC, NEXT )  
PLATEAU MUSIC, INC., and )  
J. ALBERT & SON (USA), INC. )

Plaintiffs, )

v. )

OSCAR BEDFORD HARRIS and )  
JUDY HARRIS, d/b/a J. R. )  
PRESENTS SPAT'S, a/k/a )  
J. R.'S PLACE PRESENTS SPAT'S )

Defendants. )

No. 94-C-526-BU

**F I L E D**

JUL 22 1994

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

ENTERED ON DOCKET

ORDER OF DISMISSAL WITH PREJUDICE

DATE JUL 25 1994

The above styled and numbered cause comes before the Court pursuant to the plaintiffs' Application for Order of Dismissal with Prejudice. Upon review of the plaintiffs' Application, and for good cause shown, the Court finds the same should be, and hereby is, granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this case is hereby dismissed with prejudice to its refiling, with each party to bear their own costs.

  
UNITED STATES DISTRICT JUDGE

1  
2

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

JUL 22 1994

HEIDELBERG USA, INC., )  
a Delaware corporation, )  
 )  
Plaintiff, )

vs. )

No. 94-C-414-#BU

TEFCO LITHOGRAPHERS, INC., )  
an Oklahoma corporation, and )  
GLOBAL DIRECT, INC., an )  
Oklahoma corporation, )  
 )  
Defendants. )

ENTERED ON DOCKET  
DATE JUL 25 1994

**DISMISSAL WITH PREJUDICE**

Plaintiff Heidelberg USA, Inc. hereby dismisses the Complaint, with prejudice.

Dated: July 22, 1994.

ANDREW R. TURNER

By 

Andrew R. Turner, OBA #9125  
2400 First National Tower  
Tulsa, Oklahoma 74103  
(918) 586-5711

Attorneys for Plaintiff  
Heidelberg USA, Inc.

OF COUNSEL:

CONNER & WINTERS  
2400 First National Tower  
Tulsa, Oklahoma 74103  
(918) 586-5711

40  
ENTERED ON DOCKET

DATE 7-25-94

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

SPACECOM SYSTEMS, INC., )  
a Delaware corporation, )

Plaintiff, )

vs. )

INTERNATIONAL DATACASTING )  
CORPORATION, a foreign )  
corporation, )

and )

ASCII OF AMERICA, INC., )  
a California corporation, )

Defendants. )

Case No. 93-C-0122 K

**FILED**

JUL 22 1994

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

**JOINT STIPULATION OF DISMISSAL**

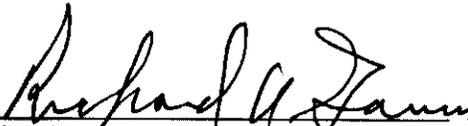
Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, SpaceCom Systems, Inc., and the Defendants, International Datacasting Corporation and ASCII of America, Inc., jointly stipulate and agree that this action should be and is hereby dismissed with prejudice, each side to bear its own costs, attorneys' fees and expenses.



R. Jay Chandler  
John E. Dowdell

NORMAN & WOHLGEMUTH  
2900 Mid-Continent Tower  
Tulsa, Oklahoma 74103

ATTORNEYS FOR PLAINTIFF,  
SPACECOM SYSTEMS, INC.

  
Richard A. Gann

**RIGGS, ABNEY, NEAL, TURPEN,  
ORBISON & LEWIS**  
Frisco Building  
502 West Sixth Street  
Tulsa, Oklahoma 74119-1010

**ATTORNEY FOR DEFENDANT  
INTERNATIONAL DATACASTING  
CORPORATION**

  
James L. Kincaid, OBA #5021  
Cheryl L. Cooper, OBA #15745

**CROWE & DUNLEVY**  
A Professional Corporation  
321 South Boston  
500 Kennedy Building  
Tulsa, Oklahoma 74103  
(918) 592-9800

and

Tod L. Gamlen

**BAKER & MCKENZIE**  
660 Hansen Way  
Palo Alto, CA 94304  
(415) 856-2400

**ATTORNEYS FOR DEFENDANT  
ASCII OF AMERICA, INC.**

***CERTIFICATE OF SERVICE***

This is to certify that a true and correct copy of the above and foregoing was mailed, postage pre-paid this 22<sup>nd</sup> day of July, 1994, to:

R. Jay Chandler  
John E. Dowdell  
NORMAN & WOHLGEMUTH  
2900 Mid-Continent Tower  
Tulsa, Oklahoma 74103

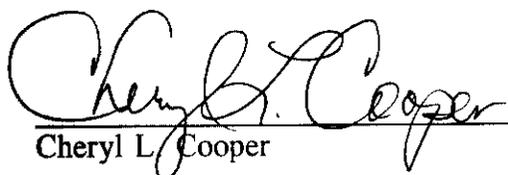
Attorneys for Plaintiff,  
SpaceCom Systems, Inc.  
and for Additional Defendant on Counterclaim,  
United Video Satellite Group, Inc

Richard A. Gann  
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS  
Frisco Building  
502 West Sixth Street  
Tulsa, Oklahoma 74119-1010

Attorney for Defendant  
International Datacasting Corporation

George W. Owens  
Owens Law Firm  
15 E. 5th St., Suite 1606  
Tulsa, Oklahoma 74103

Attorney for Additional Defendant on Counterclaim  
Zephyrus Electronics, Inc.

  
Cheryl L. Cooper

ENTERED ON DOCKET  
DATE JUL 22 1994

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

MARION WADFORD,  
  
Plaintiff,  
  
vs.  
  
RON CHAMPION, et al.,  
  
Defendants.

No. 93-C-474-K

**FILED**

JUL 21 1994

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

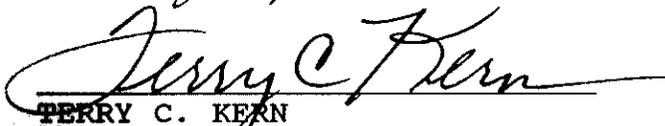
**ORDER**

On June 23, 1994, the Court ordered the Plaintiff to show cause on or before fifteen days from the date of entry of the order why this Court should not dismiss the above captioned case as moot because the Plaintiff is no longer subject to the condition about which he complains. The Plaintiff has failed to respond.

**ACCORDINGLY, IT IS HEREBY ORDERED:**

- (1) that Defendants' motion to dismiss [docket #6] be **denied as moot**; and
- (2) That this case be **dismissed** as moot because the Oklahoma Department of Corrections has rescinded its grooming code policy and the Plaintiff is no longer subject to the condition about which he complains.

SO ORDERED THIS 21 day of July, 1994.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

AMERICAN CENTRAL GAS COMPANIES, )  
INC., a Delaware corporation, )

Plaintiff, )

vs. )

CHEVRON U.S.A., INC., a )  
Pennsylvania corporation, )

Defendants. )

CASE NO. 93-CV-774 BU

**FILED**

JUL 20 1994

STIPULATION OF DISMISSAL WITH PREJUDICE

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

COME NOW the Plaintiff, American Central Gas Companies, Inc.,  
and the Defendant, Chevron U.S.A. Inc., pursuant to Rule 41(a)(1)  
of the Federal Rules of Civil Procedure, and stipulate to the  
dismissal, with prejudice, of all claims asserted by and against  
each party in this case.

Respectfully submitted,

AMERICAN CENTRAL GAS COMPANIES, INC.

By: Maria Seidler  
Maria Seidler, OBA #12348  
General Counsel  
One Summit Plaza  
5725 S. Lewis Avenue, Suite 600  
Tulsa, OK 74105  
(918) 749-6776

- AND -

LIPE, GREEN, PASCHAL,  
TRUMP & BRAGG, P.C.

By: Richard A. Paschal  
Richard A. Paschal, OBA #6927  
3700 First National Tower  
15 East 5th Street, Suite 3700  
Tulsa, Oklahoma 74103-4344  
(918) 599-9400

ATTORNEYS FOR DEFENDANTS  
CHEVRON U.S.A., INC.

ENTERED ON DOCKET  
DATE 7-21-94

(1-464)

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

**FILED**

JUL 20 1994

CORA M. ELLIS,

Plaintiff,

v.

TAMMERLANE ROZSA, M.D.,  
JERRY D. McKENZIE, M.D., INC.  
JERRY D. McKENZIE, M.D.,  
KENNETH CRAIG, M.D.,  
MARTHA GROSSMAN, M.D.

Defendants.

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

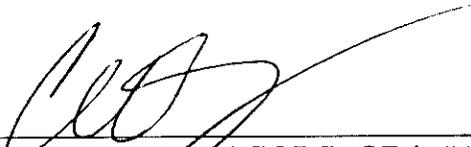
Case No. 94 C 374 B *KK*

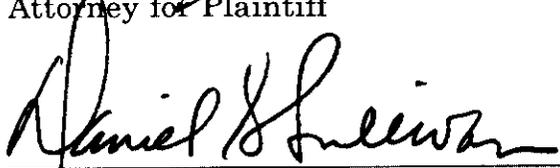
DATE JUL 21 1994

JOINT STIPULATION ~~REQUESTING DISMISSAL~~ <sup>Dismissing</sup>  
~~OF ALL DEFENDANTS WITHOUT PREJUDICE~~

COMES NOW the Plaintiff, Cora M. Ellis, and Defendants, and hereby request  
this Court enter an order dismissing all defendants without prejudice.

DATED this 18th day of July, 1994.

  
C.W. DAIMON JACOBS, OBA #14107  
Attorney for Plaintiff

  
DANIEL S. SULLIVAN, OBA #12887  
BOBBY L. LATHAM, JR., OBA # 15799  
Attorney for Defendants McKenzie  
and Craig

ENTERED ON DOCKET

DATE 7-21-94

02B  
N

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 NGHIA PHAM aka PHAM T. TRI aka ) **F**  
 NGHIA THI TRI; ANY UNKNOWN )  
 SPOUSES OF NGHIA PHAM aka )  
 PHAM T. TRI aka NGHIA THI TRI; )  
 TRI TRAN aka TRAN K. TRI aka )  
 TRAN KHAC TRI; ANY UNKNOWN )  
 SPOUSES OF TRI TRAN aka TRAN K. )  
 TRI aka TRAN KHAC TRI; COUNTY )  
 TREASURER, Tulsa County, )  
 Oklahoma; BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma, )  
 )  
 Defendants. ) CIVIL ACTION NO. 94-C 224E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 19 day  
of July, 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, **Nghia Pham**  
**aka Pham T. Tri aka Nghia Thi Tri; Tri Tran aka Tran K. Tri aka**  
**Tran Khac Tri; Unknown Spouse of Nghia Pham aka Pham T. Tri aka**  
**Nghia Thi Tri; Unknown Spouse of Tri Tran aka Tran K. Tri aka**  
**Tran Khac Tri,** appear not, but make default.

The Court being fully advised and having examined the  
court file finds that Defendant, **County Treasurer, Tulsa County,**

ENTERED ON DOCKET

DATE 7-21-94

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 14, 1994.

The Court further finds that the Defendants, **Nghia Pham aka Pham T. Tri aka Nghia Thi Tri; Tri Tran aka Tran K. Tri aka Tran Khac Tri; Unknown Spouse of Nghia Pham aka Pham T. Tri aka Nghia Thi Tri; Unknown Spouse of Tri Tran aka Tran K. Tri aka Tran Khac Tri**, were served by publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning April 28, 1994, and continuing through June 2, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Nghia Pham aka Pham T. Tri aka Nghia Thi Tri; Tri Tran aka Tran K. Tri aka Tran Khac Tri; Unknown Spouse of Nghia Pham aka Pham T. Tri aka Nghia Thi Tri; Unknown Spouse of Tri Tran aka Tran; K. Tri aka Tran Khac Tri**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses

of the Defendants, **Nghia Pham aka Pham T. Tri aka Nghia Thi Tri; Tri Tran aka Tran K. Tri aka Tran Khac Tri; Unknown Spouse of Nghia Pham aka Pham T. Tri aka Nghia Thi Tri; Unknown Spouse of Tri Tran aka Tran K. Tri aka Tran Khac Tri.** The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the **Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma,** filed their Answer on May 5, 1994; and that the Defendants, **Nghia Pham aka Pham T. Tri aka Nghia Thi Tri; Tri Tran aka Tran K. Tri aka Tran Khac Tri; Unknown Spouse of Nghia Pham aka Pham T. Tri aka Nghia Thi Tri; Unknown Spouse of Tri Tran aka Tran K. Tri aka Tran Khac Tri,** 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:

**The West Sixty (60), feet of the East One Hundred Twenty (120) feet of Block Two (2), FRIENDLY HOMES ADDITION, Tulsa County, State of Oklahoma according to the recorded plat thereof.**

The Court further **finds** that on April 15, 1983, the Defendants, Nghia Pham aka Pham T. Tri aka Nghia Thi Tri and Tri Tran aka Tran K. Tri aka Tran Khac Tri, executed and delivered to THE UNITED STATES OF AMERICA **ACTING BY AND THROUGH THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT** their mortgage note in the amount of \$36,000.00, payable in monthly installments, with interest thereon at the rate of eight percent (8%) per annum.

The Court further **finds** that as security for the payment of the above-described note, the Defendants, Nghia Pham aka Pham T. Tri aka Nghia Thi Tri and Tri Tran aka Tran K. Tri aka Tran Khac Tri, executed **and** delivered to THE UNITED STATES OF AMERICA **ACTING BY AND THROUGH THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT** a mortgage dated **April 15, 1983**, covering the above-described property. Said mortgage was recorded on May 6, 1983, in Book 4689, Page 1726, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Nghia Pham aka Pham T. Tri aka Nghia Thi Tri and Tri Tran aka Tran K. Tri aka Tran Khac Tri, were husband and wife when they took title to the subject property in 1983, and are the same parties who were divorced in Tulsa County District Court Case Number FD 84-3163.

The Court further finds that the Defendants, Nghia Pham aka Pham T. Tri aka Nghia Thi Tri and Tri Tran aka Tran K. Tri aka Tran Khac Tri, made default under the terms of the aforesaid note and mortgage, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Nghia Pham aka Pham T. Tri aka Nghia Thi Tri and Tri Tran aka Tran K. Tri aka Tran Khac Tri**, are indebted to the Plaintiff in the principal sum of \$45,782.93, plus interest at the rate of 8 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 \$13.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$8.00, which became a lien on the property as of June 25, 1993; and a claim against the subject property in the amount of \$9.00 for the 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, Nghia Pham aka Pham T. Tri aka Nghia Thi Tri; Tri Tran aka Tran K. Tri aka Tran Khac Tri; Unknown Spouse of Nghia Pham aka Pham T. Tri aka Nghia Thi Tri; Unknown Spouse of Tri Tran aka Tran K. Tri aka Tran Khac Tri, 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, Nghia Pham aka Pham T. Tri aka Nghia Thi Tri and Tri Tran aka Tran K. Tri aka Tran Khac Tri, in the principal sum of \$45,782.93, plus interest at the rate of 8 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.31 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 \$30.00 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, Nghia Pham aka Pham T. Tri aka Nghia Thi Tri; Tri Tran aka Tran K. Tri aka Tran Khac Tri; Unknown Spouse of Nghia Pham aka Pham T. Tri aka Nghia Thi Tri; Unknown Spouse of Tri Tran aka Tran K. Tri aka Tran Khac Tri 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, Nghia Pham aka Pham T. Tri aka Nghia Thi Tri and Tri Tran aka Tran K. Tri aka Tran Khac Tri 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  
\$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.

**57 JAMES O. ELISON**

---

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 224E

NBK:lg

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

CONNIE LYNN ANDERSON aka CONNIE L.  
ANDERSON fka CONNIE L. ROBINSON;  
RICK LEE ANDERSON aka RICK L.  
ANDERSON; COUNTY TREASURER, Tulsa  
County, Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

CIVIL ACTION NO. 93-C-772-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 19 day  
of July, 1994. The Plaintiff appears by Stephen C.  
Lewis, United States Attorney for the Northern District of  
Oklahoma, through Peter Bernhardt, 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, Connie Lynn  
Anderson aka Connie L. Anderson fka Connie L. Robinson and Rick  
Lee Anderson aka Rick L. Anderson, appear not, but make default.

The Court being fully advised and having examined the  
court file finds that the Defendant, Connie Lynn Anderson aka  
Connie L. Anderson fka Connie L. Robinson, acknowledged receipt  
of Summons and Complaint on September 17, 1993; that the  
Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged  
receipt of Summons and Complaint on August 31, 1993; and that

ENTERED ON DOCKET

DATE 7-21-94

Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on August 31, 1993.

The Court further finds that the Defendant, Rick Lee Anderson aka Rick L. Anderson, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning March 24, 1994, and continuing through April 28, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, Rick Lee Anderson aka Rick L. Anderson, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstractor filed herein with respect to the last known address of Defendant, Rick Lee Anderson aka Rick L. Anderson. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Farmers Home Administration, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant

United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on September 28, 1993; that the Defendants, Connie Lynn Anderson aka Connie L. Anderson fka Connie L. Robinson and Rick Lee Anderson aka Rick L. Anderson, 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 promissory note and for foreclosure of a mortgage securing said promissory note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Thirteen (13), Block Two (2), GREEN ACRES, a Subdivision to the Town of Glenpool, Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

**Subject, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record.**

The Court further finds that on April 13, 1984, Connie L. Robinson executed and delivered to the United States

of America, acting through the Farmers Home Administration, her promissory note in the amount of \$40,000.00, payable in monthly installments, with interest thereon at the rate of 11.875 percent per annum.

The Court further finds that as security for the payment of the above-described note, Connie L. Robinson executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated April 13, 1984, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on April 16, 1984, in Book 4782, Page 1708, in the records of Tulsa County, Oklahoma, and was corrected and re-recorded on June 28, 1984, in Book 4800, Page 1023, in the records of Tulsa County, Oklahoma.

The Court further finds that Connie Lynn Anderson aka Connie L. Anderson fka Connie L. Robinson executed and delivered to the United States of America, acting through the Farmers Home Administration, the following Interest Credit Agreements pursuant to which the interest rate on the above-described note and mortgage was reduced.

<u>Instrument</u>	<u>Dated</u>	<u>County</u>
Interest Credit Agreement	07/24/84	Tulsa
Interest Credit Agreement	05/07/85	Tulsa
Interest Credit Agreement	12/23/85	Tulsa
Interest Credit Agreement	10/16/86	Tulsa
Interest Credit Agreement	09/09/87	Tulsa
Interest Credit Agreement	03/26/90	Tulsa
Interest Credit Agreement	12/19/90	Tulsa

The Court further finds that the Defendant, Connie Lynn Anderson aka Connie L. Anderson fka Connie L. Robinson, made

default under the terms of the aforesaid note, mortgage and interest credit agreements by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Connie Lynn Anderson aka Connie L. Anderson fka Connie L. Robinson**, is indebted to the Plaintiff in the principal sum of \$37,458.97, plus accrued interest in the amount of \$6,635.65 as of June 18, 1993, plus interest accruing thereafter at the rate of 11.875 percent per annum or \$12.1869 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of \$20,516.87, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, **Rick Lee Anderson aka Rick L. Anderson**, is in default and therefore has no right, title or interest in the subject real property.

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 ad valorem taxes in the amount of \$376.00, plus penalties and interest, for the year 1993. Said lien is superior to the interest of the Plaintiff, **United States of America**.

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 \$26.00 which became a lien on the

property as of 1993. 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.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment against the Defendant, Connie Lynn Anderson aka Connie L. Anderson fka Connie L. Robinson, in the principal sum of \$37,458.97, plus accrued interest in the amount of \$6,635.65 as of June 18, 1993, plus interest accruing thereafter at the rate of 11.875 percent per annum or \$12.1869 per day until judgment, plus interest thereafter at the current legal rate of 5.31 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of \$20,516.87, plus interest on that sum at the current legal rate of 5.31 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$376.00, plus penalties and interest, for ad valorem taxes for the year 1993, plus the costs of this action.

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 year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Rick Lee Anderson aka Rick L. Anderson 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 Defendant, Connie Lynn Anderson aka Connie L. Anderson fka Connie L. Robinson, 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 appraisalment 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 Defendant, County Treasurer, Tulsa County, Oklahoma, for ad valorem taxes which are presently due and owing on said real property;

**Third:**

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

**Fourth:**

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma, for personal property taxes which are currently due and owing.

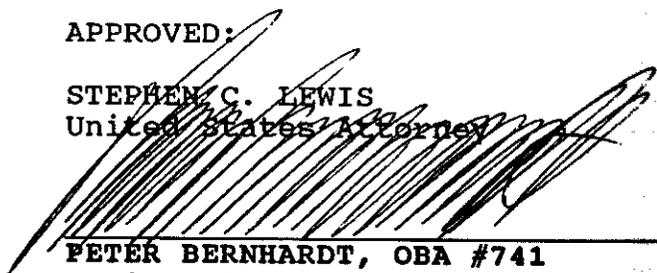
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that 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.

**57 JAMES O. ELLISON**

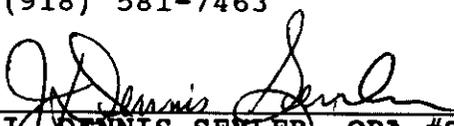
UNITED STATES DISTRICT JUDGE

APPROVED:

  
STEPHEN C. LEWIS  
United States Attorney

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PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

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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. 93-C-772-E  
PB:css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

TONY W. WADLEY aka Tony Wadley  
aka Tony William Wadley;  
REBECCA L. WADLEY aka Rebecca  
Wadley aka Rebecca Lynn Wadley;  
RESOLUTION GOVERNMENT GUARANTEE  
FUND OF FINLAND OY;  
BENEFICIAL OKLAHOMA, INC.;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

CIVIL ACTION NO. 93-C-982-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 19 day  
of July, 1994. The Plaintiff appears by Stephen C.  
Lewis, United States Attorney for the Northern District of  
Oklahoma, through Wyn Dee Baker, 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, Tony W.  
Wadley aka Tony Wadley aka Tony William Wadley, Rebecca L. Wadley  
aka Rebecca Wadley aka Rebecca Lynn Wadley, Resolution Government  
Guarantee Fund of Finland Oy, and Beneficial Oklahoma, Inc.,  
appear not, but make default.

The Court being fully advised and having examined the  
court file finds that the Defendant, Tony W. Wadley aka Tony

ENTERED ON DOCKET  
DATE 7-21-94

Wadley aka Tony William Wadley, was served with Summons and Complaint on April 21, 1994; that the Defendant, Rebecca L. Wadley aka Rebecca Wadley aka Rebecca Lynn Wadley, acknowledged receipt of Summons and Complaint on November 4, 1993; that the Defendant, Resolution Government Guarantee Fund of Finland Oy, acknowledged receipt of Summons and Complaint on March 7, 1994; that the Defendant, Beneficial Oklahoma, Inc., acknowledged receipt of Summons and Complaint on January 19, 1994; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on November 10, 1993; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on November 5, 1993.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on December 8, 1993; that the Defendants, Tony W. Wadley aka Tony Wadley aka Tony William Wadley, Rebecca L. Wadley aka Rebecca Wadley aka Rebecca Lynn Wadley, Resolution Government Guarantee Fund of Finland Oy, and Beneficial Oklahoma, Inc., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that Union Mortgage Company, Inc., ceased its corporate existence on December 17, 1993. Resolution Government Guarantee Fund of Finland Oy is the legal successor to Union Mortgage Company, Inc., and was substituted as party defendant for Union Mortgage Company, Inc. by Order filed on June 3, 1994.

The Court further finds that on March 20, 1991, Tony William Wadley and Rebecca Lynn Wadley filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-00899-W. Subsequently, the debtors were discharged on July 23, 1991, of all dischargeable debts. On November 15, 1991, Bankruptcy Case No. 91-00899-W, United States Bankruptcy Court, Northern District of Oklahoma, was closed.

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 Two (2), Block One (1), MOORE ESTATES, an Addition to the City of Collinsville, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on January 23, 1980, Tony W. Wadley and Rebecca L. Wadley executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$33,000.00, payable in monthly installments, with interest thereon at the rate of 10 percent per annum.

The Court further finds that as security for the payment of the above-described note, Tony W. Wadley and Rebecca L. Wadley executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated January 23, 1980, covering the above-

described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on January 23, 1980, in Book 4453, Page 1389, in the records of Tulsa County, Oklahoma.

The Court further finds that Tony W. Wadley aka Tony Wadley and Rebecca L. Wadley aka Rebecca Wadley executed and delivered to the United States of America, acting through the Farmers Home Administration, the following Interest Credit Agreements pursuant to which the interest rate on the above-described note and mortgage was reduced.

<u>Instrument</u>	<u>Dated</u>	<u>County</u>
Interest Credit Agreement	05/20/82	Tulsa
Interest Credit Agreement	04/04/84	Tulsa
Interest Credit Agreement	09/11/85	Tulsa
Interest Credit Agreement	07/17/86	Tulsa
Interest Credit Agreement	07/26/87	Tulsa
Interest Credit Agreement	07/31/88	Tulsa

The Court further finds that the Defendants, Tony W. Wadley aka Tony Wadley aka Tony William Wadley and Rebecca L. Wadley aka Rebecca Wadley aka Rebecca Lynn Wadley, made default under the terms of the aforesaid note, mortgage, and interest credit agreements by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Tony W. Wadley aka Tony Wadley aka Tony William Wadley and Rebecca L. Wadley aka Rebecca Wadley aka Rebecca Lynn Wadley, are indebted to the Plaintiff in the principal sum of \$28,274.99, plus accrued interest in the amount of \$8,033.69 as of September 29, 1993, plus interest accruing thereafter at the rate of 10 percent per annum or \$7.7465 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest

credit agreements of \$16,824.53, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action accrued and accruing.

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 ad valorem taxes in the amount of \$340.00, plus penalties and interest, for the year 1993. Said lien is superior to the interest of the Plaintiff, United States of America.

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 \$5.00 which became a lien on the property as of 1993. 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, Resolution Government Guarantee Fund of Finland Oy and Beneficial Oklahoma, Inc., are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment in rem against the Defendants, Tony W. Wadley aka Tony Wadley aka Tony William Wadley and Rebecca L. Wadley aka Rebecca Wadley aka

Rebecca Lynn Wadley, in the principal sum of \$28,274.99, plus accrued interest in the amount of \$8,033.69 as of September 29, 1993, plus interest accruing thereafter at the rate of 10 percent per annum or \$7.7465 per day until judgment, plus interest thereafter at the current legal rate of 5.31 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of \$16,824.53, plus interest on that sum at the current legal rate of 5.31 percent per annum from judgment until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$340.00, plus penalties and interest, for ad valorem taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$5.00 for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Resolution Government Guarantee Fund of Finland Oy, Beneficial Oklahoma, Inc., 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, Tony W. Wadley aka Tony Wadley aka Tony William Wadley and Rebecca L. Wadley aka Rebecca Wadley aka Rebecca Lynn Wadley, 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 appraisalment 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 Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$340.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

**Third:**

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 \$5.00, 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 from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants

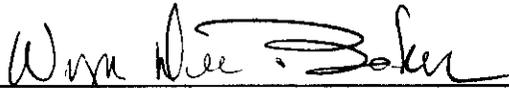
and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

BY JAMES O. ELSON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



WYN DEE BAKER, OBA #465  
Assistant United States Attorney  
3460 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. 93-C-982-E

WDB:css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TERRY L. EDWARDS;  
MARY E. EDWARDS;  
CITIZENS BANK OF TULSA;  
STATE OF OKLAHOMA, ex rel.  
DEPARTMENT OF HUMAN SERVICES;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants. ) CIVIL ACTION NO. 94-C-304-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 19 day  
of July, 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. DEPARTMENT OF HUMAN SERVICES, appears by Ann E.  
Williams; and the Defendants, TERRY L. EDWARDS, MARY E. EDWARDS  
and CITIZENS BANK OF TULSA, appear not, but make default.

The Court being fully advised and having examined the  
court file finds that the Defendant, CITIZENS BANK OF TULSA,  
acknowledged receipt of Summons and Complaint on March 31, 1994;  
that the Defendant, TERRY L. EDWARDS, was served a copy of  
Summons and Complaint on May 18, 1994; that the Defendant,

ENTERED ON DOCKET

DATE 7-21-94

MARY E. EDWARDS, was served a copy of Summons and Complaint on May 18, 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 March 31, 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. DEPARTMENT OF HUMAN SERVICES, filed its Answer on June 21, 1994; and that the Defendants, TERRY L. EDWARDS, MARY E. EDWARDS and CITIZENS BANK OF TULSA, have failed to answer and 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:

**THE SOUTH FIFTY (50) FEET OF LOT ONE (1),  
PORTLAND PLACE ADDITION TO TULSA, TULSA  
COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE  
RECORDED PLAT THEREOF.**

The Court further finds that on April 30, 1986, the Defendant, TERRY L. EDWARDS, executed and delivered to Commonwealth Mortgage Corporation, his mortgage note in the amount of \$37,108.00, 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 Defendant, TERRY L. EDWARDS, a single person, executed and delivered to Commonwealth Mortgage Corporation, a mortgage dated April 30, 1986, covering the above-described property. Said mortgage was recorded on May 8, 1986, in Book 4941, Page 596, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 15, 1990, Commonwealth 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 February 21, 1990, in Book 5237, Page 1092, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1989, the Defendants, TERRY L. EDWARDS and MARY E. EDWARDS, 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 agreement were reached between these same parties on July 1, 1990 and April 1, 1991.

The Court further finds that the Defendant, TERRY L. EDWARDS, 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 his failure to make the monthly installments due thereon, which default has continued, and that

by reason thereof the Defendant, TERRY L. EDWARDS, is indebted to the Plaintiff in the principal sum of \$57,252.14, 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 liens on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$21.00 which became a lien on the property as of June 26, 1991; in the amount of \$5.00 which became a lien on the property as of June 25, 1993; and a claim in the amount of \$5.00 for 1993 taxes. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$16,450.00 which became a lien on the property as of July 15, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, TERRY L. EDWARDS, MARY E. EDWARDS and CITIZENS BANK OF TULSA, 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 against the Defendant, TERRY L. EDWARDS, in the principal sum of \$57,252.14, 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 5.31 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 \$21.00 for personal property taxes for the year 1991, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, have and recover judgment in the amount of \$16,450.00, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$21.00, personal property taxes which are currently due and owing.

**Fourth:**

In payment of Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, in the amount of \$16,450.00.

**Fifth:**

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$10.00, 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

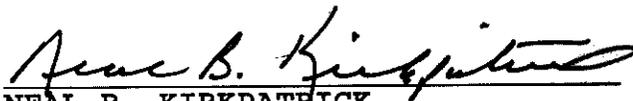
right, title, interest or claim in or to the subject real property or any part thereof.

**S/ JAMES O. ELLISON**

**UNITED STATES DISTRICT JUDGE**

APPROVED:

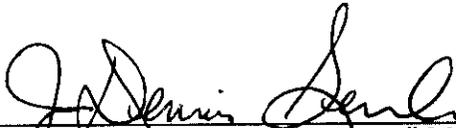
STEPHEN C. LEWIS  
United States Attorney



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



**ANN E. WILLIAMS, OBA FIRM #44**  
Department of Human Services  
Tulsa District Child Support Ofc.  
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Attorney for Defendant,  
STATE OF OKLAHOMA, ex rel.  
DEPARTMENT OF HUMAN SERVICES



**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-304-E

NBK:flv