

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

F I L E D

SEP 19 1995

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

DENISE HENDERSON,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,²

Defendant.

Case No: 94-C-24-W

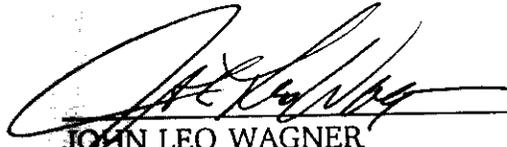
ENTERED ON DOCKET

DATE SEP 20 1995

JUDGMENT

Judgment is entered in favor of the Plaintiff, Denise Henderson, in accordance with this court's Order filed September 19, 1995.

Dated this 19th day of September, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

²Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

F I L E D

SEP 19 1995

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

DENISE HENDERSON,

Plaintiff,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

Case No. 94-C-24-W

ENTERED ON DOCKET

DATE SEP 20 1995

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge ("ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of light work, except for the inability to lift more than 20 pounds at a time and lift/carry more than frequently up to 10 pounds, to stand/walk more than 6 hours of an 8-hour day, to stoop more than occasionally, and to perform more than simple tasks with routine supervision with only incidental contact with the general public. He concluded that claimant was unable to perform her past relevant work as a truck driver, receptionist, medical assistant, and provider. He found that claimant was 41 years old, which is defined as a younger individual, had acquired her GED, and did not have any acquired work skills which are transferable to the skilled or semiskilled work functions of other work. He concluded that, although claimant's nonexertional limitations did not allow her to perform the full range of light work, there were a significant number of jobs in the national economy which she

² Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

could perform, including light truck driver and assembly work. Having determined that claimant's impairments did not prevent her from performing certain jobs in the national economy, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ's decision is not supported by substantial evidence because he did not properly evaluate claimant's mental impairment as shown by her long standing history of emotional instability, depression, and hospitalizations for treatment.
- (2) The ALJ failed to apply the vocational evidence that hospitalizations, therapy, and medication would have precluded claimant from holding a job on a sustained basis.
- (3) The ALJ did not properly evaluate claimant's complaints of pain.

It is well settled that the claimant bears the burden of proving her disability that prevents her from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

On March 16, 1992, claimant filed this application for benefits, alleging disability as of October 30, 1985. However, she filed a prior application for benefits in August of 1987, which was denied initially on January 20, 1988, and she made no request for review of that determination. The ALJ properly found that cause did not exist to reopen the prior application and that the determination of January 20, 1988 was final and binding and the final decision on that application (TR 19-21, 42-43). He then determined that issues of disability on the current application for benefits were considered as of January 21, 1988, onward only, and the claimant's request for a hearing on any issue of disability on or

before that date was dismissed on grounds of res judicata (TR 43). This decision has not been appealed.

The ALJ found that the medical evidence established that the claimant has a severe affective disorder, personality disorder, and substance addiction disorder (TR 41). Progress notes from the University of Oklahoma College of Medicine Clinic in Tulsa from April 27, 1989 to May 19, 1992 showed treatment of multiple complaints, including arm pain, asthma, and dyspepsia (TR 258-314). Claimant also complained of insomnia, emotional stress, panic, and depression (TR 261, 262, 266, 271, 278, 280, 281-285). In July of 1990, she was referred to a support group for severe emotional stress related to her husband's imprisonment (TR 284). On July 29, 1991, she was injured in an assault, leading to "vegetative signs of major depression," including a weight gain of 45-50 pounds in 3 months, sleep disturbance, decreased concentration, and increased energy (TR 266). When she was seen on August 19, 1991, the doctor reported that her condition was not metabolically related (TR 265).

On June 18, 1991, Dr. James Lee, a clinical psychologist, did a psychological evaluation of claimant at the request of a vocational rehabilitation specialist (TR 343-345). Claimant told Dr. Lee she wanted to attend junior college and had received her GED, 12 hours of college credit, and medical assistant and truck driver training (TR 343). She reported that she had been through many crises,⁴ three marriages,⁵ arrests,⁶ eating

⁴Claimant has been confronted with serious crises from childhood. Both her parents were alcoholics. They divorced, and then remarried alcoholics (TR 391). Her mother was a "violent alcoholic" (TR 309) who tried to commit suicide when Claimant was eleven (TR 394). The family moved to Venezuela, where Claimant began dating at age 9. At age 12 she became sexually active, and shortly thereafter she was "raped by 4 black men" and became pregnant, either as a result of the rape, or intercourse with her boyfriend. The baby was stillborn (TR 395).

disorders,⁷ and drug problems (TR 344).⁸ She complained of depression, panic attacks, and anxiety (TR 343-44). The Wechsler Adult Intelligence Scale-Revised identified a verbal intelligence quotient (IQ) of 110, a performance IQ of 100, and a full-scale IQ of 106, considered to be above average (TR 344). The tests showed claimant was significantly depressed, emotionally unstable, and **anxious** and had many underlying psychosomatic symptoms and complaints (TR 344). Dr. Lee stated that the claimant's problems manifested themselves in physical concerns since she could not deal with her feelings (TR 344). His diagnostic impressions from the evaluation included recurrent major depression with anxiety features, atypical eating disorder, mixed personality disorder, and arithmetic disorder (TR 345). Dr. Lee concluded that claimant was eligible for vocational rehabilitation services, but he recommended outpatient psychotherapy in addition to job training (TR 345).

Claimant was treated at Parkside Mental Health Center from December 2, 1991 to September 2, 1992 (TR 354-389). When she entered treatment at Parkside, she had drug-related charges pending against her and was depressed (TR 387). On December 10, 1991,

⁵Dr. Lee reported:

...She said she was involved in one divorce and has been widowed two times. She said that she was first married when she was 16 years old and her husband was killed in Vietnam. She said that her second marriage lasted for four years and her husband was killed while he was working as a truck driver. She said that his truck was hijacked and he was murdered. She said that her third marriage lasted for about a year and a half when her ex-husband went to the pen. She said that her ex-husband killed her stepfather (TR 343).

⁶Dr. Lee writes:

Mrs. Henderson said that she has been arrested 16 or 17 times for writing hot checks and for forgery (TR 344)

⁷Dr. Lee noted that "She currently weighs 167 pounds but said that at one point she went from weighing 365 pounds to 97 pounds" (TR 344).

⁸A treatment specialist reported: "From the time she was age thirteen...she used [illegal drugs] on an almost daily basis. She used heroin, cocaine, crank, crystal, methadone, marijuana, and other things on a fairly regular basis" (TR 396).

she was diagnosed as follows: Axis I, depression NOS and polysubstance dependence, in remission, Axis II, personality disorder, NOS, Axis III, diabetes, Axis IV: 4, and Axis V: 50/50 (GAF Score).⁹ She was treated with Elavil and counseling (TR 384-85).¹⁰

On January 10, 1992, claimant suffered a "panic attack" related to the expected release of her husband on parole (TR 383-384). She was hesitating to go to school because she might fail (TR 383-384). On January 13, 1992, her weight was 241 pounds, up from 173 in November (TR 382-83). She was under severe stress related to her husband's anticipated release from prison. Although she learned later in January he was not to be paroled until 1995 (TR 378), she remained fearful.

As a result, Claimant was hospitalized at Parkside from February 12 to March 10, 1992 (TR 405-409).¹¹ A substance abuse panel at the time of admission was positive for

⁹ The court in Irwin v. Shalala, 840 F.Supp. 751, 759 n.5 (D.Or. 1993), described the significance of a GAF score:

The Global Assessment of Functioning Scale ("GAF") ranges from 90 (absent or minimal symptoms) to 1 (persistent danger of severely hurting self or others, or unable to care for herself). A score of 41 and 50 is defined as manifesting "serious symptoms" (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).

¹⁰ On 12/10/91, the Claimant was noted to be experiencing "depression with anxiety", and remarked that "she has gained one hundred pounds in the last nine months" (TR 394).

¹¹ The Inpatient Discharge Summary listed her chief complaint as "My life is falling apart." The history recited:

...She stated she is tormented and living in fear that her ex-husband will murder her. She stated he is in the Lelick Correctional Center for murder and has a parole hearing coming up in 01/95. The patient has moved many times but somehow her ex-husband has always found her. She stated he is a former security guard for the former K.K.K. grand wizard David Duke and uses Klan connections to locate her. She stated she has knowledge of the...murder of her step-father and possibly seventeen others. She is now beginning to remember these memories after blocking them out. She is frightened by her nightmares. She is isolating herself and she is still fearful of her ex-husband. She is intimidated, anxious and paranoid. She stated she wants "suicide by sleep." She signed a suicide note dated 02/10/92. She stated she took a few extra medications. She stated "I can't live like this anymore." She stated she had not eaten any food for three days prior to admission and had been using crack cocaine (TR 405).

This was not the first time that Claimant had contemplated suicide. Records from Children's Medical Center dated 12/20/68 state:

She has entertained suicidal thoughts at times and actually on two occasions attempted it. The first attempt was made at the boarding school in Florida where she took an overdose of "nerve pills and aspirin" and had to be taken to the hospital and have her stomach pumped. The second occasion was

methamphetamine and marijuana metabolites (TR 406). Claimant was admitted voluntarily showing signs of suicidal tendencies, but then wanted to leave and was placed under administrative restraint and finally under indefinite court commitment (TR 405-407). Her discharge diagnosis was Axis I, chronic depression and post traumatic stress syndrome, Axis II, borderline personality disorder, Axis III, exogenous obesity and diabetes, Axis IV, 2, and Axis V, 65 (TR 408). She did not have any suicidal or homicidal ideations, or auditory or visual hallucinations, and her thoughts were coherent and organized (TR 408). She was discharged to follow-up as an outpatient and by court order to attend AA and NA meetings (TR 408). On March 11 and 13, 1992, it was reported that she was depressed because she had no way to make money except to sell drugs again, which she said she would not do (TR 377). During that month she was seen at least six times for stress from her financial situation (TR 374-377).

On June 8, 1992, a psychiatrist examined claimant and concluded that her daily activities at the time included taking care of her personal hygiene needs, grocery shopping, making arrangements to pay her bills, riding the bus to her appointments, attending AA meetings when she could get a ride, preparing meals, and on some days working around the house (TR 359). She enjoyed spending time with her daughter and grandson and crocheting, needlepoint, and embroidery (TR 359). She had enrolled in Tulsa Junior College in the fall of 1991, but had been unable to attend classes regularly due to her

a more recent one in regard to her unhappiness over her boyfriend (TR 426).

Dr. Pia Petculescu's discharge summary from the Tulsa Psychiatric Center Protective Service notes: "Patient had periods of depression in her life and attempted suicide three times. Last time in October 1979" (TR 243).

A Parkside discharge summary dated 9/24/87 states: "The patient returned to the Parkside emergency room on September 24th with the chief complaint of 'suicide thoughts'" (TR 251).

depression and the need for hospitalization (TR 359). She reported being very close to her neighbors (TR 359). She said she was not employed because of back problems and depression (TR 359). Her diagnoses included: Axis I, depression, NOS, post traumatic stress disorder, and polysubstance abuse, Axis II, borderline personality disorder. Axis III, diabetes, Axis IV, 4, and Axis V, 40/60 (TR 361). Under the heading, "Ability to Perform Work-Related Activities," the therapist stated that she required assistance with completing her disability forms due to a problem with comprehension, had poor impulse control with regard to her anger and depression, and had a tendency to act out her aggressive behaviors (TR 361).

Claimant was seen at Parkside several times in July and August, 1992, for problems with her school work, money, and relationships, and for depression (TR 354-358). She was hospitalized at Parkside again from April 23 to May 21, 1993 to address problems with depression, anxiety, medications, and physical and sexual abuse (TR 435-449). On May 10, 1993, she was diagnosed with post traumatic stress disorder, polysubstance dependence, and borderline personality disorder (TR 441). On May 19, 1993, it was reported that she had been sober for a year (TR 437). Her discharge summary reported that she had made good progress in learning coping skills to help her deal with depression, anxiety, and hysteria (TR 447). The final diagnosis was Axis I, depression NOS, post-traumatic stress syndrome, and polysubstance abuse, Axis II, borderline personality disorder, Axis III, diabetes, Axis IV, 4, and Axis V, 40/60 (TR 448).

There is merit to claimant's contentions that the ALJ's decision is not supported by substantial evidence because he did not properly evaluate her long history of mental

problems and vocational evidence that would preclude her from holding a job on a sustained basis.

The social security regulations specify that a special procedure must be followed when evaluating a mental impairment. 20 C.F.R. §§ 404.1520a and 416.920a. Part of the procedure entails recording pertinent information on a standard document. §§ 404.1520a(d) and 416.920a(d). When a claimant's severe mental impairment does not meet a listed mental impairment, the standard document must include an assessment of the residual functional capacity. §§ 404.1520a(c)(3) and 416.920a(c)(3). The document must be completed at the "initial, reconsideration, administrative law judge hearing, and Appeals Council levels." §§ 404.1520a(d) and 416.920a(d). At the initial and reconsideration levels, the document must be completed and signed by a medical consultant. §§ 404.1520a(d)(1) and 416.920a(d)(1). The ALJ, however, may complete the document without the assistance of a medical advisor. §§ 404.1520a(d)(1)(i) and 416.920a(d)(1)(i).

Here the ALJ completed such an assessment, finding claimant had affective disorders, personality disorders, and substance abuse disorders (TR 44). He found that she had a depressive syndrome, persistent disturbances of mood or affect, pathological dependence, passivity, or aggressivity, and intense and unstable interpersonal relationships and impulsive and damaging behavior (TR 44-45). However, he concluded that claimant was only moderately restricted in her daily living and had only moderate difficulties in maintaining social functioning. He also found that she often had deficiencies of concentration, persistence, or pace resulting in failure to complete tasks in a timely manner and once or twice had episodes of deterioration in work-like settings causing her to

withdraw from the situation (TR 46-47). He failed to consider the findings of the treating physicians that her highest Global Assessment of Functioning had been 50 and was sometimes at 25 and 40 (TR 361, 369, 386, 415, 448).

There is evidence in the record that seriously challenges the ALJ's assessment of claimant's residual functional capacity and the extent of her impairment, and the assessment is not supported by the medical reports and record. See Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1050 (10th Cir. 1993).

The court in Singletary v. Bowen, 798 F.2d 818-822 (5th Cir. 1986), cited recently in Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994), stated:

A finding that a claimant is able to engage in substantial gainful activity requires more than a simple determination that the claimant can find employment and that he can physically perform certain jobs; it also requires a determination that the claimant can hold whatever job he finds for a significant period of time. See Parsons v. Heckler, 739 F.2d 1334, 1340 (8th Cir. 1984) ('the ability of a claimant to perform jobs in the national economy must take into account the actual ability of the claimant to find and hold a job in the real world') (emphasis added); Tennant v. Schweiker, 682 F.2d 707, 709-710 (8th Cir. 1982) (where individual bases his claim on a personality disorder, 'the dispute focuses on whether the claimant has the emotional capacity to engage in sustained employment'). A determination that a claimant is unable to continue working for significant periods of time must, however, be supported by more than a claimant's personal history; it must also be supported by medical evidence. See 20 C.F.R. §§ 404.1546; 404.1560. (Emphasis in original).

The Tenth Circuit in Dollar v. Bowen, 821 F.2d 530, 533 (10th Cir. 1987), also emphasized that "residual functional capacity is defined as 'the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirement of jobs.'" (Emphasis in original).

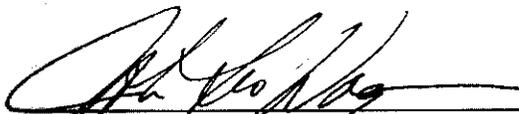
When plaintiff's counsel asked certain hypothetical questions concerning claimant's

inability to control her emotions, hostility, and anger, to concentrate, and to complete job tasks, the vocational expert admitted **this** would inhibit claimant's ability to obtain and keep employment (TR 105-106).

Claimant has had consistent **problems** staying in school (TR 76, 81, 357, 359), which is a "worklike setting," she has **difficulties** relating to people, especially men (TR 101), and she is emotionally unstable. **In addition**, she has spent numerous weeks in the hospital and in outpatient therapy since **1987**, which would have precluded her from being able to perform any job on a **sustained** daily basis, as required by social security regulations. Frey v. Bowen, 816 F.2d **508**, 512-13 (10th Cir. 1987).

The decision of the ALJ is not **supported** by substantial evidence. The decision is reversed and claimant is found to be **disabled** and entitled to disability insurance benefits under §§ 216(i) and 223 and **supplemental** security income under §§ 1602 and 1614 (a)(3)(A) of the Social Security Act, as **amended**.

Dated this 18th day of September, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:henderson

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

CONTINENTAL NATURAL GAS, INC.,
an Oklahoma corporation;
COTTONWOOD PARTNERSHIP, an Oklahoma
general partnership; CONTINENTAL
GAS MARKETING, INC., a Texas
corporation; SCOTT C. LONGMORE;
GARRY D. SMITH; TERRY K. SPENCER;
and ADAMS ENERGY COMPANY, an
Oklahoma corporation,

Plaintiffs,

vs.

ASTRA RESOURCES, INC., a Kansas
corporation,

Defendant.

FILED

SEP 19 1995

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

No. 94-C-485-K ✓

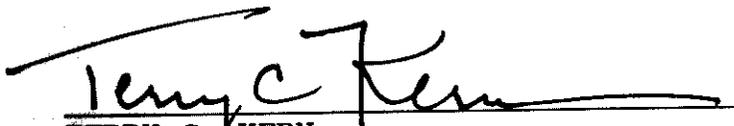
ENTERED ON DOCKET

DATE SEP 20 1995

JUDGMENT

In accordance with the jury verdict rendered on September 12, 1995, judgment is hereby entered in favor of the plaintiffs and against defendant Astra Resources Inc. in the amount of \$1,500,000.00.

ORDERED this 19 day of September, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

126

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 19 1995

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

ANDY SPODNICK,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,^{1/}

Defendant.

No. 93-C-304-J ✓

ENTERED ON DOCKET

DATE SEP 20 1995

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Administrative Law Judge was entered on August 31, 1994. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 19th day of September 1995.


Sam A. Joyner
United States Magistrate Judge

^{1/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action.

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

FILED

SEP 19 1995

GEORGE HYDE, an Individual,)
)
 Plaintiff,)
)
 vs.)
)
 KOGER PROPERTIES, INC.,)
 a foreign corporation,)
)
 Defendant.)

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

94-C 56B

ENTERED ON DOCKET

DATE SEP 20 1995

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 19 day of Sept., 1995, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

S/ THOMAS R. BRETT

United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 19 1995

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
KIM M. TIM aka KIM M. MCKEE aka)
KIM MCKEE; MICHAEL TIM;)
GEORGE L. MCKEE aka GEORGE)
MCKEE; UNKNOWN SPOUSE IF ANY)
OF GEORGE L. MCKEE aka GEORGE)
MCKEE; COUNTY TREASURER, Tulsa)
County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
Defendants.)

Civil Case No. 95-C 101B

ENTERED ON DOCKET
SEP 20 1995
DATE _____

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 19 day of Sept.,
1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant
District Attorney, Tulsa County, Oklahoma; and the Defendants, KIM M. TIM aka KIM M.
MCKEE aka KIM MCKEE; MICHAEL TIM; GEORGE L. MCKEE aka GEORGE
MCKEE; UNKNOWN SPOUSE IF ANY OF GEORGE L. MCKEE aka GEORGE
MCKEE, appear not, but make default.

The Court being fully advised and having examined the court file finds that the
Defendant, KIM M. TIM aka KIM M. MCKEE aka KIM MCKEE will hereinafter be

referred to as ("KIM M. TIM"); and the **Defendant**, GEORGE L. MCKEE aka GEORGE MCKEE will hereinafter be referred to as ("**GEORGE L. MCKEE**").

The Court further finds that **the Defendants**, KIM M. TIM; MICHAEL TIM; GEORGE L. MCKEE; and UNKNOWN SPOUSE IF ANY OF GEORGE L. MCKEE, 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 June 16, 1995, and continuing through July 21, 1995, 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, KIM M. TIM; MICHAEL TIM; GEORGE L. MCKEE; and UNKNOWN SPOUSE IF ANY OF GEORGE L. MCKEE, 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, KIM M. TIM; MICHAEL TIM; GEORGE L. MCKEE; and UNKNOWN SPOUSE IF ANY OF GEORGE L. MCKEE. 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 **Loretta F. Radford**, 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 February 9, 1995; and that **the Defendants**, **KIM M. TIM**; **MICHAEL TIM**; **GEORGE L. MCKEE**; and **UNKNOWN SPOUSE IF ANY OF GEORGE L. MCKEE**, 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 NINE (9), BLOCK THIRTEEN (13), WHISPERING MEADOWS, AN ADDITION TO THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on **January 3, 1984**, **Kenneth R. Steiner**, executed and delivered to **Commonwealth Mortgage Company** his mortgage note in the amount of \$53,041.00, payable in monthly **installments**, with interest thereon at the rate of twelve and one-half percent (12.5%) per **annum**.

The Court further finds that **as** security for the payment of the above-described note, **Kenneth R. Steiner**, a **single person**, executed and delivered to **Commonwealth Mortgage Corporation** a **mortgage** dated **January 3, 1984**, covering the

above-described property. Said mortgage was recorded on January 5, 1984, in Book 4757, Page 370, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 3, 1984, Commonwealth Mortgage Corporation assigned the above-described mortgage note and mortgage to Cameron-Brown Company. This Assignment of Mortgage was recorded on January 5, 1984, in Book 4757, Page 374, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 15, 1988, First Union Mortgage Corporation, fka Cameron-Brown 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 27, 1988, in Book 5147, Page 1966, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, GEORGE L. MCKEE and KIM M. TIM, formerly husband and wife, currently hold the record title to the property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on November 29, 1988, the Defendant, KIM M. TIM, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on December 6, 1989, July 11, 1990, and July 31, 1991.

The Court further finds that the Defendants, KIM M. TIM and GEORGE L. MCKEE, formerly husband and wife, 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, KIM M. TIM and GEORGE L. MCKEE, are

indebted to the Plaintiff in the principal sum of \$89,074.46, plus interest at the rate of 12.5 percent per annum from November 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 \$37.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$28.00 which became a lien as of June 25, 1993; and a lien in the amount of \$32.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, KIM M. TIM, MICHAEL TIM, GEORGE L. MCKEE, and UNKNOWN SPOUSE IF ANY OF GEORGE L. MCKEE, 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, KIM M. TIM and GEORGE L. MCKEE, in the principal sum of \$89,074.46, plus interest at the rate of 12.5 percent per annum from November 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.52 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 \$97.00, plus costs and interest, 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, KIM M. TIM, MICHAEL TIM, GEORGE L. MCKEE, UNKNOWN SPOUSE IF ANY OF GEORGE L. MCKEE 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, KIM M. TIM and GEORGE L. MCKEE, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$97.00, 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.

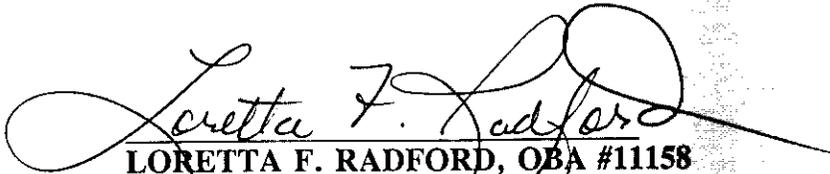
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of 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



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


DICK A. BLAKELEY, OBA #852

Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 101B

LFR/lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 19 1995

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 RANDY K. RODGERS; LAURA)
 RODGERS; SHIRLEY G. URIBE;)
 UNKNOWN SPOUSE OF Shirley G.)
 Uribe, if any; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET

DATE SEP 20 1995

Civil Case No. 95-C 0100B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 19 day of Sept., 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, RANDY K. RODGERS, LAURA RODGERS, SHIRLEY G. URIBE, and UNKNOWN SPOUSE OF Shirley G. Uribe, if any, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, RANDY K. RODGERS, was served with process a copy of Summons and Complaint on May 9, 1995; that the Defendant, LAURA RODGERS, was served with process a copy of Summons and Complaint on May 9, 1995.

The Court further finds that **the Defendants, SHIRLEY G. URIBE and UNKNOWN SPOUSE OF Shirley G. Uribe, if any,** 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 May 25, 1995, and continuing through June 29, 1995, **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, **SHIRLEY G. URIBE and UNKNOWN SPOUSE OF Shirley G. Uribe, if any,** 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, **SHIRLEY G. URIBE and UNKNOWN SPOUSE OF Shirley G. Uribe, if any.** 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 Department of **Housing** and Urban Development, and its attorneys, Stephen C. Lewis, United States **Attorney** for the Northern District of Oklahoma, through Loretta F. Radford, 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 February 9, 1995; and that the Defendants, RANDY K. RODGERS, LAURA RODGERS, SHIRLEY G. URIBE, and UNKNOWN SPOUSE OF Shirley G. Uribe, if any, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on June 21, 1995, Randall K. Rodgers and Laura K. Rodgers, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 95-01855-W. On August 30, 1995, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

The Court further finds that the Defendant, RANDY K. RODGERS, is one and the same person as Randall K. Rodgers, and will hereinafter be referred to as "RANDY K. RODGERS." The Defendant, LAURA RODGERS, is one and the same person as Laura K. Rodgers, and will hereinafter be referred to as "LAURA RODGERS." The Defendants, RANDY K. RODGERS and LAURA RODGERS, are husband and wife.

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 Eight (8), Block Three (3), in RIDGEVIEW ADDITION, a subdivision to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded Plat No. 1587.

may also be described as:

Lot Eight (8), Block Three (3), in RIDGE VIEW ADDITION, a Subdivision to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat No. 1587,

The Court further finds that on April 23, 1986, Donna Marie Reinhardt and Thelma C. Mefford, executed and delivered to LIBERTY MORTGAGE COMPANY, their mortgage note in the amount of \$43,336.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9.50%) per annum.

The Court further finds that as security for the payment of the above-described note, Donna Marie Reinhardt, a single person and Thelma C. Mefford, a single person, executed and delivered to LIBERTY MORTGAGE COMPANY, a mortgage dated April 23, 1986, covering the above-described property. Said mortgage was recorded on May 1, 1986, in Book 4939, Page 1131, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 31, 1987, Liberty Mortgage Company, assigned the above-described mortgage note and mortgage to Universal Savings Bank F.A. of Wisconsin. This Assignment of 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 February 15, 1989, UNIVERSAL SAVINGS BANK F.A. OF WISCONSIN, 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 17, 1989, in Book 5167, Page 1251, in the records of Tulsa County, Oklahoma.

The Court further finds that **Defendants**, RANDY K. RODGERS and SHIRLEY G. URIBE, currently hold the title to the property via mesne conveyances and are the current assumptors of the subject indebtedness, by virtue of a General Warranty Deed, dated November 24, 1987, and recorded on November 30, 1987, in Book 5066, Page 1597, in the records of Tulsa County, Oklahoma.

The Court further finds that on **January 17, 1989**, the Defendants, RANDY K. RODGERS and LAURA RODGERS, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that **the Defendants**, RANDY K. RODGERS and SHIRLEY G. URIBE, made default under **the terms** of the aforesaid note and mortgage, as well as the terms and conditions of the **forbearance** agreement, by reason of their failure to make the monthly installments due thereon, **which** default has continued, and that by reason thereof the Defendants, RANDY K. RODGERS and SHIRLEY G. URIBE, are indebted to the Plaintiff in the principal sum of **\$62,798.23**, plus interest at the rate of 9.50 percent per annum from November 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 **\$5.00** which became a lien on the property as of July 2, 1990, a lien in the amount of **\$4.00** which became a lien on the property as of June 20, 1991, a lien in the amount of **\$23.00** which became a lien on the property as of June 26, 1992, a lien in the amount of **\$21.00** which became a lien on the property as of June 25, 1993, and a lien in the amount of **\$16.00** which became a lien on the property as of

June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, RANDY K. RODGERS, LAURA RODGERS, SHIRLEY G. URIBE, and UNKNOWN SPOUSE OF Shirley G. Uribe, if any, 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, RANDY K. RODGERS and SHIRLEY G. URIBE, in the principal sum of \$62,798.23, plus interest at the rate of 9.50 percent per annum from November 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.52 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 \$69.00, plus costs and interest, for personal property taxes for the years 1989-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, RANDY K. RODGERS, LAURA RODGERS, SHIRLEY G. URIBE, and UNKNOWN SPOUSE OF Shirley G. Uribe, if any, 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, RANDY K. RODGERS and SHIRLEY G. URIBE, 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 the judgment **rendered** herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the **amount** of \$69.00, 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.

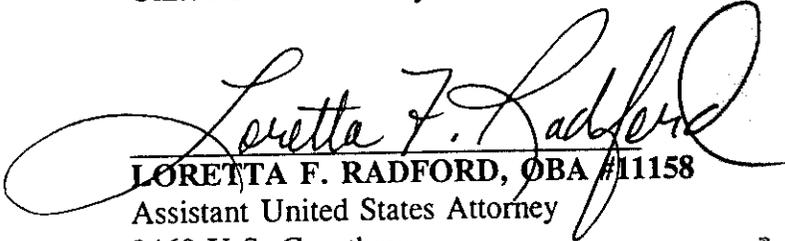
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of 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



LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852

Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 0100B

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

R. L. PETE PERRY; UNKNOWN
SPOUSE IF ANY OF R. L. PETE
PERRY; THREE LAKES VILLAGE
PROPERTY OWNERS' ASSOCIATION,
INC.; CITY OF OWASSO, Oklahoma;
COUNTY TREASURER, Tulsa County,
Oklahoma; BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

SEP 19 1995

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

Civil Case No. 95-C 102K

ENTERED ON DOCKET

DATE SEP 20 1995

ORDER

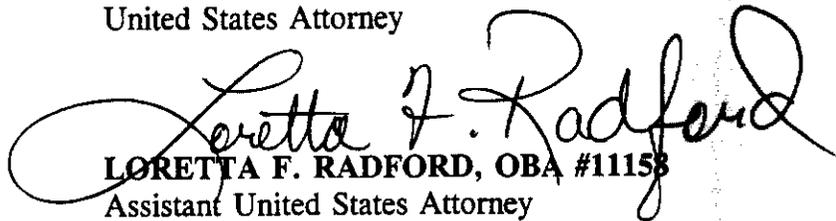
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that service on the Defendant, UNKNOWN SPOUSE IF ANY OF R. L. PETE PERRY, be quashed, and the Defendant, UNKNOWN SPOUSE IF ANY OF R. L. PETE PERRY, is hereby dismissed from this action.

Dated this 19 day of Sept, 1995.

/s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:
STEPHEN C. LEWIS
United States Attorney

A large, stylized handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with large, sweeping loops.

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 LARRY D. COLLINS aka Larry Dean)
 Collins; WANDA S. COLLINS aka)
 Wanda Sue Collins fka Wanda Sue Sharp)
 fka Wanda Sue Campbell; CITY OF)
 GLENPOOL, Oklahoma; COUNTY)
 TREASURER, Tulsa County, Oklahoma;)
 BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

SEP 19 1995

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

ENTERED ON DOCKET
DATE SEP 20 1995

Civil Case No. 95cv0844BU

ORDER

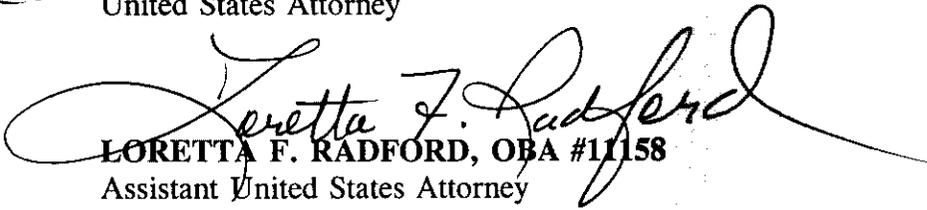
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 19th day of Sept, 1995.

s/ MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A large, elegant handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 19 1995

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

UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.)
)
JOE LEWIS SMITH, SR. aka JOE L.)
SMITH aka LEWIS J. SMITH aka J.L.)
SMITH; VINCENT SPOSATO; BETTY)
SPOSATO; STATE OF OKLAHOMA ex)
rel OKLAHOMA TAX COMMISSION;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
Defendants.)

Civil Case No. 95-CV 886B

ENTERED ON DOCKET

ORDER

DATE SEP 20 1995

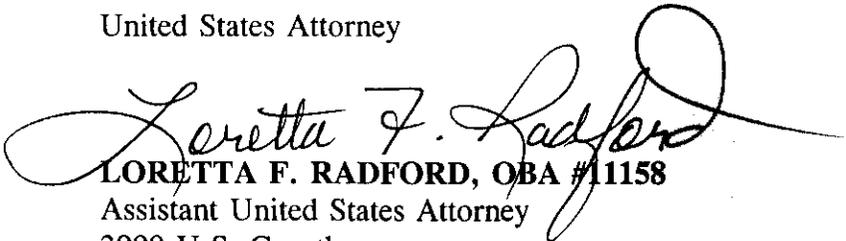
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Defendants, VINCENT SPOSATO and BETTY SPOSATO, are dismissed from this action.

Dated this 19 day of Sept., 1995.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:
STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

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

FILED

SEP 18 1995

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

DEBRA A. ASH, Individually)
and as mother and next friend)
of ROBERT SANDS, a minor child,)

Plaintiffs,)

vs.)

THE TOWN OF OOLOGAH, OKLAHOMA)
and Chief of Police, BOB SLAGLE)

Defendants.)

Case No: 95-C-235-H

ENTERED ON DOCKET

DATE SEP 19 1995

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties stipulate that this case is dismissed with prejudice against Defendants, Town of Oologah, Oklahoma and Chief of Police, Bob Slagle.

Debra Ash
DEBRA ASH, individually and
as mother and next friend
of Robert Sands, a minor.

JACK E. GORDON, JR., OBA #3469
Attorney for Plaintiff
P.O. Box 1167
Claremore, OK 74018

JOHN H. LIEBER, OBA #5421
Attorney for Defendants
ELLER & DETRICH
2727 East 21st Street
Suite 200, Midway Building
Tulsa, Oklahoma 74114

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

F I L E D

SEP 18 1995

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

PHYLLIS PRINCE

Plaintiff,

v.

DONNA E. SHALALA,
Secretary of Health and
Human Services,

Defendant.

NO. 94-C-155-B ✓

ENTERED ON DOCKET

DATE SEP 19 1995

JUDGMENT

Judgment is hereby entered for the Plaintiff and against Defendant. Dated this 18th day
of Sept, 1995.


THOMAS R. BRETT
UNITED STATES CHIEF JUDGE

12

FILED

SEP 18 1995

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

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

ONETTA A. WEBSTER,

Plaintiff,

v.

DONNA E. SHALALA,
Secretary of Health and
Human Services,

Defendant.

NO. 94-C-78-B ✓

ENTERED ON DOCKET
DATE SEP 19 1995

JUDGMENT

Judgment is hereby entered for the **Defendant** and against Plaintiff. Dated this 18th day
of Sept., 1995.


THOMAS R. BRETT
UNITED STATES CHIEF JUDGE

ENTERED ON DOCKET
DATE SEP 19 1995

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

FILED
SEP 18 1995

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

HOMEWARD BOUND, INC., et. al.,)
)
Plaintiffs,)
)
vs.)
)
THE HISSOM MEMORIAL CENTER, et. al.,)
)
Defendants.)

Case No: 85-C-437-E

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on August 9, 1995 for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees and approves the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees in the amount of \$41,620.00 and out of pocket expenses in the amount of \$5,895.94.

IT IS THEREFORE ORDERED that the Department of Human Services shall pay Plaintiffs' counsel, Bullock & Bullock, attorney fees in the amount of \$41,620.00 plus expenses in the amount of \$5,895.94, and a judgment in the amount of \$47,515.94 is hereby entered on this day. A hearing on the contested issue has been set by the Court for September 22, 1995 at 1:30 p.m.

ORDERED this 15 day of Sept, 1995.

S/ JAMES O. ELLISON

JAMES O. ELLISON
United States District Court



Louis W. Bullock
Patricia W. Bullock
BULLOCK & BULLOCK
320 South Boston, Suite 718
Tulsa, Oklahoma 74103-3783
(918) 584-2001

Frank Laski
Judith Gran
**PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA**
125 South Ninth Street, Suite 700
Philadelphia, Pennsylvania 19107
(215) 627-7100
ATTORNEYS FOR PLAINTIFFS



Mark Jones
Assistant Attorney General
**OFFICE OF THE ATTORNEY
GENERAL**
4545 North Lincoln, Suite 260
Oklahoma City, OK 73105-3498
(405) 521-4274
ATTORNEYS FOR DEFENDANTS

(ORDER.FEE)

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

ENTERED ON DOCKET
DATE SEP 19 1995

GEORGE HYDE, an Individual,)
)
 Plaintiff,)
)
 vs.)
)
 KOGER PROPERTIES, INC.,)
 a foreign corporation,)
)
 Defendant.)

94-C 56B

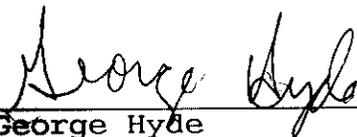
FILED

SEP 18 1995

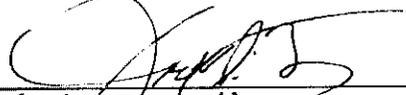
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE

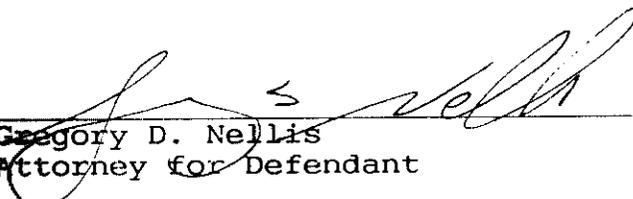
COMES NOW the Plaintiff, his attorney of record, and Defendant's counsel, and would show the Court that this matter has been compromised and settled and, therefore, move the Court for an Order Of Dismissal With Prejudice.



George Hyde



Jack G. Zurawik
Attorney for Plaintiff



Gregory D. Nellis
Attorney for Defendant

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025

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

FILED

SEP 18 1995

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

MARK CHRISTOPHER CHRISTI,)
)
Petitioner,)
)
vs.)
)
EDWARD L. EVANS,)
)
Respondent.)

Case No. 94-C-226-BU

ENTERED ON DOCKET

DATE SEP 19 1995

ORDER

On June 19, 1995, the Court entered an Order conditionally granting the Petition for Writ of Habeas Corpus filed by Petitioner, Mark Christopher Christi. In that Order, the Court ruled that the Writ shall issue within 90 days from June 19, 1995 unless the State assigns new counsel for Petitioner and grants Petitioner an out-of-time appeal. The Court also directed Respondent, Edward L. Evans, to notify the Court within 90 days whether or not new counsel had been assigned and an out-of-time appeal had been granted.

On September 8, 1995, the Court entered an Minute Order directing Respondent to notify the Court as to whether or not new counsel had been assigned and an out-of-time appeal had been granted. Respondent complied with the Court's directive on September 15, 1995. As it appears from the response of the Respondent that Petitioner has been assigned new counsel and granted an out-of-time appeal, the Court finds that Petition for Writ of Habeas Corpus should be denied.

Accordingly, the Court hereby VACATES its June 19, 1995 Order to the extent it conditionally grants the Petition for Writ of

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Habeas Corpus and hereby DENIES the Petition for Writ of Habeas Corpus (Docket Entry #1) in its entirety.

ENTERED this 18th day of September, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 18 1995

CITICORP (USA) INC. and
CITIBANK, N.A.,

Plaintiffs,

vs.

JOHN H. WILLIAMS, JR.,

Defendant.

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

Case No. 88-CV-01636-E

ENTERED ON DOCKET

DATE SEP 19 1995

ORDER LIFTING STAY AND
REMANDING CASE TO BANKRUPTCY COURT

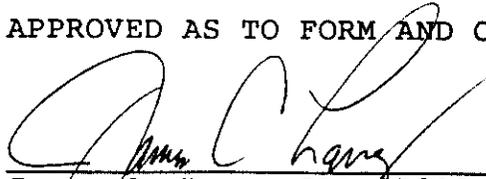
By order of August 2, 1989, a stay was entered in the bankruptcy proceeding styled, John H. Williams, Jr. and Carol S. Williams, Debtors, Citicorp (USA), Inc. and Citibank, N.A., Plaintiffs v. John H. Williams, Jr., Defendant, in the Bankruptcy Court for the Northern District of Oklahoma (Bankruptcy Case No. 86-00475-W, Chapter 11) (Bankruptcy Adversary No. 87-0069-W). By Joint Status Report filed June 12, 1995, the parties agreed that the basis for the stay no longer exists, and, at a status conference held August 25, 1995, it was determined that the case should be remanded to the bankruptcy court for further proceedings.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the stay is lifted, and the case remanded to the bankruptcy court.

S/ JAMES O. ELLISON

JAMES O. ELLISON, SENIOR JUDGE
United States District Court

APPROVED AS TO FORM AND CONTENT:



James C. Lang, OBA #5218
SNEED, LANG, ADAMS & BARNETT
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(918) 583-3145

Attorneys for Defendant,
John H. Williams, Jr.



Gregory M. Gordon
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2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 220-3939

Attorneys for Plaintiffs,
Citicorp (USA), Inc.
and Citibank, N.A.

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

FILED

SEP 18 1995

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

LEONARD D. WHITE,
Plaintiff,

vs.

No. 94-C-505-B

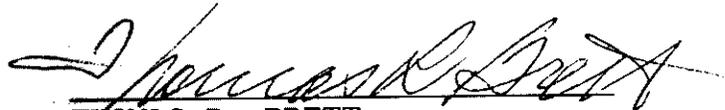
STANLEY GLANZ, et al.,
Defendants.

ENTERED ON DOCKET
DATE SEP 19 1995

JUDGMENT

In accord with the Order granting Defendants' motions for summary judgment, the Court hereby enters judgment in favor of all Defendants and against Plaintiff Leonard D. White. Plaintiff shall take nothing on his claim. Each side is to pay its respective costs and attorney fees.

SO ORDERED THIS 18th day of Sept., 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

LEONARD D. WHITE,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, et al.,)
)
 Defendants.)

No. 94-C-505-B

SEP 18 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE SEP 19 1995

ORDER

In this prisoner's civil rights action, Plaintiff, a federal prisoner proceeding pro se, alleges that the Tulsa County Sheriff's Department and Correctional Medical Systems (CMS) violated his constitutional rights during his pretrial detention at the Tulsa County Jail on a state detainer. Defendants have filed motions for summary judgment to which Plaintiff has responded. For the reasons stated below, the Court concludes that Defendants' motions should be granted.

I. BACKGROUND AND PROCEDURAL HISTORY

On April 20, 1994, Plaintiff arrived at the Tulsa City-County Jail (TCCJ) from the Springfield Medical Center, Springfield, Missouri, with a fourteen-day supply of Diclofenac, a non-steroidal anti-inflammatory drug to relieve back pain. Because the TCCJ does not stock Diclofenac, a nurse contacted a TCCJ physician who ordered that Plaintiff receive 800 milligrams of Motrin twice a day for ninety days. On May 6, 1994, Plaintiff's prescription for Diclofenac was discontinued, and Plaintiff began receiving Motrin as ordered until he was returned to the Springfield Medical Center

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on June 23, 1994.

In May 1994, Plaintiff filed the instant civil rights action against Sheriff Glanz and CMS. He alleges denial of medical care, exercise, access to the courts, and the law library. He also alleges denial of clean clothing, lack of sufficient lighting, infestation of lice, overcrowding, and general harassment during the night shift. Plaintiff seeks compensatory damages.¹

Although Plaintiff's complaint alleges in some instances claims on behalf of other pretrial detainees, the Court has liberally construed Plaintiff's complaint to allege only whether Defendants' actions or inactions violated his own civil rights. It is well established that one may not sue or recover damages for violations of another's civil rights under 42 U.S.C. § 1983. See McGowan v. State of Maryland, 366 U.S. 420, 429 (1961); Reynoldson v. Shillinger, 907 F.2d 124, 125 (10th Cir. 1990).

II. SUMMARY JUDGMENT STANDARD

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the

¹ Plaintiff's claim for injunctive relief in the form of an order directing that he be released from state custody and returned to the custody of the Federal Bureau of Prisons is moot. Plaintiff returned to federal custody on June 23, 1994.

evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. The court cannot resolve material factual disputes at summary judgment based on conflicting affidavits. Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991). However, the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the nonmovant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. The court may treat the Martinez Report as an affidavit in support of a motion for summary judgment, but may not accept the

factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972). When reviewing a motion for summary judgment it is not the judge's function to weigh the evidence and determine the truth of the matter but only to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249.

III. ANALYSIS

In considering Defendants' motions for summary judgment, the Court has examined the special report. Although Plaintiff has responded to the motions, he has presented no evidence to refute the facts in Defendants' motions and special report. Plaintiff's response merely contains conclusory allegations that the report is inadequate and erroneous, and does not controvert Defendants' summary judgment evidence. Accordingly, because Plaintiff has not presented conflicting evidence, the court accepts the factual findings of the report.² See Hall, 935 F.2d at 1111.

² Plaintiff's petition for a writ of habeas corpus or brief attached to his complaint (docket #5) is not sworn under penalty of perjury, 28 U.S.C. § 1746, and therefore, cannot be considered as an affidavit. Hall, 935 F.2d at 1111.

A. Rights of Pretrial Detainees

"There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). Even convicted prisoners do not forfeit all constitutional rights by reason of their conviction and confinement in prison. Bell v. Wolfish, 441 U.S. 520, 545 (1979). Those rights retained include freedom of speech and religion under the First and Fourteenth Amendments. See e.g. Thornburgh v. Abbott, 490 U.S. 401, 407 (1989); O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987). The court has recognized that pretrial detainees retain at least those constitutional rights as those retained by convicted prisoners. Bell, 441 U.S. at 545. However, these rights are not immune from restrictions or limitations pursuant to lawful incarceration. Id. at 545-46. Detainees do not possess the full range of freedoms as unincarcerated individuals. Id. at 546. Courts must accommodate both the legitimate needs of the institution and the rights of the incarcerated. See id. Courts should ordinarily defer their judgment in the day-to-day operations of a corrections facility to the appropriate officials unless there is substantial evidence that the response is exaggerated. Id. at 546-47.

Conditions or restrictions which implicate only the detainee's liberty interest are evaluated under the Due Process Clause. Bell, 441 U.S. at 535. Because a detainee cannot be punished without adjudication of guilt in accordance with due process of law, restrictions which amount to punishment are invalid. See id. Loss

of freedom of choice and privacy are inherent incidents of lawful confinement and, while they interfere with the detainee's desire to live as comfortably as possible, do not amount to punishment. Id. at 537. Absent a showing of intent to punish on the part of corrections officials, if a condition or restriction is reasonably related to a legitimate government objective, without more, it is valid. Id. at 538-39. However, if the restriction is arbitrary, purposeless, or appears excessive in relation to the purpose assigned to it, the court may infer a punitive purpose. Id. Such a restriction, although not imposed with the expressed intent to punish, contravenes a detainee's rights under the Fourteenth Amendment. See id.

B. Analysis of Plaintiff's Individual Claims

1. Medical Care

In support of his claim of denial of medical care, Plaintiff alleges that CMS officials acted with deliberate indifference to his serious medical needs by failing to give him Diclofenac as prescribed at the Springfield Medical Center, and for terminating it in the first part of May 1994 without conducting test or x-rays. Lastly, he alleges that the TCCJ does not have a medical staff available at all time for emergencies and that medication privileges are taken away if a prisoner in the cell violates any minor rule.

Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection regarding

medical care as that afforded convicted inmates under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990). Thus, Plaintiff's inadequate medical attention claim must be judged against the "deliberate indifference to serious medical needs" test set out in Estelle v. Gamble, 429 U.S. 97 (1976). See Martin, 909 F.2d at 406. That test has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991).

Viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Plaintiff has failed to make any showing that the CMS staff possessed the requisite culpable state of mind in replacing his prescription for Diclofenac with Motrin 800 mg. Diclofenac and Motrin are both nonsteroidal anti-inflammatory drugs indicated for relief of rheumatoid arthritis and osteoarthritis. See Physicians Desk Reference at 1077 and 2565. At most Plaintiff differs with the medical judgment of the CMS staff that he needed Diclofenac instead of Motrin 800 mg. It is well established, however, that a difference of opinion between the prison's medical staff and the inmate does not support a claim of cruel and unusual punishment. Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); McCraken v. Jones, 562 F.2d 22 (10th Cir. 1977), cert denied, 435 U.S. 917 (1978); Smart v. Villar, 547 F.2d 112 (10th Cir. 1976).

In his response, Plaintiff argues that "motrin could not, and was not issued, because [he] was allergic to motrin and aspirin." (Response, docket #22, at 1.) In support of this contention, he relies on a notation in the April 1994 Medication Administration Record that he was allergic to Motrin and that Motrin was not administered on April 25 and 26, 1994, because of that allergy. Plaintiff overlooks the fact that upon his arrival at the TCCJ on April 20, 1994, he indicated that he was allergic only to Aspirin. See Medical Health Screening Form. Moreover, the Medication Administration Record for May and June 1994 do not reveal that Plaintiff was allergic to Motrin. On the contrary, the Record indicates that Motrin was administered twice a day in lieu of Diclofenac.

Because Plaintiff received non-steroidal anti-inflammatory analgesic medications for treatment of his back pain throughout his incarceration, Plaintiff has failed to show that the CMS staff was deliberate indifferent to his medical needs. The medical records further indicate that Plaintiff was seen by either a doctor or a nurse on several different occasions during his stay at the TCCJ.

To the extent Plaintiff contends that the CMS medical staff was negligent in providing medical care, Defendants are entitled to judgment as a matter of law. Neither negligence nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause of the Eighth Amendment. Estelle, 429 U.S. at 104-05; Ramos, 639 F.2d at 575.

Lastly, the undisputed summary judgment evidence reveals that a full time medical staff is available, that medication privileges are not taken away if someone violates a minor rule, and medical care is available for life threatening emergencies.

Accordingly, Defendant CMS is entitled to judgment as a matter of law on Plaintiff's claim of denial of medical care.

2. Access to the Courts and the Law Library

Next, Plaintiff alleges that the TCCJ has interfered with his constitutional rights of access to the court and the law library. He alleges that he has filed several requests for the necessary forms to file the instant action, and that none were provided.

A detainee, just like a convicted inmate, has a constitutional right to adequate, effective, and meaningful access to the courts and the law library. Love v. Summit County, 776 F.2d 908, 912 (10th Cir. 1985), cert. denied, 479 U.S. 814 (1986).

The right is one of the privileges and immunities accorded citizens under article four of the Constitution and the Fourteenth Amendment. It is also one aspect of the First Amendment right to petition the government to redress grievances. Finally the right of access is founded on the due process clause and guarantees the right to present to a court of law allegations concerning the violation of constitutional rights.

Smith v. Maschner, 899 F.2d 940, 947 (10th Cir. 1990) (citation omitted).

In Bounds v. Smith, 430 U.S. 817, 827 (1977), the Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing

prisoners with adequate law libraries or adequate assistance from persons trained in the law."

After reviewing the Special Report and Plaintiff's response, the Court concludes that Plaintiff has not demonstrated a total deprivation of legal materials. The Special Report reveals that, although Plaintiff was not allowed to go to the law library, a jailer was assigned to pick-up library requests from him and then provide the requested material. Even if Plaintiff was denied access to the law library due to the delay in providing him the requested materials, he has not shown any actual injury. In fact this action was timely filed on May 17, 1994. Since prejudice is an essential element for maintaining a claim for denial of access to the courts, see Twyman v. Crisp, 584 F.2d 352 (10th Cir. 1978), Plaintiff's claim for denial of access to the courts must fail.

3. General Conditions of Confinement

The remainder of Plaintiff's complaints focus on general conditions of his confinement at the TCCJ. The treatment a detainee receives in jail and the conditions under which he is confined are subject to constitutional scrutiny under the Fourteenth Amendment. See Bell v. Wolfish, 441 U.S. 520, 535 (1979). A detainee may not be subject to conditions which amount to punishment or otherwise violate the constitution. Id. at 537. Conditions which are intended as punitive or are not reasonably related to a legitimate governmental interest violate a detainee's due process rights. Id. at 538-39.

Plaintiff alleges that he was (1) housed in an overcrowded cell; (2) denied adequate exercise and fresh air; (3) deprived of a clean uniform; (4) harassed at night by jail officials; and (5) housed where there were no fire alarms.

The Court cannot become involved in the minor details of running the county jail. Daily decisions concerning detainees are best left to those entrusted with their confinement. Only where constitutional abuse is apparent should the Court interfere with the administrative functioning of the jail. It is fundamental that loss of liberty and freedom of choice occur during lawful incarceration. Corrections officials cannot accommodate the precise needs of every inmate. Consequently, some level of discomfort is inherent in any incarceration, and as long as that discomfort does not amount to punishment it does not violate a detainee's constitutional rights.

Plaintiff's complained of conditions do not amount to punishment. While prison overcrowding may violate the Constitution where it is so egregious that it endangers the safety of inmates, Plaintiff has failed to show that the crowded condition at the TCCJ caused Plaintiff any physical injury.³ Even if Plaintiff was

³ The Crime Control and Law Enforcement Act of 1994 recently amended title 18 of the United States Code by adding at the end section 3626 on prison overcrowding. Subsection (a)(1) of section 3626 requires the following showing with respect to a particular plaintiff claiming prison overcrowding:

(1) HOLDING.--A Federal court shall not hold prison or jail crowding unconstitutional under the eighth amendment except to the extent that an individual plaintiff inmate proves that the crowding causes the infliction of cruel and unusual punishment of that inmate.

forced to sleep on a mattress on the floor, as he states in his response, the Constitution is indifferent as to whether the mattress a detainee sleeps on is on the floor or on a bed absent some aggravating circumstances.⁴ See Mann v. Smith, 796 F.2d 79, 85 (5th Cir. 1986); Castillo v. Bowles, 687 F.Supp. 277, 281 (N.D. Tex. 1988).

Defendants' policy of prohibiting high-escape risk inmates from participating in the county jail's exercise program is reasonably related to a legitimate penological interest. See Martin, 845 F.2d at 1457 (denial of outdoor exercise was related to legitimate prison concern in security, based on escape charge pending against detainee, and thus was not a constitutional deprivation). Plaintiff has raised no sufficient questions of fact as to whether he was classified as a high-escape risk. The fact that Plaintiff was classified as minimum to moderate risk at the federal prison does not mean that he was classified as such during his incarceration at the TCCJ, especially given the fact that he was being held on a state detainer.

Similarly, there remain no genuine issues of material fact as to whether Plaintiff was denied a clean uniform for more than a temporary period of time and as to whether he was housed where there were no fire alarms. The Special Report reveals that inmates should be given an opportunity to receive a complete change of clean clothing at least once a week, and Plaintiff has not

⁴ While Plaintiff alleges he had to sleep on the floor without a mattress for a couple of days, he has failed to submit an affidavit or any other evidence.

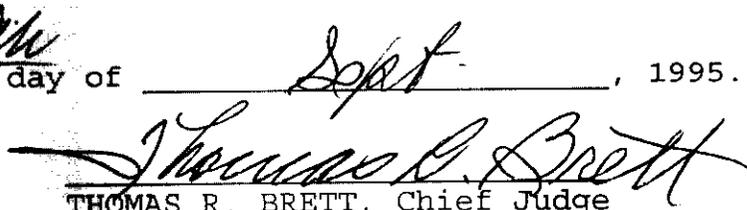
controverted Defendants' statement by presenting an affidavit or a copy of a "prison grievance." Only the failure to regularly provide prisoners with clean clothing constitutes a denial of personal hygiene and sanitary living conditions. See, e.g., Dawson v. Kendrick, 527 F.Supp. 1252, 1288-89 (S.D.W.Va. 1981); see also Williams v. Hart, 930 F.2d 36, 1991 WL 47118, at *2 (10th Cir. 1991) (unpublished opinion). Moreover, the Tulsa County Jail has fire alarms, smoke detectors, and fire extinguishers.

Lastly, the Court finds that the incidents involving the gas in the ventilation system, the temporary closing of the kitchen on the ninth floor, the \$12.90 bookkeeping error in Plaintiff's commissary account, the loss of phone and other privileges because of rule violations, and shakedowns after midnight do not amount to punishment under the Fourteenth Amendment.

III. CONCLUSION

Viewing the evidence in the light most favorable to Plaintiff the Court finds that Defendants have made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendants' summary judgment evidence, and that Defendants are entitled to judgment as a matter of law. Accordingly, Defendants' motions for summary judgment (docket #19 and #28) are hereby granted.

SO ORDERED THIS 15th day of Sept., 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

MARJORIE RADFORD,
an individual,
Plaintiff,
v.
J.C. PENNEY LIFE INSURANCE
COMPANY, a Delaware corpora-
tion doing business in the
State of Oklahoma
Defendant.

No. 95-C-528-K

ENTERED ON DOCKET
DATE SEP 19 1995

FILED

SEP 18 1995

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

ORDER

Now, on this thirteenth day of September, 1995, this case comes on for case management conference. Defendant J.C. Penney Life Insurance Company removed this case from the District Court of Osage County, Oklahoma to this Court on June 14, 1995 based upon diversity jurisdiction. 28 U.S.C. § 1332.

Plaintiff Marjorie Radford filed a stipulation with this Court representing that her total damages in this action do not exceed \$50,000. Therefore, as it appears that this Court lacks subject matter jurisdiction, this case shall be remanded. 28 U.S.C. § 1447(c).

ORDERED this 18 day of September, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

WILLIAM McLaurin,
Plaintiff,
vs.
DONNA E. SHALALA, SECRETARY
OF HEALTH AND HUMAN SERVICES,
Defendant.

No. 93-C-858-K

ENTERED ON DOCKET
DATE ~~SEP 10 1995~~

FILED

SEP 18 1995

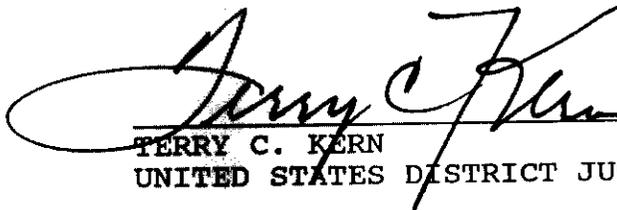
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

J U D G M E N T

This matter came before the Court for consideration of the appeal of Plaintiff, William McLaurin, to the Secretary's denial of Social Security disability benefits. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered affirming the Secretary's decision,

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

IT IS SO ORDERED THIS 18 DAY OF SEPTEMBER, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

CR

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

ANNETTE A. BLANKE, individually,
and ANNETTE A. BLANKE, as mother
and guardian of JESSE BLANKE and
KRISTA BLANKE,

Plaintiffs,

vs.

BILLY E. ALEXANDER, individually,
BUILDERS TRANSPORT, INC., a foreign
corporation, and PLANET INSURANCE
COMPANY a/k/a RELIANCE NATIONAL
INDEMNITY COMPANY, a foreign cor-
poration,

Defendants.

SEP 15 1995

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

Case No. 94-C-1165-BU

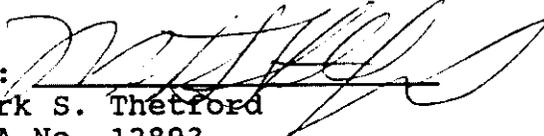
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DATE SEP 18 1995

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the parties herein, by and through their attorneys
of record, Mark S. Thetford of Stipe Law Firm for the Plaintiffs
and Daniel E. Holeman and Michael R. Annis of Atkinson, Haskins,
Nellis, Boudreaux, Holeman, Phipps & Brittingham for the
Defendants, and hereby stipulate that Jesse C. Blanke, a minor, is
dismissed without prejudice from this action.

Respectfully submitted,

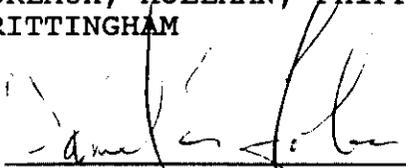
STIPE LAW FIRM

By: 
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Muskogee, OK 74402
(918) 683-5050
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Attorneys for Plaintiffs

and

ATKINSON, HASKINS, NELLIS,
BOUDREAUX, HOLEMAN, Phipps &
BRITTINGHAM

By: 
Daniel E. Holeman, OBA #11865
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1500 ParkCentre
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Tulsa, OK 74103-4524

lc

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

FILED
SEP 13 1995

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

CONNIE SPENCER,

Plaintiff,

vs.

SAND SPRINGS PUBLIC SCHOOLS
OF TULSA COUNTY, OKLAHOMA,

Defendant.

Case No. 94-C-681-K

ENTERED ON DOCKET
DATE ~~SEP 13 1995~~

STIPULATION TO DISMISS WITH PREJUDICE

Plaintiff Connie Spencer and Defendant Sand Springs Public Schools, Independent School District No. 2, Tulsa County, by and through their attorneys, hereby stipulate pursuant to a Settlement Agreement between the parties that all claims in the above captioned cause have been dismissed with prejudice, with each party to bear their own costs and attorney fees.

CONNIE SPENCER, Plaintiff

By: Robert L. Briggs
Robert L. Briggs, OBA #10215
Oil Capital Building
507 S. Main, Suite 605
Tulsa, Oklahoma 74103
(918) 599-7780

ATTORNEY FOR PLAINTIFF

and

RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS

By: Gary L. Watts
Gary L. Watts, OBA #9404
502 West Sixth Street
Tulsa, Oklahoma 74119-1010
(918) 587-3161

ATTORNEYS FOR DEFENDANT

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

FILED

SEP 15 1995

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

GREGORY COLE, CARLETTA FISHER,)
KENDRICK ADAMS, CORNELL DAWSON)
and CHRISTINA DAY,)

Plaintiffs,)

vs.)

Civil No. 94-CV-1135-~~B~~^H

CITY OF BRISTOW; OFFICERS)
RANDY WOOD, DALLAS ARNELL and)
ERIC ROBERTS, Individually and)
as Representatives of the City)
of Bristow as Police Officers,)
JOHN DOE, Unknown, Individually)
and as a Representative of the)
City of Bristow as a Police)
Officer,)

Defendants.)

ENTERED ON DOCKET
DATE SEP 18 1995

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties stipulate that this case is dismissed with prejudice against all Defendant, City of Bristow, Oklahoma, Officers Randy Wood, Dallas Arnell, Eric Roberts and John Doe, individually and as Representatives of the City of Bristow as Police Officers.

Ronald V. Combs, III

RONALD COMBS, III OBA #11073
Attorney for Plaintiffs
P.O. Box 13352
Oklahoma City, OK 73113

John H. Lieber

JOHN H. LIEBER, OBA #5421
Attorney for Defendants
ELLER & DETRICH
2727 East 21st Street
Suite 200, Midway Building
Tulsa, Oklahoma 74114

Handwritten mark

FILED

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

SEP 15 1995

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

MICHAEL THOMAS, an individual,)
)
Plaintiff,)
)
vs.)
)
ED CHAMBERS, an individual;)
STEVE CASTELLON, an individual;)
and GIT-N-GO; an Oklahoma)
corporation,)
)
Defendants.)

No. 95-C-246-BU

ENTERED ON DOCKET
DATE SEP 18 1995

STIPULATION OF DISMISSAL

COME NOW the Plaintiff and the Defendants, by and through their respective attorneys, and in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedures, hereby stipulate to the dismissal with prejudice of all claims and causes of action involved herein with prejudice for the reason that all matters, causes of action and issues in the case have been settled, compromised and released herein, including post and pre-judgment interest.

BRIAN E. DUKE

Brian E. Duke

Attorney for Plaintiff

BRUCE N. POWERS

Bruce N. Powers

Attorney for Defendants

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JOHN J. GRAMMER; SHIRLEY A.)
GRAMMER; UNKNOWN SPOUSE OF)
John J. Grammer, if any; UNKNOWN)
SPOUSE OF Shirley A. Grammer, if any;)
CITY OF TULSA, Oklahoma; STATE OF)
OKLAHOMA, ex rel. OKLAHOMA TAX)
COMMISSION; COUNTY TREASURER,)
Tulsa County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
)
Defendants.)

FILED

SEP 14 1995

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

Civil Case No. 95-C 290H

ENTERED ON DOCKET

DATE SEP 15 1995

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14th day of September, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, CITY OF TULSA, Oklahoma, appears not having previously filed a Disclaimer; and the Defendants, JOHN J. GRAMMER, SHIRLEY A. GRAMMER, UNKNOWN SPOUSE OF John J. Grammer, if any, and UNKNOWN SPOUSE OF Shirley A. Grammer, if any, 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, was served a copy of Summons and Complaint on March 30, 1995, by Certified Mail; and that the Defendant, CITY OF TULSA, Oklahoma, was served of Summons and Complaint on March 30, 1995, by Certified Mail.

The Court further finds that the Defendants, JOHN J. GRAMMER, SHIRLEY A. GRAMMER, UNKNOWN SPOUSE OF John J. Grammer, if any, and UNKNOWN SPOUSE OF Shirley A. Grammer, if any, 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 June 7, 1995, and continuing through July 12, 1995, 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, JOHN J. GRAMMER, SHIRLEY A. GRAMMER, UNKNOWN SPOUSE OF John J. Grammer, if any, and UNKNOWN SPOUSE OF Shirley A. Grammer, if any, 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, JOHN J. GRAMMER, SHIRLEY A. GRAMMER, UNKNOWN SPOUSE OF John J. Grammer, if any, and UNKNOWN SPOUSE OF Shirley A. Grammer, if any. 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 Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, 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 April 11, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on April 19, 1995; that the Defendant, CITY OF TULSA, Oklahoma, filed its Disclaimer on April 25, 1995; and that the Defendants, JOHN J. GRAMMER, SHIRLEY A. GRAMMER, UNKNOWN SPOUSE OF John J. Grammer, if any, and UNKNOWN SPOUSE OF Shirley A. Grammer, if any, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, JOHN J. GRAMMER and SHIRLEY A. GRAMMER, were granted a Divorce on March 5, 1991, in Case No. FD 91-0723, in District Court, Tulsa County, Oklahoma.

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 Thirteen (13), in Block Five (5), of SUN VALLEY
SECOND ADDITION, A Subdivision to the City of Tulsa,
Tulsa County, State of Oklahoma, according to the Recorded
Plat thereof.**

A/K/A 7107 E. Marshall Place, Tulsa, Okla.

The Court further finds that on March 5, 1986, Marlet Howard and Thelma Howard, executed and delivered to LIBERTY MORTGAGE COMPANY, their mortgage note in the amount of \$40,652.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Marlet Howard and Thelma Howard, husband and wife, executed and delivered to LIBERTY MORTGAGE COMPANY, a mortgage dated March 5, 1986, covering the above-described property. Said mortgage was recorded on March 7, 1986, in Book 4928, Page 1559, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 31, 1987, Liberty Mortgage Company, assigned the above-described mortgage note and mortgage to Universal Savings Bank F.A. of Wisconsin. This Assignment of 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 June 8, 1989, Universal Savings Bank F.A. of Wisconsin, 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 June 12, 1989, in Book 5188, Page 1245, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, JOHN J. GRAMMER and SHIRLEY A. GRAMMER, currently hold title to the property by virtue of a General Warranty Deed,

dated April 10, 1987, and recorded on April 13, 1987, in Book 5015, Page 20, in the records of Tulsa county, Oklahoma, and are the current assumptors of the subject indebtedness.

The Court further finds that on June 3, 1989, the Defendants, JOHN J. GRAMMER and SHIRLEY A. GRAMMER, 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 June 29, 1990 and July 19, 1991.

The Court further finds that the Defendants, JOHN J. GRAMMER and SHIRLEY A. GRAMMER, 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, JOHN J. GRAMMER and SHIRLEY A. GRAMMER, are indebted to the Plaintiff in the principal sum of \$56,092.98, plus interest at the rate of 9.5 percent per annum from January 1, 1995 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 \$4.00 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 Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of \$149.04 which became a lien on

the property as of August 7, 1990. 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 Defendant, CITY OF TULSA, Oklahoma, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, JOHN J. GRAMMER, SHIRLEY A. GRAMMER, UNKNOWN SPOUSE OF John J. Grammer, if any, and UNKNOWN SPOUSE OF Shirley A. Grammer, if any, 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, JOHN J. GRAMMER and SHIRLEY A. GRAMMER, in the principal sum of \$56,092.98, plus interest at the rate of 9.5 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$4.00, plus costs and interest, 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. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of \$149.04 for state income taxes, plus the costs and accrued and accruing interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, CITY OF TULSA, Oklahoma, JOHN J. GRAMMER, SHIRLEY A. GRAMMER, UNKNOWN SPOUSE OF John J. Grammer, if any, and UNKNOWN SPOUSE OF Shirley A. Grammer, if any, 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, JOHN J. GRAMMER and SHIRLEY A. GRAMMER, 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 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 the Defendant, STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION, in the amount of \$149.04,
state income taxes, plus costs and accrued and accruing interest.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa
County, Oklahoma, in the amount of \$4.00, 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.

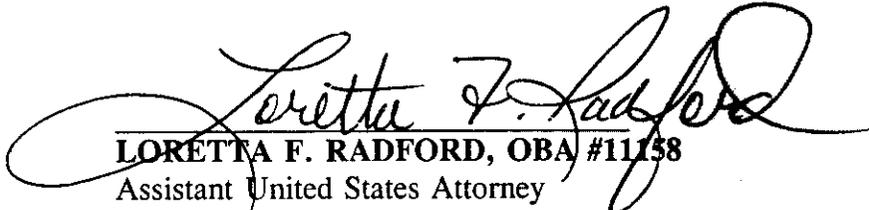
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant
to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any
right to possession based upon any right of redemption) in the mortgagor or any other person
subsequent to the foreclosure sale.

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/ SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



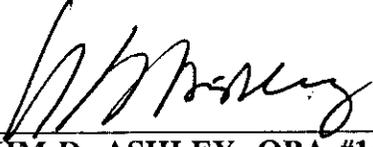
LORETTA F. RADFORD, OBA #11138

Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852

Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



KIM D. ASHLEY, OBA #14175

Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, *ex rel.*
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 95-C 290H

LFR:flv

COPY

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

FILED

SEP 14 1995

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

MARY WILLIAMS AND RICHARD
WILLIAMS, HUSBAND AND WIFE,
Plaintiffs,

-vs.-

EPIC HEALTH CARE GROUP, INC.,
Defendant.

CASE NO. 95-C-384 H

ENTERED ON DOCKET

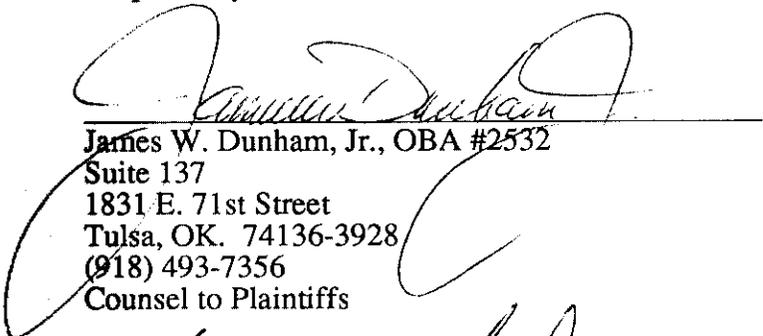
DATE SEP 15 1995

JOINT STIPULATION FOR DISMISSAL

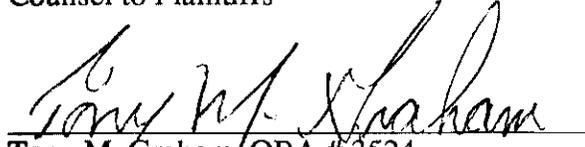
The parties hereby jointly stipulate to the dismissal of this action, with prejudice. In support hereof, the parties represent to the Court that all claims and controversies between the parties, at issue herein, have been fully compromised and settled by fully executed and delivered agreements, supported by fully paid consideration.

WHEREFORE, the parties jointly pray that this matter be dismissed with prejudice, immediately and without delay.

Respectfully Submitted,


James W. Dunham, Jr., OBA #2532

Suite 137
1831 E. 71st Street
Tulsa, OK. 74136-3928
(918) 493-7356
Counsel to Plaintiffs


Tony M. Graham, OBA #3524

Attorney at Law
Suite 1400
525 S. Main
Tulsa, OK. 74103
(918) 583-7129
Counsel to Defendant

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

FILED

SEP 13 1995

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

LAVERN BERRYHILL,)
)
 Plaintiff,)
)
 vs.)
)
 RONALD J. CHAMPION, et al.,)
)
 Defendants.)

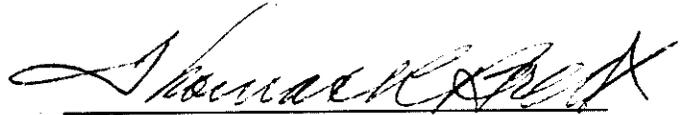
No. 94-C-723-B

ENTERED ON DOCKET
DATE SEP 15 1995

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby enters judgment in favor of all Defendants and against Plaintiff Lavern Berryhill. Plaintiff shall take nothing on his claim. Each side is to pay its respective costs and attorney fees.

SO ORDERED THIS 13th day of Sept., 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

27

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

VELMA L. MORNES, on behalf of)
JESSE L. NORMENT and COLECIA)
NORMENT,)

Plaintiff,)

v.)

SHIRLEY S. CHATER, ¹ Commissioner,)
Social Security Administration,)

Defendant.)

NO. 90-C-97-M

FILED

SEP 14 1995

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

ENTERED ON DOCKET

DATE SEP 15 1995

JUDGMENT

Judgment is hereby entered for the Defendant and against Plaintiff. Dated this 14th day
of Sept., 1995.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

subject of this appeal. Plaintiff appropriately requested review by the Appeals Council, which request was denied. The decision of the Appeals Council represents a final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481. On Plaintiff's unopposed application, the present case number was re-opened for a review of the April 24, 1992 denial decision. [Dkt. 23].

The role of the court in reviewing the decision of the Secretary under 42 U.S.C. § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (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, 91 S.Ct. at 1427.

Plaintiff seeks to obtain surviving child benefits for her two children under 42 U.S.C. § 402(d) which provides for payment of insurance benefits to a child "of an individual who dies a fully or currently insured individual". To qualify for such benefits several requirements must be met. The child must be the insured person's child and must be dependent on the insured, as well as meet other age and marital status requirements not at issue here. 42 U.S.C. § 402(d); 20 C.F.R. § 404.350. Plaintiff claims that her children, Jesse LaShon Norment and Colecia

LaKaye Norment, are the natural children of the decedent and that they were dependent on him. There are several ways to prove that a person is the natural child of the insured. See 20 C.F.R. § 404.355. Because the written forms of proof under §404.355(c) were not available in this case, only the method listed in 20 C.F.R. § 404.355(d) is applicable. That section requires production of evidence other than the **written** forms of proof outlined in 404.355(c) and "evidence to show that the insured was **either** living with you or contributing to your support when he or she died." *Id.*

The initial May 31, 1989, decision of the ALJ determined that the evidence "strongly suggests" that the two children, were **the** natural children of the deceased wage earner. However, in addition to biological **parentage**, to be eligible for benefits as a "natural child" of the decedent, the applicable statute, 42 U.S.C. § 416(h) and regulation, 20 C.F.R. § 404.355(d), also require that the insured individual "**was** living with or contributing to the support of the applicant at the time such insured individual **died**." *Id.* Since the evidence demonstrated that the deceased wage earner neither lived **with** or supported the children at any time after August 1978 until the time of his death in 1981, **they** were not entitled to child's insurance benefits. Nor did they otherwise qualify as **presumptive dependents** under statutory or regulatory criteria. See 42 U.S.C. § 416(h)(3)(c)(i); 20 C.F.R. § 404.355(a)-(c).

On appeal from the May 1989 decision, the District Court adopted the Magistrate's Report and Recommendation, which **concluded** that decedent's tax returns for years prior to 1979, (when Plaintiff and her children **were** actually living with decedent) should have been obtained [Dkt 17]. These tax returns **might contain** a written acknowledgment by decedent that the children were his. If such an **acknowledgment** existed, then the children would be deemed

to be decedent's and there would be no impediment to their receiving benefits under 42 U.S.C. § 416(h)(3)(C)(i)(I). The case was therefore, remanded to obtain those tax returns. The record reflects that the ALJ attempted to obtain the tax returns, but they were not available [R. 132, 134, 137, 146-7].

In the April 24, 1992 decision, which is the subject of the instant appeal, the ALJ found that "the evidence of record does not establish that the wage earner was the biological father of the children or that he was living with his children or contributing to their support at the time of his death." [R. 73]. The Court notes that, contrary to the ALJ's finding, the record does support a finding that decedent was the biological father of the children. However, the record demonstrates that Plaintiff has not established that the decedent was contributing to their support at the time of their death which is required to establish their eligibility for benefits. Indeed, Plaintiff has acknowledged that "[t]his case hinges on a finding of whether or not Jesse Norment [decedent] was contributing to the support of the children." According to Plaintiff, if he was, then the children are entitled to benefits. The Court agrees with this assessment.

Plaintiff testified that the children were not living with decedent at the time of his death [R. 36]. She also testified that he was not making support contributions at that time [R. 38]. Plaintiff and her children traveled from their home in Tulsa to Little Rock to visit once a month and "most of the times" during those visits they stayed with decedent at his apartment and he would provide food and sometimes clothes and movies. Once in a while he gave Plaintiff \$40.00 or \$50.00 [R. 96-100; 126-127]. Since the children did not live with decedent, the only question is whether the children were otherwise dependent upon decedent.

The Social Security Regulations provide criteria to determine whether a child is

dependent upon an insured. An insured is considered to have made a "contribution for support" if some of his or her own cash or goods are given to help support an individual. However, the contributions must be regular and large enough to meet an important part of living expenses. 20 C.F.R. § 404.366. The regulations specifically provide that gifts or donations once in a while for special purposes will not be considered contributions for support. 20 C.F.R. § 404.366(a)(2). Plaintiff's testimony establishes that the contributions made by decedent were small, and only occasional, or sporadic. The evidence does not establish that the claimant children were dependent upon decedent for their support.² Thus, because the children do not meet the requirements of 42 U.S.C. § 416(h)(3)(C)(ii) and 20 C.F.R. § 404.355(d), they are not entitled to benefits.

The Court finds that the decision of the Secretary denying benefits is supported by substantial evidence. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 14th day of September, 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

² Decedent's 1979 tax return does not establish the dependency of the claimant children at the time of his death in 1981. Colecia and Jesse did not live with decedent in 1979 [R. 99]. Moreover, the tax return is of such questionable veracity that it does not qualify as a written acknowledgement of paternity. The decedent claimed 5 people as his dependent children, Shawn, Jackie, Michael, Felicia, and Ella [R. 55]. This list includes one person, Ella, who was not decedent's child and was not a child at all. Ella was the mother of one of decedent's other children, Jackie [R. 95]. Although the names Colecia and Jesse LaShon are not among those listed as dependents, there was evidence that Colecia was also known as Felicia, and Jesse LaShon was also called Shawn [R. 153].

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 13 1995

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)

vs.)

BILLY JOE EARP aka Billy J. Earp;)
UNKNOWN SPOUSE OF Billy Joe Earp)
aka Billy J. Earp, if any; DOROTHY)
JOYCE EARP aka Dorothy J. Earp;)
UNKNOWN SPOUSE OF Dorothy Joyce)
Earp aka Dorothy J. Earp, if any;)
SERVICE COLLECTION)
ASSOCIATION, INC.; STATE OF)
OKLAHOMA, ex rel. OKLAHOMA TAX)
COMMISSION; CITY OF BROKEN)
ARROW, Oklahoma; COUNTY)
TREASURER, Tulsa County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)

Defendants.)

ENTERED ON DOCKET
SEP 15 1995
DATE _____

Civil Case No. 95-C 239B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 13 day of Sept.,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, SERVICE COLLECTION ASSOCIATION, INC., appears by its Attorney, Fred A. Pottorf; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, CITY OF BROKEN ARROW, Oklahoma,

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

appears by Michael R. Vanderburg, City Attorney, Broken Arrow, Oklahoma; the Defendant, DOROTHY JOYCE EARP aka Dorothy J. Earp, appears not having previously filed a Disclaimer; the Defendant, UNKNOWN SPOUSE OF Dorothy Joyce Earp aka Dorothy J. Earp, if any, should be Dismissed from this action; and the Defendants, BILLY JOE EARP aka Billy J. Earp and UNKNOWN SPOUSE OF Billy Joe Earp aka Billy J. Earp, who is the same person as ZINA EARP, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, BILLY JOE EARP aka Billy J. Earp, and UNKNOWN SPOUSE OF Billy Joe Earp aka Billy J. Earp, who is the same person as ZINA EARP, each signed a Waiver of Summons on April 10, 1995; that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., signed a Waiver of Summons on March 20, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on March 17, 1995, by Certified Mail; and the Defendant, CITY OF BROKEN ARROW, Oklahoma, was served a copy of Summons and Complaint on March 16, 1995, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on March 30, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on April 6, 1995; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on March 22, 1995; the Defendant, SERVICE COLLECTION ASSOCIATION, INC., filed its Answer on April 13, 1995; the Defendant, DOROTHY JOYCE EARP, filed her Disclaimer on April 7, 1995, and an Affidavit on April 12, 1995; the Defendants, BILLY JOE EARP aka Billy J. Earp and UNKNOWN SPOUSE OF Billy Joe Earp aka Billy J. Earp, who is the same person as

ZINA EARP, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, BILLY JOE EARP, is one and the same person as Billy J. Earp, and will hereinafter be referred to as "BILLY JOE EARP." The Defendant, DOROTHY J. EARP, is one and the same person as Dorothy Joyce Earp, and will hereinafter be referred to as "DOROTHY J. EARP." The Defendants, BILLY JOE EARP and DOROTHY J. EARP, were granted a Divorce on June 25, 1992, in Case No. FD 92-01239, in Tulsa County District Court.

The Court further finds that the Defendant, DOROTHY J. EARP, is a single unmarried person, as evidenced by the Affidavit filed on April 12, 1995. The Defendant, UNKNOWN SPOUSE OF Dorothy J. Earp, if any, should be dismissed from this action.

The Court further finds that the Defendant, UNKNOWN SPOUSE OF Billy Joe Earp, if any, is one and the same person as ZINA EARP, and will hereinafter be referred to as "ZINA EARP."

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

**LOT TWENTY-THREE (23), BLOCK TWO (2), SOUTH
PARK PLAZA, AN ADDITION TO THE CITY OF
BROKEN ARROW, TULSA COUNTY, STATE OF
OKLAHOMA, ACCORDING TO THE RECORDED PLAT
THEREOF.
AKA/ 400 WEST ALBUQUERQUE, BROKEN ARROW,
OKLAHOMA 74012**

The Court further finds that on December 16, 1988, the Defendants, BILLY JOE EARP and DOROTHY J. EARP, executed and delivered to LEADER FEDERAL

MORTGAGE, INC., their mortgage note in the amount of \$64,100.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10½%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, BILLY JOE EARP and DOROTHY J. EARP, then Husband and Wife, executed and delivered to LEADER FEDERAL MORTGAGE, INC., a mortgage dated December 16, 1988, covering the above-described property. Said mortgage was recorded on December 20, 1988, in Book 5146, Page 2222, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 16, 1988, LEADER FEDERAL MORTGAGE, INC., assigned the above-described mortgage note and mortgage to LEADER FEDERAL SAVINGS AND LOAN ASSOCIATION. This Assignment of Mortgage was recorded on December 6, 1990, in Book 5292, Page 1667, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 28, 1990, LEADER FEDERAL BANK FOR SAVINGS, 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 September 5, 1990, in Book 5274, Page 2481, in the records of Tulsa County, Oklahoma. This Assignment was re-recorded on December 6, 1990, in Book 5292, Page 1668, in the records of Tulsa County, Oklahoma, to show proper chain of title.

The Court further finds that on August 10, 1990, the Defendants, BILLY JOE EARP and DOROTHY J. EARP, 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 February 22, 1991 and April 3, 1992, and an agreement was made between the Plaintiff and the Defendant, BILLY JOE EARP, was made on August 3, 1993.

The Court further finds that the Defendants, BILLY JOE EARP and DOROTHY J. EARP, 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, BILLY JOE EARP and DOROTHY J. EARP, are indebted to the Plaintiff in the principal sum of \$94,401.90, plus interest at the rate of 10½ percent per annum from January 1, 1995 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 \$26.00 which became a lien on the property as of June 26, 1992, and a lien in the amount of \$56.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of \$173.23, plus accrued and accruing interest, which became a lien on the property as of December 20, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$5,260.20, representing \$4,634.20 Principal,

\$540.00 Attorney Fees and \$86.00 Costs, plus accruing costs and interest, which became a lien on the property as of April 25, 1991. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, BILLY JOE EARP and ZINA EARP, 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 the Defendant, DOROTHY J. EARP, Disclaims any right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, BILLY JOE EARP and DOROTHY J. EARP, in the principal sum of \$94,401.90, plus interest at the rate of 10½ percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of ^{5.89}~~5.70~~ 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 \$82.00, plus costs and interest, 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 Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of \$173.23, plus accrued and accruing interest, for state income taxes, and costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., have and recover judgment in the amount of \$5,260.20, representing \$4,634.20 Principal Amount, \$540.00 Attorney Fees, and \$86.00 Costs, for a judgment, plus the accruing costs and interest.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, BILLY JOE EARP, ZINA EARP and DOROTHY EARP, 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, BILLY JOE EARP and DOROTHY J. EARP, to satisfy the

judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, SERVICE COLLECTION ASSOCIATION, INC., in the amount of \$5,260.20, plus accrued and accruing interest, and costs, for judgment.

Fourth:

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

Fifth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of \$173.23, plus accrued and accruing interest, and costs, for state income taxes which are currently due.

Sixth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$56.00, 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.

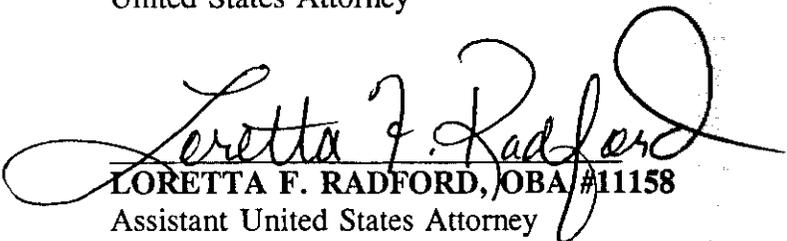
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

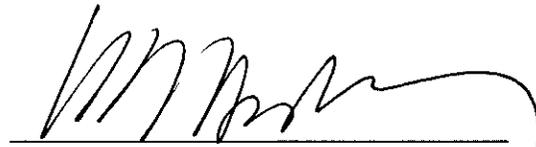
UNITED STATES DISTRICT JUDGE

APPROVED:

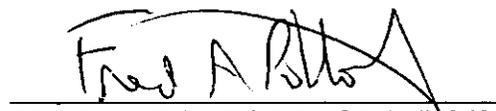
STEPHEN C. LEWIS
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Mapco Plaza Building
177 South Boulder, Suite 900
Tulsa, Oklahoma 74119
(918)582-3191

Judgment of Foreclosure
Civil Action No. 95-C 239B

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 14 1995

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MAURICE EZELL; BRENDA EZELL;)
GILCREASE HILLS HOMEOWNERS)
ASSOCIATION; COUNTY)
TREASURER, Osage County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Osage County,)
Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE SEP 15 1995

Civil Case No. 95-C 280B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14 day of Sept.,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Osage County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, appear by John S. Boggs, Jr., Assistant District Attorney, Osage County, Oklahoma; and the Defendants, MAURICE EZELL, BRENDA EZELL and GILCREASE HILLS HOMEOWNERS ASSOCIATION, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, MAURICE EZELL, was served with process a copy of Summons and Complaint on May 9, 1995; that the Defendant, BRENDA EZELL, was served with process a copy of Summons and Complaint on May 9, 1995; that the Defendant, GILCREASE HILLS HOMEOWNERS ASSOCIATION, was served with process of Summons and Complaint on

NOTE: THIS CASE IS FILED
BY MR. LAWRENCE
PRO SE LITIGANT
UPON RECEIPT.

Complaint on May 8, 1995; that Defendant, COUNTY TREASURER, Osage County, Oklahoma, acknowledged receipt of Summons and Complaint on March 29, 1995, by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, acknowledged receipt of Summons and Complaint on March 29, 1995, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Osage County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, filed their Answer on April 6, 1995; and that the Defendants, MAURICE EZELL, BRENDA EZELL and GILCREASE HILLS HOMEOWNERS ASSOCIATION, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on May 17, 1995, Maurice Ezell and Brenda Ezell filed their voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 95-01436-C. On August 25, 1995, the case was Dismissed. The property which is the subject of this foreclosure was listed in schedules A and C.

The Court further finds that the Defendants, MAURICE EZELL and BRENDA EZELL, are husband and wife.

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 Osage County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT TWENTY-FIVE (25), BLOCK TWO (2), GILCREASE HILLS, VILLAGE I, BLOCKS 1, 2, AND 3, A SUBDIVISION IN OSAGE COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

**2402 W. NEWTON CT.
TULSA, OK 74127**

The Court further finds that on June 17, 1986, Edward A. Thomas, Jr., executed and delivered to FIRSTIER MORTGAGE CO., his mortgage note in the amount of \$63,100.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Edward A. Thomas, Jr., a single person, executed and delivered to FIRSTIER MORTGAGE CO., a mortgage dated June 17, 1986, covering the above-described property. Said mortgage was recorded on June 25, 1986, in Book 0697, Page 801, in the records of Osage County, Oklahoma.

The Court further finds that on August 31, 1987, FirstTier Mortgage Co., assigned the above-described mortgage note and mortgage to LEADER FEDERAL SAVINGS & LOAN ASSOCIATION. This Assignment of Mortgage was recorded on September 24, 1987, in Book 0721, Page 484, in the records of Osage County, Oklahoma.

The Court further finds that on March 14, 1989, LEADER FEDERAL SAVINGS AND LOAN ASSOCIATION, assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT his successors in office and assigns. This Assignment of Mortgage was recorded on March 14, 1989, in Book 0750, Page 726, in the records of Osage County, Oklahoma.

The Court further finds that Defendants, MAURICE EZELL and BRENDA EZELL, currently hold title to the property by virtue of a General Warranty deed, conveyed from Edward A. Thomas, Jr., and Mary Ray Buffington Thomas, Husband and Wife, to MAURICE EZELL and BRENDA EZELL, Husband and Wife, dated December 31, 1987,

recorded on January 4, 1988, in Book 728, Page 169, in the records of Osage County, Oklahoma. The Defendants, MAURICE EZELL and BRENDA EZELL, are the current assumptors of the subject indebtedness.

The Court further finds that on February 14, 1989, the Defendants, MAURICE EZELL and BRENDA EZELL, 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 February 11, 1991, and January 24, 1992.

The Court further finds that the Defendants, MAURICE EZELL and BRENDA EZELL, 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, MAURICE EZELL and BRENDA EZELL, are indebted to the Plaintiff in the principal sum of \$89,703.95, plus interest at the rate of 9.5 percent per annum from January 1, 1995 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, MAURICE EZELL, BRENDA EZELL and GILCREASE HILLS HOMEOWNERS ASSOCIATION, 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, Osage County, 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 In Rem against the Defendants, MAURICE EZELL and BRENDA EZELL, in the principal sum of \$89,703.95, plus interest at the rate of 9.5 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.89 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 Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, MAURICE EZELL, BRENDA EZELL and GILCREASE HILLS HOMEOWNERS ASSOCIATION, 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, MAURICE EZELL and BRENDA EZELL, 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 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;

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.

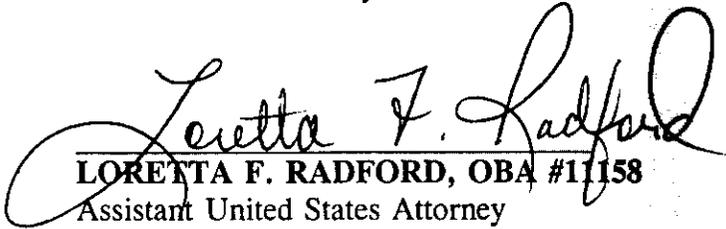
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described **real property**, under and by virtue of this judgment and decree, all of the Defendants and all **persons** claiming under them since the filing of the Complaint, be and they are forever **barred and foreclosed** 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



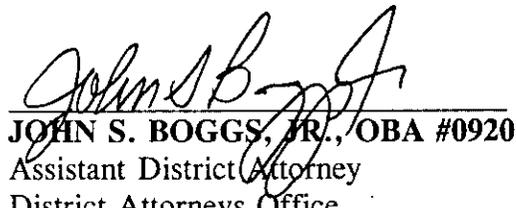
LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

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JOHN S. BOGGS, JR., OBA #0920

Assistant District Attorney

District Attorneys Office

Osage County Courthouse

Pawhuska, Oklahoma 74056

(918)287-1510

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Osage County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 280B

LFR:flv

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

FILED

SEP 13 1995

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

ALFRED RAY CARTER,)
)
 Plaintiff,)
)
 vs.)
)
 STATE OF OKLAHOMA, and THE)
 OKLAHOMA ATTORNEY GENERAL,)
)
 Defendants.)

No. 94-C-635-B ✓
consolidated with
95-C-851-B

ENTERED ON DOCKET
DATE SEP 15 1995

ORDER

Plaintiff, a state prisoner appearing pro se, brings this consolidated action pursuant to 42 U.S.C. § 1983, against the State of Oklahoma and the Attorney General for the State of Oklahoma. He challenges the constitutionality of the habitual offender statute, Okla. Stat. tit. 21, § 51(A) and (B), under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹ Specifically Plaintiff alleges that it is unconstitutional for section 51(B) to consider for enhancement purposes a crime that is committed within ten years of the completion of a prior sentence, but which may not result in a conviction until after the ten-year statutory period. Plaintiff seeks a declaratory judgment and actual and punitive damages. In a brief submitted on September 8, 1994, Plaintiff also seeks release from confinement under 28 U.S.C. §

¹ Section 51(B) provides in part as follows:

Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offense within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of not less than twenty years.

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2254 if possible. Defendants have moved to dismiss or in the alternative for summary judgment. Plaintiff has filed a cross motion for summary judgment and a motion for an evidentiary hearing. For the reasons stated below, the Court concludes that Defendants' motion to dismiss should be granted.

I. MOTION TO DISMISS STANDARD

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

II. ANALYSIS

A. State of Oklahoma

"A State is not a person within the meaning of § 1983," Will v. Michigan Dept. of State Police, 491 U.S. 58, 64 (1989). Thus,

although "[s]ection 1983 provides a federal forum to remedy many deprivations of civil liberties, . . . it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." Id. at 66. Moreover, "in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment," Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (citations omitted), "whether the relief sought is legal or equitable." Papasan v. Allain, 478 U.S. 265, 276 (1986).

The State of Oklahoma has not waived its Eleventh Amendment immunity. See Nichols v. Department of Corrections, 631 P.2d 746, 750-51 (Okla. 1981). Thus, the Court concludes that the State of Oklahoma is immune from suit by Plaintiff.

B. Attorney General for the State of Oklahoma

Plaintiff cannot seek money damages against the Oklahoma Attorney General, a state official sued in his official capacity, for the alleged invalidity of the habitual offender statute. See Ramirez v. Oklahoma Department of Mental Health, 41 F.3d 584, 588 (10th Cir. 1994) (Eleventh Amendment immunity remains in effect when state officials are sued for damages in their official capacity as judgment against public servant in his official capacity imposes liability on the entity that he represents). Nor can Plaintiff seek money damages for the alleged invalidity of his enhanced sentence prior to a determination that it is invalid. The

Supreme Court recently held in Heck v Humphrey, 114 S.Ct. 2364, 2372 (1994), that in order to recover damages in an action brought pursuant to 42 U.S.C. § 1983 for an allegedly unconstitutional conviction or imprisonment, or for "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," a prisoner must show that the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Therefore, Plaintiff's claim for damages against the Attorney General for the State of Oklahoma is hereby dismissed.

Plaintiff's request for declaratory and injunctive relief must similarly be dismissed under Fed. R. Civ. P. 12(b)(6). As noted above, Plaintiff's complaint essentially asks for release. The requested order, therefore, "would be tantamount to a decision on [plaintiff's] entitlement to a speedier release." Duncan v. Gunter, 15 F.3d 989, 991 (10th Cir. 1994). Therefore, Petitioner may seek this relief only in a habeas corpus action after exhausting state judicial remedies. Id. It is well established that habeas corpus is the sole federal remedy for a state prisoner seeking a determination that he is entitled to a speedier release. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).

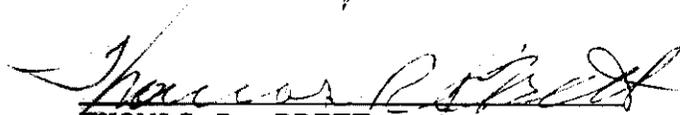
In any event, the Court concludes that Plaintiff's conclusory allegations fail to state a cause of action for which relief can be granted in that Plaintiff does not allege the factual basis for a his constitutional claims. Brown v. Zavarass, ___ F.3d ___, 1995

WL 492830, *4 (10th Cir. Aug 18, 1995). It is well established that even pro se litigants must do more than allege conclusory statements regarding constitutional claims. Id.

III. CONCLUSION

After liberally construing Plaintiff's complaint, the Court concludes that Plaintiff has failed to state a claim upon which relief can be granted. Accordingly, Defendants' motion to dismiss (docket #11-1) is **granted** and the consolidated action is hereby **dismissed with prejudice**. Defendants' motion for summary judgment (docket #11-2) and Plaintiff's motions for summary judgment and for an evidentiary hearing (docket #13 and #14) are **denied as moot**.

SO ORDERED THIS 13th day of Sept, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

of counsel. The motion for appointment of counsel, however, was not properly forwarded to the trial judge and the record on appeal was returned to the trial court for failure to file an opening brief. Subsequently Petitioner sought an appeal out of time which the Oklahoma Court of Criminal Appeals granted on February 28, 1994. The Appellate Public Defender was appointed to represent Petitioner on appeal and a petition in error was filed on June 1, 1994.

On October 12, 1994, Petitioner filed the instant petition. He alleges ineffective assistance of his trial counsel in connection with his direct appeal. Petitioner also alleges inordinate delay in the filing of his direct criminal appeal and that his trial transcript was incomplete.

II. ANALYSIS

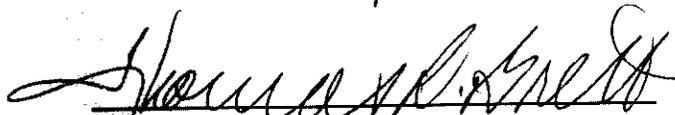
As a preliminary matter this Court must address whether Petitioner meets the exhaustion requirement of 28 U.S.C. § 2254(b) and (c). Because Petitioner has alleged, among other issues, inordinate delay in the processing of his direct criminal appeal, the Court turns to Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994), to determine whether exhaustion should be excused in this case. In Harris, the Tenth Circuit Court of Appeals held that "the state appellate process should be presumed to be ineffective and, therefore, exhaustion should presumptively be excused, when a petitioner's direct criminal appeal has been pending for two years without resolution absent a constitutionally sufficient

justification by the State." Id. at 1556. When a petitioner has been granted an appeal out of time, however, "the length of the appellate process should be measured from the entry of that order unless, of course, delay in perfecting the appeal in the first instance is attributable to the State." Id. at 1556 n.9.

On the basis of the record in this case, the Court concludes that excusing Petitioner's failure to exhaust state remedies is inappropriate. Less than two years have passed since the entry of the February 28, 1994 order granting Petitioner an appeal out of time and the delay in perfecting the appeal in the first instance is not attributable to the State. As noted above, Petitioner's motion for appointment of counsel was not brought to the attention of the trial court until Petitioner filed his Application for Post-Conviction Relief, requesting an appeal out of time. Therefore, Petitioner is not excused from exhausting his state remedies.

Accordingly, Respondent's motion to dismiss (docket #7) is granted and the instant petition is hereby dismissed without prejudice. Petitioner's motion for summary judgment, for leave to amend and to extend time to file an amended petition (docket #11, #12-1, and #12-2) are hereby denied. The Clerk shall strike and return to Petitioner his amended petition for a writ of habeas corpus (docket #14).

SO ORDERED THIS 13th day of Sept., 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

SEP 13 1995

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

KELLEY EUGENE MOSIER,)
)
 Plaintiff,)
)
 vs.)
)
 JIM EARP, and FREDDIE HALL,)
)
 Defendants.)

No. 94-C-1067-B

ENTERED ON DOCKET

DATE SEP 14 1995

ORDER

Plaintiff, a state prisoner appearing pro se, brings this action pursuant to 42 U.S.C. § 1983, naming Jim Earp, Sheriff of Delaware County, and Freddie Hall, jail inspector for the Oklahoma Department of Health as Defendants. He alleges that Defendants subjected him to "severe, health threatening and inhumane living condition[s]" during his pretrial detention at the Delaware County Jail. Defendant Hall has moved to dismiss or, in the alternative, for summary judgment on the basis of the court-ordered Martinez report. See Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978); Worley v. Sharp, 724 F.2d 862 (10th Cir. 1983). Plaintiff has objected and sought leave to amend his complaint to sue the Defendants in their official as well as individual capacities. For the reasons stated below, the Court concludes that Defendant Hall's motion to dismiss should be granted.

I. MOTION FOR LEAVE TO AMEND

In light of Plaintiff's pro se status, and in light of Federal Rule of Civil Procedure 15(a)'s requirement that leave to amend be "freely given," the Court concludes that Plaintiff should be

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permitted leave to amend his complaint to sue the Defendants in their official as well as individual capacities. "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." Hall, 935 F.2d at 1110. This broad reading of a pro se plaintiff's complaint does not, however, relieve him of the burden of alleging sufficient facts on which a cognizable claim could be based. Id. Even so, a pro se plaintiff who fails to allege sufficient facts is to be given a reasonable opportunity to amend his complaint if justice so requires. See Roman Nose v. New Mexico Dept. of Human Services, 967 F.2d 435, 438 (10th Cir. 1992).

Accordingly, the Court grants Plaintiff's motion for leave to amend.

II. MOTION TO DISMISS STANDARD

A. Standard

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S.

519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

B. Analysis

Plaintiff has failed to state a claim against Hall in either his official or individual capacities. At the time of the challenged actions, Freddie Hall was an employee of the Oklahoma Health Department, Jail Inspection Division, and therefore an employee of the State of Oklahoma. As a State employee, Hall is not a "person" within the meaning of section 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 70-71 (1989); Croft v. Harder, 927 F.2d 1163, 1164 (10th Cir. 1991). This protection flows from the State's Eleventh Amendment immunity. See Will, 491 U.S. at 66. Therefore, Plaintiff has failed to state a claim against Defendant Hall in his official capacity.

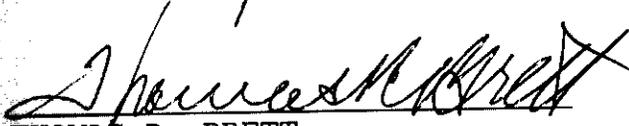
Nor has Plaintiff alleged an affirmative link sufficient to establish liability as to Hall in his individual capacity. It is well established that a defendant cannot be liable under section 1983 unless that defendant personally participated in the challenged action. Meade v. Grubbs, 841 F.2d 1512, 1527. Contrary to Plaintiff's allegations, it is not the responsibility of the state inspector to maintain a healthy environment at the Delaware County Jail. Pursuant to Okla. Stat. tit. 74, § 192, Hall only had the responsibility to inspect the Delaware County Jail and report his findings. Accordingly, Plaintiff has failed to state a claim

against Defendant Hall in his individual capacity.

III. CONCLUSION

Defendant Hall's motion to dismiss (docket #11-1) is granted and Hall is hereby dismissed with prejudice as a party in this case. Hall's motion for summary judgment (docket #11-2) is denied as moot. Plaintiff's motion to amend the complaint (docket #14) to sue the Defendants in their official and individual capacities is granted.

SO ORDERED THIS 13 day of Sept, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

SEP. 13 1995

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

LAVERN BERRYHILL,
Plaintiff,
vs.
RON CHAMPION, et al.,
Defendants.

Case No. 94-C-723-B

ENTERED ON DOCKET

ORDER

DATE SEP 14 1995

Before the Court are: a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment filed by Defendants Ron Champion, et al. (Docket #6 and #21); a Motion for Summary Judgment and a Motion that the Oklahoma State Attorney General's Office be barred from further representation of Defendants (Docket #24), filed by Plaintiff Lavern Berryhill ("Berryhill"); and a Motion that Assistant Attorney General Sarah Hawxby and "DOC personnel" Debbie Morton¹ be charged with contempt of court and perjury (Docket #23), filed by Berryhill.

Berryhill alleges in his Complaint that Defendants violated his Fourteenth Amendment rights when they transferred him from the Dick Conner Correctional Center ("DCCC") (a medium security facility) to the Oklahoma State Penitentiary ("OSP") (a maximum security facility) after he wrote a love letter to DCCC Warden Ron Champion's wife. Berryhill also alleges that he is incarcerated on a void judgment and sentence, and that Defendants violated his

¹Morton is Warden's Assistant at James Crabtree Correctional Center in Helena, Oklahoma, where Berryhill currently is incarcerated.

Eighth Amendment rights by: (1) placing him in a cell with an inmate who beat him; and (2) "double celling", because a cellmate broke Berryhill's television set. The Court permitted Berryhill to amend his Complaint to add the allegation that his transfer violated his First Amendment right to free speech because he alleges the transfer was made in retaliation for his letter to Mrs. Champion.²

I. UNDISPUTED FACTS

1. While incarcerated at DCCC, Berryhill received a misconduct report for Battery. He received a disciplinary hearing and was found guilty on January 11, 1994. (Special Report, Attachment E)

2. On January 10, 1994, Berryhill received a misconduct report for Bartering. He received a disciplinary hearing and was found guilty on January 19, 1994. (Special Report, Attachment G)

3. Also on January 19, 1994, Vickie Champion, a parole investigator at DCCC and wife of DCCC Warden Ron Champion, received a letter from Berryhill. (Special Report, Attachment I; Defendants' Exh. A, B and D) In the letter, Berryhill stated:

I am sure that this letter has come as a surprise; but, I must identify [sic] to you the feelings that is [sic] inside of me for you. I've tried for sometime now to hide this desire for you and I now deem it only appropriate that I tell you what is true: I was at Stringtown with Anita Trammell, and I worked for her as a law library orderly for over a year and she confided in me what "you"

²Berryhill first made this allegation in his Response to Defendants' Motion to Dismiss, or in the alternative, Motion for Summary Judgment. After Berryhill amended his Complaint, Defendants amended their motion to address the additional allegation, and Berryhill has filed a Response Brief.

must be going through and when I got here and saw you, my heart went out to you and it is my desire to rescue you from this demon that is now possessing you. Now that you know that I am here, I "am" someone that you can talk, too [sic]. I hope to here [sic] from you soon ...

(Special Report, Attachment I; Defendants' Exh. A)

4. Mrs. Champion felt threatened by Berryhill writing the letter; in order to protect herself from any harm from Berryhill, she immediately took the letter to DCCC's chief of security.

(Defendants' Exh. B)

5. On January 20, 1994, the decision was made to administratively transfer Berryhill to a different facility, based on security considerations. (Defendants' Exh. C)

6. After the decision was made to transfer Berryhill, officials conducted a security assessment to determine Berryhill's security level. The security assessment, completed on January 20, 1994, assessed Berryhill to be maximum security, based solely on his two previous misconduct convictions. (Special Report, Attachment H; Defendants' Exh. C, D).

7. On February 3, 1995, the Battery misconduct against Berryhill was dismissed on a technicality and expunged from his record. As a result, his security level dropped to medium. (Special Report, Attachment F; Defendants' Exh. E)

8. Berryhill was transferred to OSP on February 18, 1994, pursuant to the security assessment done on January 20, 1994. (Special Report, Attachment H; Defendants' Exh. D)

9. The drop in Berryhill's security level due to the expungement of the Battery misconduct was not discovered until

after Berryhill had been transferred to OSP. (Defendants' Exh. G, L, M)

10. On April 12, 1994, Berryhill's Unit Staff at OSP was notified that Berryhill's Battery misconduct had been dismissed. Therefore, Berryhill was reclassified at medium security, although he was not immediately transferred to a medium-security facility. (Defendants' Exh. F, G, L)

11. In February, March and April 1994, Berryhill was assessed at Level 1 as a result of his Bartering misconduct and subsequent transfer to maximum security. Pursuant to DOC policy, inmates serving Disciplinary Unit time or who have been transferred to higher security are not entitled to receive earned credits. Therefore, Berryhill did not receive earned credits. (Defendants' Exh. F)

12. Berryhill was reclassified at medium security on April 12, 1994 and began receiving 22 earned credits per month (the same amount he received before being classified at maximum security). (Defendants' Exh. F, K, L, M, O)

13. On April 28, 1994, OSP Warden Dan Reynolds denied Berryhill's transfer to a medium security facility. He based this decision on Berryhill's Bartering and Battery misconducts, although the Battery misconduct had been dismissed. He further based this decision on a letter written May 5, 1994, by Berryhill to Larry Fields, director of DOC, in which Berryhill stated that, after being charged with a misconduct:

I elected to try and confuse the issue as part of my defense and I constructed a letter to

Mrs. Champion in a manner designed to upset Warden Champion and his staff in an attempt to control the minds and behavior of all that I came in contact with in an attempt to cause them to make mistakes during disciplinary procedures.

(Defendants' Exh. G)

14. On June 30, 1994, Berryhill was taken to the OSP Health Care Center and received medical treatment following an altercation with another inmate. (Special Report, Attachment K)

15. Berryhill alleges that his cellmate, Inmate Jimmy Smith, beat him up, and that prison officials knew that Smith routinely beat up his cellmates. (Complaint at 13)

16. Unit Manager Mike Pruitt has no knowledge of any altercations between Inmate Smith and Smith's previous cellmates. (Special Report, Attachment M)

17. While at OSP, Berryhill's television set was broken by a cellmate, Donnie Daniels. (Complaint at 29; Special Report, Attachment N)

18. In September 1994, Berryhill was assigned to Level 3 and began receiving 33 earned credits per month. (Defendants' Exh. F and N)

19. On November 21, 1994, Plaintiff was transferred to James Crabtree Correctional Center, a medium security facility. (Defendants' Exh. F)

II. SUMMARY JUDGMENT STANDARD

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); Widon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the court 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.

477 U.S. at 317 (1986). 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).

The Tenth Circuit Court of Appeals stated:

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 . . . [r]ather, 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.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

III. MOTIONS FOR SUMMARY JUDGMENT/DISMISSAL

A. Martinez Report

When a pro se plaintiff is a prisoner, a court-authorized Martinez Report prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). On summary judgment, the court may treat the Martinez Report as an affidavit, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. The plaintiff's complaint also may be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

B. Void Judgment and Sentence Claim

Berryhill first alleges that he is incarcerated on a void

judgment and sentence. His Complaint alleges that his judgment and sentence conflict with DOC policy, and that he was sentenced to 20 years per conviction while he should have been sentenced to five years for each conviction. (Complaint at 2) Further, he states in his Response to Defendants' Motion to Dismiss/Motion for Summary Judgment that he was illegally sentenced under 21 O.S. 51(B), the general habitual criminal statute. The Court concludes that a § 1983 action is not the appropriate method to seek redress for this claim. "When a state prisoner is challenging the ... duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to ... a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). Therefore, Berryhill may seek relief on this claim only in a habeas corpus action after exhausting state judicial remedies. Berryhill's claim that he is incarcerated on an illegal judgment and sentence is dismissed without prejudice under Fed. R. Civ. P. 12(b)(6).³

C. Eighth Amendment Violations

Berryhill also claims that his Eighth Amendment rights were violated (1) by being placed in a cell with an inmate who had

³Insofar as Berryhill's request for release could be construed as a request for injunctive relief pursuant to his § 1983 claim, it also is dismissed under Rule 12(b)(6). Release "would be tantamount to a decision on [the plaintiff's] entitlement to a speedier release". Duncan v. Gunter, 15 F.3d 989, 991, citing Hanson v. Heckel, 791 F.2d 93, 96 (7th Cir. 1986).

assaulted previous cellmates, and who assaulted Berryhill; (2) by double celling, because another cellmate broke Berryhill's television set.

The Eighth Amendment imposes a duty upon the state to protect prisoners from each other. Duane v. Lane, 959 F.2d 673, 676 (7th Cir. 1992). The duty to protect, however, "does not lead to absolute liability". Id. Rather, because the Eighth Amendment speaks only to "punishment", prison officials who fail to prevent an injury inflicted by fellow inmates are liable "only where those officials possess the requisite mental state", which is intent, or, at the very least, deliberate indifference. Id. That is, the prison officials must want harm to come to the prisoner, or must possess total unconcern for the prisoner's welfare in the face of serious risks. Id. The prisoner must show recklessness, which, for Eighth Amendment purposes, involves an "actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." Id., citing Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985). A prisoner who establishes negligence but fails to show either "actual knowledge of the danger, or danger objectively so great that actual knowledge of the danger can be inferred, cannot prevail." Id.

Berryhill alleges that Defendants knew of his cellmate's propensity toward beating his fellow prisoners; however, he provides no evidence to withstand Defendants' Motion for Summary Judgment. Defendants provide evidence that Mike Pruitt, Unit

Manager, had no knowledge of any altercation between Inmate Smith and other previous cellmates (Special Report, Attachment M). There is no evidence in the record that controverts Pruitt's affidavit; therefore, Defendants are entitled to judgment as a matter of law.

Further, Berryhill's allegation that a cellmate broke his television set does not rise to the level of an Eighth Amendment violation. According to DOC policy, prison officials are not responsible for damage to an inmate's property unless the damage was caused by staff. (Special Report, Attachment O) Defendants are entitled to judgment as a matter of law on Berryhill's Eighth Amendment claims.

D. Fourteenth Amendment Violations

Berryhill alleges that he was deprived of his liberty interest in being at a medium-security facility. Berryhill, however, has no constitutional right to be incarcerated in a particular facility, and his transfer from DCCC to OSP, in and of itself, does not implicate a constitutional right. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976); Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Thus, any expectation Berryhill may have had in remaining at DCCC is too insubstantial to rise to the level of constitutional protection. Meachum, 427 U.S. at 228; Kincaid v. Duckworth, 689 F.2d 702, 704 (7th Cir. 1982), *cert. denied*, 461 U.S. 946 (1983); see also Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991) (because an inmate has no right to confinement in a particular institution, "[h]e cannot complain of

deprivation of his 'right' in violation of due process"). Additionally, federal courts do not interfere in classification and placement decisions. Such decisions are entrusted to prison administrators, not to the federal courts. Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228; Wilkerson v. Maggio, 703 F.2d 909, 911 (5th Cir. 1983). Accordingly, Defendants are entitled to judgment as a matter of law on this claim.⁴

E. First Amendment Violations

Although disciplinary transfers without due process are generally permissible, a different result can occur if a transfer is made in retaliation for a prisoner's exercise of constitutional rights:

[W]hile a prisoner enjoys no constitutional right to remain in a particular institution and generally is not entitled to due process protections prior to such a transfer, prison officials do not have the discretion to punish an inmate for exercising his first amendment rights by transferring him to a different institution.

Frazier v. DuBois, 922 F.2d 560, 561-2 (10th Cir. 1990), *citing* Murphy v. Missouri Dep't of Correction, 769 F.2d 502, 503 (8th Cir. 1985). Berryhill alleges that he was transferred to OSP in retaliation for the letter he wrote to Mrs. Champion.

⁴Insofar as Berryhill's claim can be construed as a request for restoration of earned credits, it is hereby dismissed because such a claim must be brought in a petition for habeas corpus, subject to exhaustion of state remedies. Habeas corpus is the proper remedy for the withholding of time credits if it affects the length of confinement, as is the case here. Gregory v. Wyse, 512 F.2d 378, 381 (10th Cir. 1975).

In a case similar to the one at bar, the First Circuit Court of Appeals held that a prisoner's First Amendment rights must be accommodated to the security concerns required in a prison setting. In Gomes v. Fair, 738 F.2d 517 (1st Cir. 1983), a prisoner wrote a sexually explicit poem and gave it to a female prison employee. The female employee interpreted the poem as referring to her, due to her previous contacts with the prisoner, and filed a disciplinary report. As a result, the prisoner was transferred to another prison. The First Circuit stated that:

We agree that the issue for a court in a case like this is limited to whether the prison officials were acting in good faith and reasonable belief that the restrictions they were imposing were necessary. The concept of reasonableness, however, must be applied so as to give ... "wide-ranging deference" to prison administrators on questions of prison security and discipline.

Gomes, 738 F.2d at 525, citing Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). The Gomes court found that the prison's interest in safety and security prevailed in a situation such as the one at bar:

Defendants have a strong interest in assuring the safety of prison staff and taking immediate action in the case of inmate threats, no matter how veiled. A sexual advance by an inmate on a staff member is not to be taken lightly; a sexual proposition need not ripen into a physical assault before prison officials can take steps.

Gomes, 738 F.2d at 524. The Gomes court then evaluated United State Supreme Court case law to determine that its sole consideration in the case is determining whether the prison

officials were acting in good faith and reasonable belief by transferring the prisoner. "The Supreme Court has indicated that even in the presence of legitimate First Amendment concerns, considerable deference is due to the 'expert' judgment of prison administrators." Id. The Gomes court also noted the distinction between punishing the prisoner for writing the poem versus using the poem for an improper purpose. Id. at 527.

That distinction is particularly applicable in Berryhill's case. There is substantial uncontroverted evidence before the Court that Berryhill wrote the letter to Mrs. Champion for such an improper purpose. In his Complaint, Berryhill stated: "In an attempt to anger defendant Champion and DCCC staff, this plaintiff constructed a letter to defendant Champion's wife of whom is a parole review supervisor at DCCC." (Complaint at 8) Further, OSP Warden Dan Reynolds noted a letter from Berryhill to OBP Director Larry Fields, in which Berryhill stated:

I elected to try and confuse the issue as part of my defense and I constructed a letter to Mrs. Champion in a manner designed to upset Warden Champion and his staff, in an attempt to control the minds and behavior of all that I came in contact with in an attempt to cause them to make mistakes during disciplinary procedures.

(Defendants' Exh. G)

Berryhill provides additional evidence that the letter to Mrs. Champion was a strategy of some sort in his Battery misconduct hearing: in a letter to Regional Director James L. Saffle, Berryhill states that

I constructed a letter to Vicki Champion

mainly out of outraged [sic] behind the investigative process afforded an innocent inmate, the lack thereof, the letter was designed to upset Warden Champion and in a manner to not commit a DOC rule violation

(Plaintiff's Motion for Summary Judgment, Exh. A)

Applying Gomes, there is uncontradicted evidence in the record that prison officials were acting in good faith and reasonable belief by transferring Berryhill. After the decision was made to transfer him due to the security risk he posed, the security assessment done January 20, 1994, based solely on his Bartering and Battery misconducts--not based on the letter itself--assessed Berryhill as maximum security. Therefore, he was transferred to OSP, a maximum security facility. (Defendants' Exh. C) Noting the deference given to prison administrative decisions, the Court holds, as a matter of law, that Berryhill was transferred to OSP based on security considerations, not as retaliation for exercising his First Amendment rights.

The fact that Berryhill's Battery misconduct later was expunged, thereby dropping Berryhill back to medium security, does not alter the Court's holding.⁵ There is no evidence before the Court to indicate that prison officials knew before Berryhill was transferred that Berryhill's security assessment had dropped to medium security; rather, the uncontroverted evidence indicates only that Berryhill was transferred before officials became aware

⁵Because the Court has ruled that the transfer was not retaliatory under the First Amendment, the transfer must be evaluated under the Fourteenth Amendment as a possible due process violation. As stated above, however, a prisoner has no constitutional right to be incarcerated at a particular facility.

of the drop in security level. See Defendants' Exh. G, L, M. Berryhill was reclassified at medium security as soon as OSP officials were notified of the drop in Berryhill's security assessment. See Defendants' Exh. F, G, L.

Berryhill also alleges that OSP Warden Dan Reynolds' decision on April 28, 1994, to not transfer Berryhill back to medium security was done in retaliation for his exercising his First Amendment rights. Reynolds, in a memo to Berryhill dated July 6, 1994, clarified his reason for not transferring Berryhill to a medium security facility although his security assessment indicated such level was warranted. According to the memo, Reynolds considered both the Battery and Bartering misconducts, although the Battery misconduct had been expunged.⁶ Further, he also considered Berryhill's letter to Fields, set out above. Regarding the letter to Fields, Reynolds' memo states: "Please be advised that manipulation of words and employees is not behavior indicative of an inmate seeking to successfully adjust to incarceration." (Defendants' Exh. G) The memo clearly indicates to the Court that Berryhill was denied a transfer not for writing the letter, but for "manipulation of words and employees", which the Court considers an "improper purpose" under the Gomes rationale. A letter from Saffle to Berryhill also notes to the difference between permissible expression and use of expression for an improper purpose:

You have the privilege to correspond with the

⁶Berryhill does not contend that consideration of his Battery misconduct was erroneous.

employees who work within our facilities, as long as that correspondence is professional, but when you attempt to become affectionate as your letter indicates, you are wrong.

(Berryhill's Motion for Contempt, Exh. A) The Court holds that Defendants are entitled to judgment as a matter of law on Berryhill's First Amendment claims. Conversely, Berryhill's Motion for Summary Judgment is denied.

IV. MOTION FOR CONTEMPT OF COURT AND PERJURY

Berryhill asks the Court to charge Assistant Attorney General Sarah Hawxby and DOC staffer Debbie Morton with perjury because they "are falsely contending to this court, knowingly, that the records in their possession reflect that Plaintiff was not sent to OSP as punishment and retaliation for writing a letter to Ms. Champion." (Berryhill's Motion, p. 1) He further alleges that they are falsely contending he was transferred to OSP before officials realized his security level had dropped due to the expungement of the Battery misconduct. The fact that Hawxby and Morton are disputing Berryhill's allegations do not prove perjury.

Berryhill also alleges that Hawxby and Morton are withholding the complete classification review package that was reviewed by Defendant Reynolds before he denied Berryhill's transfer to a medium security facility. (Motion, p. 2) However, Defendants are not required to use each and every piece of potential evidence in support of their motions. There is no proof that Defendants are unreasonably withholding information from Berryhill, or refusing to honor discovery requests. Berryhill's motion is denied.

V. MOTION TO DISQUALIFY DEFENDANTS' COUNSEL

Berryhill alleges that Hawxby and the Oklahoma Attorney General's office should be barred from further representation of the defendants because Hawxby should be charged with perjury and contempt of court, as stated in Berryhill's previous motion. However, because the Court holds there is no basis for Berryhill's allegation that Hawxby committed perjury, there is no need to disqualify Defendants' counsel. Berryhill's motion is denied.

VI. SUMMARY

Defendants' Motion to Dismiss (Docket #6) is GRANTED as to Berryhill's claim that he is incarcerated on a void judgment and sentences; Defendants' Motion for Summary Judgment (Dockets #6 and #21) is GRANTED as to Berryhill's claims of a First, Eighth and Fourteenth Amendment violation; Berryhill's Motion for Summary Judgment (Docket #24) is DENIED; Berryhill's Motion to Disqualify Defendants' Counsel (Docket #24) is DENIED; and Berryhill's Motion for Contempt of Court and Perjury (Docket #23) is DENIED.

IT IS SO ORDERED this 13th day of September, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

JASON EDWARD HENDERSON and
DONNA S. HENDERSON, husband
and wife,

Plaintiffs,

vs.

LTV STEEL COMPANY, INC.,
and THE LTV CORP.,
foreign corporations,

and

YOUNGSTOWN SHEET AND TUBE
COMPANY, FOC CORPORATION
FC DIVESTITURE CORPORATION,
LTV ENERGY PRODUCTS COMPANY,
CONTINENTAL EMSCO,

Defendants.

ENTERED ON DOCKET
DATE ~~SEP 14 1995~~

Case No. 94-C-515-K

FILED

SEP 13 1995

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

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COME NOW the Plaintiffs, Jason Edward Henderson and Donna S. Henderson, and Defendants, LTV Steel Company, Inc., The LTV Corporation, and Continental Emsco Company, by and through their respective counsel, pursuant to Fed. R. Civ. Proc. 41(a)(1), and stipulate that Plaintiffs do hereby voluntarily dismiss without prejudice all claims and causes of action against LTV Steel Company, Inc. and The LTV Corporation, in the above-styled matter.¹

¹Youngstown Sheet and Tube Company, FOC [sic] Corporation, FC Divestiture Corporation and LTV Energy Products Company have not been served with process.

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Respectfully submitted,



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**ATTORNEY FOR PLAINTIFFS,
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**ATTORNEYS FOR DEFENDANTS, LTV STEEL
COMPANY, INC., THE LTV CORPORATION,
AND CONTINENTAL EMSCO COMPANY**

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

F I L E D

SEP 13 1995

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

DOROTHY R. JONES,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,¹

Defendant.

Case No: 94-C-372-W

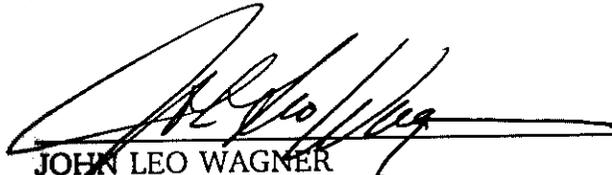
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DATE SEP 14 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed September 12, 1995.

Dated this 13th day of September, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

F I L E D

SEP 12 1995

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

DOROTHY R. JONES,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

Case No. 94-C-372-W

ENTERED ON DOCKET
DATE SEP 14 1995

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of **this** matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge ("ALJ"), which summaries are incorporated herein by **reference**.

The only issue now before the **court** is whether there is substantial evidence in the record to support the final decision of **the** Secretary that claimant is not disabled within

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform work-related activities, except for work involving lifting/carrying 50 pounds occasionally or 25 pounds frequently or more than occasional bending, squatting, crawling, and climbing, and that she had mild to moderate morning pain and stiffness.

The ALJ concluded that claimant's past relevant work as a janitor, housekeeper, and electronics assembler did not require the performance of work-related activities precluded by the above limitations and that her impairments did not prevent her from performing her past relevant work. Having determined that claimant's impairments did not prevent her from performing her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts that the ALJ erred in relying almost entirely on the medical report of Dr. Sutton, which was incomplete because the doctor only

² Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

saw claimant for fifteen minutes, did not review her medical records, and did no objective testing.

It is well settled that the claimant bears the burden of proving her disability that prevents her from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The medical evidence establishes that claimant has cervico-thoracic strain, left shoulder pain of unknown etiology, and mild osteoporosis. She injured her back at work on January 5, 1991, while lifting and emptying trash containers (TR 136, 192). She was initially examined at Westview Medical Clinic on January 29, 1991, and complained of continuing headaches radiating out of the occipital portion of her skull and upper neck, continued pain and stiffness in her thoracic spine, exacerbation of a previous injury to her neck and lumbar spine, and stiffness in her hands, especially in the mornings (TR 136, 155-56). She was seen on February 12, 1991, February 28, 1991, March 18, 1991, and April 2, 1991, and there had been improvement (TR 136, 150-154). She was treated conservatively with medication (TR 139).

Dr. Lawrence Reed did a final examination of claimant on April 29, 1991 and found tenderness and restricted motion of her cervical spine, "trigger areas" throughout the area between T6 and T12 areas of the thoracic spine as well as at the L5-S1 levels, and restricted motion of the left shoulder (TR 137). A straight-leg-raising test was positive bilaterally (TR 137). X-rays of the cervical spine demonstrated anterior bulging of the ligament between C5-6 with soft tissue visualization (TR 137). X-rays of the lumbar spine demonstrated anterior degenerative changes at the L3-4 levels, and x-rays of the dorsal

spine were negative (TR 137-157). Dr. Reed diagnosed myofascial strain of the left shoulder and thoracic spine, as well as **aggravation** of a previously-existent neck and low back injury (TR 137). Claimant was **found** to be temporarily disabled from January 5 through April 2, 1991, and 6.5% **permanently disabled** due to the restricted motion of her thoracic spine and shoulder (TR 141). The doctor noted that he did not feel "she will easily convince anyone that she is **totally disabled**" and that she did not want to undergo retraining (TR 147).

On December 5, 1991, Dr. Richard Cooper examined claimant for back, neck, head, and shoulder pain (TR 158-159). He **found** that claimant could walk on her toes or heels without difficulty, leg lengths were **equal**, straight leg raising, lesegue, bowstring, and Fajerstajn tests were negative, gait was **normal** within the confines of the office, range of motion of the spine, knees, hips, ankles, **shoulders**, elbows, wrists, and fingers were all full range, and there was discomfort with **full abduction** and elevation of the shoulders and with flexion of the spine to 70 degrees (TR 159). He noted that her grip, biceps, triceps, and shoulder shrug strengths were **full and equal**, finger dexterity was good, cranial nerves were grossly intact, vibratory sense was **intact** in both great toes, light touch sensation was intact in all four extremities **excepting a small** area of the left calf and the ulnar fingers of the right hand, and there was some **difficulty** with rolling over on the table (TR 159). However, in spite of these findings, **the doctor** concluded claimant was impaired in activities requiring prolonged standing, **sitting**, walking, or bending and lifting.

On February 17, 1992, claimant **told her** doctor that her left shoulder was bothering her, but shoulder x-rays revealed **no abnormalities** (TR 168) and her sedimentation rate

was within normal limits and RA screening was negative (TR 169). By March 20, 1992, the pain was more in her back (TR 163). A year later her doctor noted she had osteoporosis and continued her on naprosyn and premarin (TR 185).

A consultative examination was conducted by Dr. E. Joseph Sutton on May 14, 1993 (TR 171-173). He noted that she **drives**, does her housework, grocery shops, cooks, watches television, draws, oil paints, **and sews** (TR 172). Her range of motion studies were "essentially normal," but she had **difficulty** with the straight leg raising test in the supine position (TR 172). However, **the test** in the sitting position was entirely normal (TR 172). The doctor stated she **could only** get her shoulders up to ninety degrees with abduction or flexion, but when he "**was able to distract**" her, her range of motion could go further (TR 172). Dr. Sutton concluded as follows:

The patient should be able to **sit a total** of 4 hours at one time and stand 4 hours at one time and walk **3 to 4** hours at one time. During an entire 8 hour day, she should be able to **sit and stand** for 8 hours and walk perhaps 6 to 8 hours. The patient **can lift** infrequently 51 to 100 pounds, occasionally 26 to 50 pounds, **frequently** 21 to 25 pounds and anything less than this continuously. She **can probably** carry the same amount. I saw no objective evidence of any **disability**. In spite of this, I feel that the patient probably has some legitimate **complaints** and thus it would be reasonable to not expect her to do a **full days** work without at least some minimal restrictions. There are no **restrictions** of the feet with regards to pushing and pulling of leg controls. There **is no** restriction of the hands to include grasping. She should **occasionally** be able to bend, squat, crawl or climb and frequently be able to reach. **There is no** restriction of activities involving any of the environmental factors.

This patient's symptoms were **completely** subjective. She went through the examination without any **difficulty**. She was on and off the examination table and walked throughout **the office** and walked the length of our parking lot without any difficulty or **any evidence** of any type of disability.

(TR 173).

X-rays taken of the thoracic spine on July 29, 1993 showed no bone or joint abnormalities, and disc spaces and curvature were normal (TR 188).

The ALJ concluded that claimant could perform work at the medium exertional level, which involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds, based on physical examinations which had consistently shown unrestricted motion of the neck and Dr. Sutton's notes that her range of motion was essentially normal, shoulder flexion was 90 degrees, and sitting and supine straight-leg-raising tests were inconsistent (TR 17). The ALJ also noted that Dr. Cooper reported that straight-leg-raising was negative, both sitting and supine, all the tests were negative, and range of motion of all the joints was full (TR 17). The ALJ commented that Dr. Cooper had found claimant impaired in activities requiring prolonged standing, sitting, walking, bending, and lifting, but considering the paucity of objective evidence in Dr. Cooper's examination, "[I am] not persuaded by the cursory and nonspecific assessment provided by the examiner. Moreover, a limitation to the medium exertional level with occasional bending, squatting, crawling, and climbing is not inconsistent with his assessment, which essentially says only that these activities are limited to some degree, but not how much." (TR 17).

There is no merit to claimant's contention that the ALJ relied almost entirely upon the medical report of Dr. Sutton, and it was "incomplete and otherwise defective" (Claimant's Brief, Docket #6, pg. 4). While claimant testified that she only saw Dr. Sutton for "10, 15 minutes" (TR 56), he clearly had reviewed background records (TR 171-173).

The ALJ also relied on Dr. Cooper's examination, conducted eleven months after

claimant's injury, Dr. Reed's reports, and physical examinations done over the years (TR 16-20). The ALJ noted that "claimant has not obtained a consistent treatment and in fact there is a lapse between the alleged onset date and the consultative examination. She has had only the occasional medical attention, and that was for essentially transitory problems such as the gastritis and vaginitis. Findings have been consistently minimal." (TR 18).

He also commented on her inconsistent allegations regarding her medications:

She reports on her medication report that she takes Lortab, Toradol, Neclofenamate, Dolobid, Tylon No. 3, and over-the-counter Advil. However, it is clear from a review of the records that these are not taken concurrently but are sequential prescriptions received since 1990. Moreover, she told her physician in February 1992 that she was taking Tylenol only. She also told Dr. Cooper, the consultative examiner, that she was taking Tylenol only for pain and her other pills were a water pill and a joint pill.

(TR 18).

The ALJ concluded:

Exaggeration is a factor to be considered in assessing the claimant's credibility. In addition, a low level of pain medication is inconsistent with a severe level of pain. The claimant has obtained no treatment for her complaints other than the occasional emergency room treatment for stomach pain and the 1987 hospitalization when she had the onset of diabetes. She has obtained no therapy since February 1991 when she reported that it was helpful. This was within 2 weeks after her first medical treatment subsequent to the alleged injury, but she no longer participates in any activity. In addition, by April 1991, she was reporting that her shoulder no longer bothered her as much and that her hands were okay. She now claims that she cannot sit over 20 minutes, stand over 10 to 15 minutes, walk over 1 block, or reach, stoop, or climb. However, she testified that she rode to Dallas on the bus, and the stops were 2 hours apart. This indicates that she in fact is able to sit for up to 2 hours and normal breaks would be all that was required.

(TR 18-19).

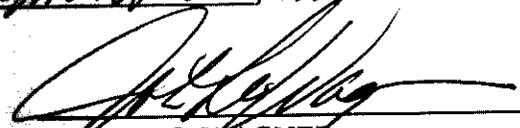
The ALJ noted that claimant's daily activities show little limitation and that medical

professionals had not restricted her from doing household chores (TR 19). He also pointed out that claimant participated in no activities on her own to alleviate her symptoms and continued to smoke. He went so far as to state: "It was observed by one of the consultative examiners that she had 'extremely long fingernails,' and protection of these nails may be the reason why the claimant does not like to do the vacuuming and mopping." (TR 20).

The ALJ concluded that claimant might lack motivation to return to work (TR 20), since she had a history of receiving payment for her physical complaints. She had obtained worker's compensation in 1974 for her neck and in 1978 for her back, with a combination payment occurring in 1980 (TR 135). He noted that, although the claimant alleged an onset date of January 4, 1991, she actually worked until April 1991 and filed her request for worker's compensation on the day she first obtained any medical treatment. The ALJ pointed out that Dr. Reed, who saw her after the alleged injury, found no more than a 11 or 12 percent impairment and stated that she would not easily convince anyone she was disabled and that she did not want retraining. "This suggests that the claimant intends not to return to work and that she wants to obtain benefits regardless of the degree of her disability." (TR 20, 147).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 12th day of September, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

FILED

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

SEP 13 1995

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

LINDA HARRIS,

Plaintiff,

vs.

No. 95-C-545-E

NATIONAL COMMUNITY DEVELOPMENT
CORPORATION OF OKLAHOMA, a
corporation,

Defendant.

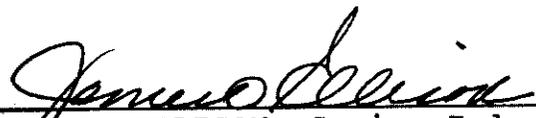
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ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE 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, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 90 days that settlement has not been completed and further litigation is necessary.

ORDERED this 13th day of September, 1995.


JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

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

F I L E D

SEP 13 1995

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

VICTOR JOEL COOPER,
Petitioner,
vs.
R. MICHAEL CODY,
Respondent.

No. 94-C-568-BU
and
No. 94-C-569-BU

ENTERED ON DOCKET

DATE SEP 14 1995

ORDER

This matter comes before the Court on Respondent's request to dismiss these habeas corpus actions as successive under Rule 9(b) of the Rules Governing 28 U.S.C. § 2254 cases. As more fully set out below, the Court concludes that these actions should be dismissed as successive.

I. BACKGROUND

In 1988, Petitioner was charged with three counts of robbery after former conviction of two or more felonies (AFCF) in Tulsa County District Court, Case Nos. CF-88-1001, CF-88-1269, and CF-88-1388.¹ The prior convictions on which the State predicated the AFCF charges were: CRF-78-2615, CRF-79-584, CRF-79-907, CRF-85-4910, and CRF-85-4921. Petitioner pled guilty and received a thirty-year sentence on each count to run concurrently. Petitioner did not seek to withdraw his 1988 guilty pleas or file a direct appeal. Almost three years later, he filed an application for

¹ Petitioner was also charged in Oklahoma County District Court Case Nos. CRF-88-3171, CRF-88-3176, and CRF-88-3177.

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post-conviction relief, contending that his 1988 sentences were improperly enhanced by prior unconstitutional guilty plea based convictions. The Tulsa County District Court denied relief and the Oklahoma Court of Criminal Appeals affirmed the denial on July 13, 1992. The Court stated as follows:

Petitioner now claims that the former convictions used to enhance his sentences are void because the guilty pleas "were obtained in the absence of a knowing, intelligent and voluntary waiver of Petitioner's constitutional rights." He contends that changes in the law and errors committed by his counsel justify his failure to appeal and provide a basis for his application.

Even though Petitioner is considered "in custody" under the former convictions for purposes of federal habeas corpus relief, see Maleng v. Cook, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989); Gamble v. Parsons, 8989 F.2d 117 (10th Cir. 1990), if Petitioner's former convictions are not valid, then they should have been attacked in a direct appeal, 22 O.S. 1991, § 1051 et seq., or a post-conviction proceeding in the court imposing the judgment and sentence for that former conviction. 22 O.S. 1981, §§ 1081-1089; see also Parker v. State, 556 P.2d 1298, 1306 (Okl. Cr. 1976). If not so attacked and voided, the convictions may be used to enhance punishment in a subsequent criminal proceeding. Bowen v. State, 586 P.2d 67, 69 (Okl. Cr. 1978).

Petitioner has not substantiated his claim that errors by counsel provide sufficient reasons for his failure to appeal. 22 O.S. 1991, § 1086; see also Hale v. State, 807 P.2d 264, 266-67 (Okl. Cr. 1991). Petitioner's sentences are well within the range of punishment for Robbery With Firearms regardless of any alleged errors concerning former conviction enhancement that Petitioner claims his counsel overlooked. 21 O.S. 1991, § 801.

(Ex. A to response in 92-C-695-B, docket #4.)

On August 6, 1992, Petitioner filed his first federal petition for a writ of habeas corpus in this District, Case No. 92-C-695-B. He challenged the felonies used to enhance his 1988 sentences and alleged ineffective assistance of counsel prior to and during

sentencing of his 1988 convictions. In his reply to the State's response, Petitioner alleged that counsel (who was not appointed until the day of sentencing) did not assist him during sentencing and materially misled Petitioner into believing that he could not challenge the validity of his prior guilty plea convictions during sentencing or on appeal. As a result of counsel's misrepresentation, Petitioner alleged he waived his right to a direct appeal.

On February 3, 1993, the Honorable Thomas R. Brett denied habeas relief in Case No. 92-C-695-B on the basis of a state procedural bar--i.e., Petitioner's failure to file a direct appeal from his 1988 convictions. He relied in part on the doctrine of res judicata which bars consideration in post-conviction proceedings of issues which have been or which could have been raised on direct appeal. He also relied on the holding of the Court of Criminal Appeals that Petitioner had not shown that counsel's errors provided sufficient reasons for his failure to appeal. In the alternative, Judge Brett concluded that the petition should be dismissed for the following reasons:

"A court is not required to consider a petitioner's challenge to his former conviction if he has voluntarily and knowingly pled guilty to the enhancement charge. Mason v. Anderson, 357 F.Supp. 672 (W.D. Okla. 1973), quoting Price v. Beto, 436 F.2d 1070 (5th Cir. 1971). See also Long v. McColter, 792 F.2d 1338 (5th Cir. 1986). In this case, Cooper does not attack the validity of the 1988 guilty plea, which included the AFCF underlying convictions.

The Tenth Circuit Court of Appeals affirmed the dismissal on procedural default grounds on October 19, 1993.

On June 2, 1994, Petitioner filed three federal petitions for a writ of habeas corpus in this Court, Case No. 94-C-568-BU, 94-C-569-BU, and 94-C-570-BU.² In the first two cases, Petitioner challenged the constitutionality of his 1979 and 1985 prior convictions respectively. In the third case, Case No. 94-C-570-BU, Petitioner challenged the constitutionality of one of his 1988 convictions, CF-88-1001, and alleged that he was denied his first appeal as of right due to ineffective assistance of counsel, that counsel was ineffective during the sentencing proceedings, and that his sentence was enhanced on the basis of unconstitutional prior convictions from 1978, 1979, and 1985.

On November 14, 1994, this Court dismissed as successive the petition in 94-C-570-BU. The Court noted that Petitioner had not objected to Respondent's motion to dismiss and, in any event, Petitioner had not shown adequate cause and prejudice, or a fundamental miscarriage of justice. Petitioner did not appeal.

On December 5, 1994, this Court construed the petitions in 94-C-568-BU and 94-C-569-BU as asserting a challenge to Petitioner's present sentence, CRF-88-1001, to the extent that it had been enhanced by the allegedly invalid prior convictions from 1979 and 1985. The Court then denied Respondent's motions to dismiss for failure to meet the "in custody" requirement. (Docket #7 in 94-C-568-BU and 94-C-569-BU.) Because 94-C-568-BU and 94-C-569-BU involve common questions of law and fact, the Court now

² The Clerk of the Court originally assigned these cases to the Honorable James O. Ellison, and then administratively transferred them to this Court in November of 1994.

consolidates them in the interest of judicial economy.

Respondent contends that the claims raised in the consolidated action have been previously raised and adjudicated on the merits by this Court and therefore should be dismissed as successive. Petitioner responds that the Honorable Thomas R. Brett committed plain error when he dismissed his ineffective assistance of counsel claim in the first habeas petition, 92-C-965-B, on the basis of a state procedural bar, citing Breechen v. Reynolds, 41 F.3d 1343, 1363-64 (10th Cir. 1994), cert. denied, 115 S.Ct. 2564 (1995). Therefore, Petitioner contends that the "ends of justice" would be served by a redetermination of those claims as stated in Bass v. Wainwright, 675 F.2d 1204 (11th Cir. 1982).

II. ANALYSIS

The law regarding dismissal of successive section 2254 petitions is clear. Rule 9(b) states as follows:

Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In this case it is undisputed that Petitioner previously filed one habeas corpus action, 92-C-695-B, which this Court denied on the merits.³ See Hawkins v. Evans, ___ F.3d ___, 1995 WL 496028, at *3 (10th Cir. Aug. 22, 1995) (No. 95-5068) (dismissal of first

³ For purposes of this order, the Court presumes that the dismissal of Case No. 94-C-570-BU as a successive petition had no impact on the present action.

habeas petition on the grounds of a state procedural default constitutes a determination on the merits for purposes of the Rule 9(b) successive petition doctrine). Therefore, Petitioner bears the burden of showing that "although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground." Parks v. Reynolds, 958 F.2d 989, 994 (10th Cir. 1992) (quoting Sanders v. United States, 373 U.S. 1 (1963)), cert. denied, 503 U.S. 928 (1992). In McClesky v. Zant, 499 U.S. 467, 495 (1991), the Supreme Court equated the "ends of justice" inquiry with the "fundamental miscarriage of justice" inquiry. See also Parks, 958 F.2d at 994.

The Supreme Court recently summarized its prior holdings involving a defendant's subsequent use of the habeas writ. In Herrera v. Collins, 113 S.Ct. 853, 862 (1993), the Court stated

that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.

See also McClesky v. Zant, 499 U.S. 467, 495 (1991); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion); Parks, 958 F.2d at 995.

Petitioner has made no colorable showing of actual innocence as to his 1988 guilty plea conviction which would justify reaching the merits of the successive claims raised in the consolidated action. Therefore, Petitioner's action must be dismissed as

successive.

Even assuming the Court could reach Petitioner's contention that his ineffective assistance of counsel claim should not have been procedurally barred under the recent ruling in Breechen v. Reynolds, 41 F.3d 1343, 1363-64, Petitioner would not be entitled to habeas relief.⁴ Petitioner contends that he did not appeal his 1988 guilty plea conviction because counsel advised him that he could not challenge on appeal the constitutionality of his prior convictions.⁵ He claims that counsel's advice was clearly wrong, under Maleng v. Cook, 490 U.S. 488 (1989), and Gamble v. Parsons, 898 F.2d 117 (10th Cir.), cert. denied, 498 U.S. 879 (1990), which recognized that a prisoner may challenge a conviction for which he is presently incarcerated on the ground that the sentence was enhanced on the basis of a fully discharged conviction.

While Petitioner correctly cites Maleng and Gamble, Petitioner overlooks the fact that neither of these cases had been decided as of 1988 when Petitioner pled guilty. Therefore, this Court cannot conclude that counsel's performance in failing to anticipate these claims places counsel's advice concerning whether to appeal the 1988 conviction "outside the wide range of professionally competent

⁴ In Breechen, the Tenth Circuit Court of Appeals held that the state procedural rule barring review of an ineffective assistance of counsel claim for failure to raise the claim on direct appeal was not an "adequate" state ground for purposes of the procedural default doctrine. 41 F.3d at 1363-64.

⁵ Ineffective assistance of counsel may constitute cause for state procedural default where counsel's performance falls below the minimum required by Strickland v. Washington, 466 U.S. 668 (1984).

assistance." See Strickland, 466 U.S. at 690. Petitioner's reliance on ineffective assistance of counsel to establish cause and prejudice to excuse his failure to file an appeal following his 1988 guilty plea conviction is therefore meritless and Judge Brett properly dismissed any challenge to the 1988 guilty plea conviction as procedurally barred.⁶

III. CONCLUSION

For the foregoing reasons, Case Nos. 94-C-568-BU and 94-C-569-BU are hereby consolidated and 94-C-568-BU is designated as the base file. All further pleadings, motions and other documents shall bear only the title and designation by number of 94-C-568-BU with the words "(Base File)" written below the case number, and shall be filed in the base file only.

Petitioner's consolidated habeas action is hereby dismissed as successive under Rule 9(b) of the Rules Governing Section 2254 cases. Respondent's motion to dismiss (doc. #8 in 94-C-569-BU) is granted.

SO ORDERED THIS 13th day of September, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

⁶ This Court need not discuss the applicability of Breechen to Petitioner's claims that he received ineffective assistance of counsel in connection with his 1979 and 1985 prior convictions. Judge Brett did not reach those claims as he found the entire petition procedurally barred.

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

F I L E D

SEP 13 1995

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

VICTOR JOEL COOPER,
Petitioner,
vs.
R. MICHAEL CODY,
Respondent.

No. 94-C-568-BU
and
No. 94-C-569-BU

ENTERED ON DOCKET

DATE SEP 14 1995

ORDER

This matter comes before the Court on Respondent's request to dismiss these habeas corpus actions as successive under Rule 9(b) of the Rules Governing 28 U.S.C. § 2254 cases. As more fully set out below, the Court concludes that these actions should be dismissed as successive.

I. BACKGROUND

In 1988, Petitioner was charged with three counts of robbery after former conviction of two or more felonies (AFCF) in Tulsa County District Court, Case Nos. CF-88-1001, CF-88-1269, and CF-88-1388.¹ The prior convictions on which the State predicated the AFCF charges were: CRF-78-2615, CRF-79-584, CRF-79-907, CRF-85-4910, and CRF-85-4921. Petitioner pled guilty and received a thirty-year sentence on each count to run concurrently. Petitioner did not seek to withdraw his 1988 guilty pleas or file a direct appeal. Almost three years later, he filed an application for

¹ Petitioner was also charged in Oklahoma County District Court Case Nos. CRF-88-3171, CRF-88-3176, and CRF-88-3177.

14

post-conviction relief, contending that his 1988 sentences were improperly enhanced by prior unconstitutional guilty plea based convictions. The Tulsa County District Court denied relief and the Oklahoma Court of Criminal Appeals affirmed the denial on July 13, 1992. The Court stated as follows:

Petitioner now claims that the former convictions used to enhance his sentences are void because the guilty pleas "were obtained in the absence of a knowing, intelligent and voluntary waiver of Petitioner's constitutional rights." He contends that changes in the law and errors committed by his counsel justify his failure to appeal and provide a basis for his application.

Even though Petitioner is considered "in custody" under the former convictions for purposes of federal habeas corpus relief, see Maleng v. Cook, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989); Gamble v. Parsons, 8989 F.2d 117 (10th Cir. 1990), if Petitioner's former convictions are not valid, then they should have been attacked in a direct appeal, 22 O.S. 1991, § 1051 et seq., or a post-conviction proceeding in the court imposing the judgment and sentence for that former conviction. 22 O.S. 1981, §§ 1081-1089; see also Parker v. State, 556 P.2d 1298, 1306 (Okl. Cr. 1976). If not so attacked and voided, the convictions may be used to enhance punishment in a subsequent criminal proceeding. Bowen v. State, 586 P.2d 67, 69 (Okl. Cr. 1978).

Petitioner has not substantiated his claim that errors by counsel provide sufficient reasons for his failure to appeal. 22 O.S. 1991, § 1086; see also Hale v. State, 807 P.2d 264, 266-67 (Okl. Cr. 1991). Petitioner's sentences are well within the range of punishment for Robbery With Firearms regardless of any alleged errors concerning former conviction enhancement that Petitioner claims his counsel overlooked. 21 O.S. 1991, § 801.

(Ex. A to response in 92-C-695-B, docket #4.)

On August 6, 1992, Petitioner filed his first federal petition for a writ of habeas corpus in this District, Case No. 92-C-695-B. He challenged the felonies used to enhance his 1988 sentences and alleged ineffective assistance of counsel prior to and during

sentencing of his 1988 convictions. In his reply to the State's response, Petitioner alleged that counsel (who was not appointed until the day of sentencing) did not assist him during sentencing and materially misled Petitioner into believing that he could not challenge the validity of his prior guilty plea convictions during sentencing or on appeal. As a result of counsel's misrepresentation, Petitioner alleged he waived his right to a direct appeal.

On February 3, 1993, the Honorable Thomas R. Brett denied habeas relief in Case No. 92-C-695-B on the basis of a state procedural bar--i.e., Petitioner's failure to file a direct appeal from his 1988 convictions. He relied in part on the doctrine of res judicata which bars consideration in post-conviction proceedings of issues which have been or which could have been raised on direct appeal. He also relied on the holding of the Court of Criminal Appeals that Petitioner had not shown that counsel's errors provided sufficient reasons for his failure to appeal. In the alternative, Judge Brett concluded that the petition should be dismissed for the following reasons:

"A court is not required to consider a petitioner's challenge to his former conviction if he has voluntarily and knowingly pled guilty to the enhancement charge. Mason v. Anderson, 357 F.Supp. 672 (W.D. Okla. 1973), quoting Price v. Beto, 436 F.2d 1070 (5th Cir. 1971). See also Long v. McColter, 792 F.2d 1338 (5th Cir. 1986). In this case, Cooper does not attack the validity of the 1988 guilty plea, which included the AFCF underlying convictions.

The Tenth Circuit Court of Appeals affirmed the dismissal on procedural default grounds on October 19, 1993.

On June 2, 1994, Petitioner filed three federal petitions for a writ of habeas corpus in this Court, Case No. 94-C-568-BU, 94-C-569-BU, and 94-C-570-BU.² In the first two cases, Petitioner challenged the constitutionality of his 1979 and 1985 prior convictions respectively. In the third case, Case No. 94-C-570-BU, Petitioner challenged the constitutionality of one of his 1988 convictions, CF-88-1001, and alleged that he was denied his first appeal as of right due to ineffective assistance of counsel, that counsel was ineffective during the sentencing proceedings, and that his sentence was enhanced on the basis of unconstitutional prior convictions from 1978, 1979, and 1985.

On November 14, 1994, this Court dismissed as successive the petition in 94-C-570-BU. The Court noted that Petitioner had not objected to Respondent's motion to dismiss and, in any event, Petitioner had not shown adequate cause and prejudice, or a fundamental miscarriage of justice. Petitioner did not appeal.

On December 5, 1994, this Court construed the petitions in 94-C-568-BU and 94-C-569-BU as asserting a challenge to Petitioner's present sentence, CRF-88-1001, to the extent that it had been enhanced by the allegedly invalid prior convictions from 1979 and 1985. The Court then denied Respondent's motions to dismiss for failure to meet the "in custody" requirement. (Docket #7 in 94-C-568-BU and 94-C-569-BU.) Because 94-C-568-BU and 94-C-569-BU involve common questions of law and fact, the Court now

² The Clerk of the Court originally assigned these cases to the Honorable James O. Ellison, and then administratively transferred them to this Court in November of 1994.

consolidates them in the interest of judicial economy.

Respondent contends that the claims raised in the consolidated action have been previously raised and adjudicated on the merits by this Court and therefore should be dismissed as successive. Petitioner responds that the Honorable Thomas R. Brett committed plain error when he dismissed his ineffective assistance of counsel claim in the first habeas petition, 92-C-965-B, on the basis of a state procedural bar, citing Breechen v. Reynolds, 41 F.3d 1343, 1363-64 (10th Cir. 1994), cert. denied, 115 S.Ct. 2564 (1995). Therefore, Petitioner contends that the "ends of justice" would be served by a redetermination of those claims as stated in Bass v. Wainwright, 675 F.2d 1204 (11th Cir. 1982).

II. ANALYSIS

The law regarding dismissal of successive section 2254 petitions is clear. Rule 9(b) states as follows:

Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In this case it is undisputed that Petitioner previously filed one habeas corpus action, 92-C-695-B, which this Court denied on the merits.³ See Hawkins v. Evans, ___ F.3d ___, 1995 WL 496028, at *3 (10th Cir. Aug. 22, 1995) (No. 95-5068) (dismissal of first

³ For purposes of this order, the Court presumes that the dismissal of Case No. 94-C-570-BU as a successive petition had no impact on the present action.

habeas petition on the grounds of a state procedural default constitutes a determination on the merits for purposes of the Rule 9(b) successive petition doctrine). Therefore, Petitioner bears the burden of showing that "although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground." Parks v. Reynolds, 958 F.2d 989, 994 (10th Cir. 1992) (quoting Sanders v. United States, 373 U.S. 1 (1963)), cert. denied, 503 U.S. 928 (1992). In McClesky v. Zant, 499 U.S. 467, 495 (1991), the Supreme Court equated the "ends of justice" inquiry with the "fundamental miscarriage of justice" inquiry. See also Parks, 958 F.2d at 994.

The Supreme Court recently summarized its prior holdings involving a defendant's subsequent use of the habeas writ. In Herrera v. Collins, 113 S.Ct. 853, 862 (1993), the Court stated

that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.

See also McClesky v. Zant, 499 U.S. 467, 495 (1991); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion); Parks, 958 F.2d at 995.

Petitioner has made no colorable showing of actual innocence as to his 1988 guilty plea conviction which would justify reaching the merits of the successive claims raised in the consolidated action. Therefore, Petitioner's action must be dismissed as

successive.

Even assuming the Court could reach Petitioner's contention that his ineffective assistance of counsel claim should not have been procedurally barred under the recent ruling in Breechen v. Reynolds, 41 F.3d 1343, 1363-64, Petitioner would not be entitled to habeas relief.⁴ Petitioner contends that he did not appeal his 1988 guilty plea conviction because counsel advised him that he could not challenge on appeal the constitutionality of his prior convictions.⁵ He claims that counsel's advice was clearly wrong, under Maleng v. Cook, 490 U.S. 488 (1989), and Gamble v. Parsons, 898 F.2d 117 (10th Cir.), cert. denied, 498 U.S. 879 (1990), which recognized that a prisoner may challenge a conviction for which he is presently incarcerated on the ground that the sentence was enhanced on the basis of a fully discharged conviction.

While Petitioner correctly cites Maleng and Gamble, Petitioner overlooks the fact that neither of these cases had been decided as of 1988 when Petitioner pled guilty. Therefore, this Court cannot conclude that counsel's performance in failing to anticipate these claims places counsel's advice concerning whether to appeal the 1988 conviction "outside the wide range of professionally competent

⁴ In Breechen, the Tenth Circuit Court of Appeals held that the state procedural rule barring review of an ineffective assistance of counsel claim for failure to raise the claim on direct appeal was not an "adequate" state ground for purposes of the procedural default doctrine. 41 F.3d at 1363-64.

⁵ Ineffective assistance of counsel may constitute cause for state procedural default where counsel's performance falls below the minimum required by Strickland v. Washington, 466 U.S. 668 (1984).

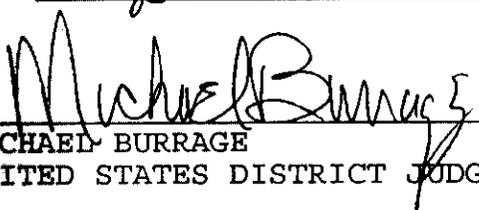
assistance." See Strickland, 466 U.S. at 690. Petitioner's reliance on ineffective assistance of counsel to establish cause and prejudice to excuse his failure to file an appeal following his 1988 guilty plea conviction is therefore meritless and Judge Brett properly dismissed any challenge to the 1988 guilty plea conviction as procedurally barred.⁶

III. CONCLUSION

For the foregoing reasons, Case Nos. 94-C-568-BU and 94-C-569-BU are hereby consolidated and 94-C-568-BU is designated as the base file. All further pleadings, motions and other documents shall bear only the title and designation by number of 94-C-568-BU with the words "(Base File)" written below the case number, and shall be filed in the base file only.

Petitioner's consolidated habeas action is hereby dismissed as successive under Rule 9(b) of the Rules Governing Section 2254 cases. Respondent's motion to dismiss (doc. #8 in 94-C-569-BU) is granted.

SO ORDERED THIS 13th day of September, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

⁶ This Court need not discuss the applicability of Breechen to Petitioner's claims that he received ineffective assistance of counsel in connection with his 1979 and 1985 prior convictions. Judge Brett did not reach those claims as he found the entire petition procedurally barred.

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

FILED

SEP 13 1995

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

DELTA MANUFACTURING COMPANY,)
INC., and GARY SHACKELFORD,)
)
Plaintiffs,)
)
vs.)
)
HEATRON,)
)
Defendant.)

Case No. 95-C-589-BU ✓

ENTERED ON DOCKET

DATE SEP 14 1995

ORDER

Defendant, Heatron ("Heatron"), is a Missouri corporation with its principal place of business in Leavenworth, Kansas. It is engaged in the manufacture of commercial and industrial heating elements. Heatron's business includes a cartridge heater division, a flexible heating division and a band heating division. Plaintiff, Gary Shackelford ("Shackelford"), is a former team manager of the cartridge heater division and the flexible heater division. During his employment with Heatron, Shackelford executed a covenant not to compete with Heatron.

On June 16, 1995, Shackelford voluntarily resigned his employment with Heatron to accept a position with Plaintiff, Delta Manufacturing Company ("Delta"). Delta is an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma. Delta is a competitor of Heatron.

On June 21, 1995, Heatron's counsel sent letters to both Delta and Shackelford, advising them that Shackelford's employment with Delta was a violation of the covenant between Heatron and Shackelford. Shackelford was also advised that if he continued his

employment with Delta, Heatron would file suit in Leavenworth County, Kansas on or about June 28, 1995 to enforce the covenant.

On June 26, 1995, Delta and Shackelford filed this action, seeking a declaratory judgment that the covenant violates public policy and therefore is unenforceable.

On June 29, 1995, Heatron filed a petition against Shackelford in the District Court in Leavenworth County, Kansas, seeking an injunction prohibiting Shackelford from working for Delta. Heatron filed a motion for preliminary injunction on July 10, 1995. Shackelford thereafter removed the action to the United States District Court for the District of Kansas (Kansas City) and filed a motion to transfer the Kansas action to this Court pursuant to 28 U.S.C. § 1404(a). The motion to transfer was orally denied on July 26, 1995. Following the denial of the motion, the Kansas court held an evidentiary hearing on Heatron's motion for preliminary injunction. On August 30, 1995, the Kansas court entered a written order denying motion to transfer and granting the motion for preliminary injunction.

Heatron now moves the Court to dismiss/stay this declaratory judgment action in light of the pending Kansas proceeding. In the alternative, Heatron moves to transfer this action pursuant § 1404(a) to the United States District Court for the District of Kansas (Kansas City). Because the Court, as discussed below, finds that transfer of this matter to the United States District Court for the District of Kansas (Kansas City) is appropriate, the Court shall not address the motion to dismiss/stay.

Section 1404(a) allows a court in its discretion to transfer a civil action to any other district where the action might have been brought when the court is satisfied that the transfer is "for the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). The purpose of section 1404(a) is to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense. Van Dusen v. Barrack, 376 U.S. 612, 616, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964).

The movant under section 1404(a) has the burden of establishing that the action should be transferred. Wm. A. Smith Contracting Co., Inc. v. Travelers Indemnity Company, 467 F.2d 662, 664 (10th Cir. 1972). Unless the balance is strongly in favor of the movant, the plaintiff's choice of forum should not be disturbed. Id.; Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 147 (10th Cir. 1962).

Under Section 1404(a), the Court at the outset must determine whether the instant action might have been brought in the United States District Court for the District of Kansas (Kansas City). Pope v. Missouri Pac. R. Co., 446 F. Supp. 447, 449 (W.D. Okla. 1978). The Court must determine not only whether venue would be proper in said District but also whether said District would have subject matter jurisdiction over this action and personal jurisdiction over Heatron. DeMoss v. First Artists Production Co., 571 F. Supp. 409, 412-13 (N.E. Ohio 1983). Even if Heatron were to consent to the transfer, the Court cannot transfer this action

if said District lacks personal jurisdiction over Heatron. Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1515 (10th Cir. 1991).

In reviewing the record, the Court finds that Heatron currently resides or is doing business in the District of Kansas (Kansas City). Indeed, the record reveals that Heatron's principal place of business is in Leavenworth, Kansas. As a result, the Court finds that venue would be proper in said District. 28 U.S.C. § 1391(a)(1). The Court also finds that the United States District Court for the District of Kansas (Kansas City), would have subject matter jurisdiction over this action under 28 U.S.C. § 1332 because Delta and Shackelford are citizens of Oklahoma and Heatron is a citizen of Kansas. The Court further finds that the United States District Court for the District of Kansas (Kansas City), would have in personam jurisdiction as Heatron currently resides and/or has its principal place of business in the District of Kansas. Consequently, the Court finds that this action might have been brought in the United States District Court for the District of Kansas (Kansas City).

Since the action might have been brought in the United States District Court for the District of Kansas (Kansas City), the Court must consider the other factors under section 1404(a). Two of those factors are the convenience of the parties and the convenience of the witnesses. Undoubtedly, the parties and their witnesses in the instant case will be inconvenienced if they are required to travel to a forum other than where they reside.

However, the Court is not convinced that one of the parties and their witnesses will be more inconvenienced than the others if the case is adjudicated in a distant forum. In the Court's view, the parties will incur substantially the same burden with respect to transporting documentary evidence and producing witnesses who are not employees and over whom the court does not have subpoena power. The Court, though, is convinced that the parties and their witnesses will be greatly inconvenienced if they are required to travel between two forums in two different states to litigate essentially the same issues. The Kansas court has already denied Shackelford's motion to transfer. Thus, it is clear if this Court were to decline to transfer this case to Kansas, the parties and their witnesses would be left in a position to litigate in both Kansas and Oklahoma. Avoidance of the added and unnecessary burden to the parties and the witnesses in litigating between two different forums in two different states clearly favors this action being transferred to the District of Kansas.

The third factor under § 1404(a) is the interest of justice. Under this factor, the Court must weigh the considerations of cost, judicial economy, expeditious discovery and trial process. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); Texas Gulf Sulphur Co., 371 F.2d at 147. Having considered the facts before it, the Court finds the interest of justice also tips the balance in favor of the case being transferred to the District of Kansas.

As it appears the Kansas proceeding will involve primarily the

same central issue as the instant case, it would be more expeditious to try all claims in the same forum. If the instant case were transferred to the Kansas court, it could be consolidated with the Kansas action. This would further conserve judicial resources and promote judicial economy. Pretrial discovery could be conducted in a more orderly manner, witnesses could be saved the time and expense of appearing in more than one trial and the possibility of inconsistent results could be avoided.

Although Delta and Shackelford assert that this forum should be given priority as the declaratory judgment action was filed first, the Court concludes that the "first to file" rule should not govern. From the record, it appears that Delta and Shackelford were motivated by forum shopping and procedural fencing to file the instant action. Indeed, within a few days of receiving written notice that a lawsuit would be filed in Leavenworth, Kansas, the instant action was filed. Because the Court concludes that the instant action was triggered by the notice letter to Delta and Shackelford, the transfer of this action should not be precluded based upon the "first to file" rule.

Delta and Shackelford have also argued that this Court should proceed with this action as the Kansas court will not apply the same law in determining the enforceability of the covenant between Heatron and Shackelford. The Court notes, however, that Oklahoma and Kansas apply essentially the same standard in determining whether the covenant not to compete is unenforceable. Bayly, Martin & Fay, Inc. v. Pickard, 780 P.2d 1168, 1171 (Okla. 1989) (in

order to be valid, a covenant must be deemed reasonable by the Court); Puritan-Bennett Corp. v. Richter, 679 P.2d 206, 210 (Kan. 1984) (restrictive covenant in an employment contract will only be applied to the extent it is reasonably necessary under the facts and circumstances of a particular case).

Based upon a consideration of the factors under section 1404(a), the Court finds that this declaratory judgment action should be transferred to the United States District Court for the District of Kansas (Kansas City). Accordingly, the Motion to Transfer (Docket Entry #5-3) filed by Heatron is GRANTED. In light of the Court's ruling, the Motion to Dismiss (Docket Entry #5-1) filed by Heatron is declared MOOT and the Motion to Stay (Docket Entry #5-2) filed by Heatron is declared MOOT.

Entered this 13th day of September, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 11 1995

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

ARLENE BROWN-MCLEMORE,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ, individually, and)
in his official capacity as Sheriff of Tulsa)
County, Oklahoma)
and)
CORRECTIONAL MEDICAL SYSTEMS)
INC.,)
Defendants.)

Case No. 93-C-116-H

ENTERED ON FILE
DATE SEP 13 1995

JOURNAL ENTRY ON CONFESSION OF JUDGMENT

This cause comes on for hearing on this 6th day of ~~August~~ ^{September}, 1995. Plaintiffs, the next of kin of Arlene Brown-McLemore appears through their attorneys of record, David Phillips. Defendant Stanley Glanz, Tulsa County Sheriff, appears through his attorney of record, Fred J. Morgan Assistant District Attorney. The Court finds that these parties have entered the following stipulations:

1. On July 10, 1995, the Board of County Commissioners of Tulsa County, Oklahoma approved the recommendation of the District Attorney of Tulsa County, Oklahoma, to confess judgment in the case herein in the amount of Fifteen Thousand Dollars (\$15,000.00) under the following conditions:

1. The Defendants are in **no way** admitting any liability or fault on the part of Defendants Stanley Glanz, **Tulsa County Sheriff**, or any other unnamed employees of the **Tulsa County Sheriff or Tulsa County, Oklahoma**;
2. That the settlement of **this case** will result in a full release of any and all, past, present, or future claims **against Defendants Stanley Glanz, Tulsa County Sheriff, and any other unnamed employees** of the **Tulsa County Sheriff or Tulsa County, Oklahoma**, which Plaintiff **'s have** or may have as a result of the incidents alleged to have occurred herein;
3. That the settlement of **this case** will result in a full release of any and all, past, present, or future claims **for attorney's fees** under 42 U.S.C. § 1988, and costs associated therewith **against Defendants Stanley Glanz, Tulsa County Sheriff, and any other unnamed employees** of the **Tulsa County Sheriff or Tulsa County, Oklahoma**, which **Plaintiffs or his attorneys, David Phillips, Robert Mayes, or Jon B. Comstock** may have as a **result** of this judgment.
4. This Journal Entry represents **all agreements** between plaintiff and defendant Glanz. This **agreement** does not reflect any agreements between plaintiff and defendant **Correctional Medical Systems**.
5. Plaintiff is fully aware of the **conditions** upon which this confession of judgment is made and hereby fully accepts **said conditions**.

The Court accepts these stipulations and based upon said stipulations finds that the Plaintiff is entitled to recover the sum of **Fifteen** Thousand Dollars (\$15,000.00) against the Board of County Commissioners of the **County of Tulsa, Oklahoma**.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff recover judgment against the Board of County Commissioners of Tulsa County, Oklahoma, in the sum of Fifteen Thousand Dollars (\$15,000.00), with interest from the date hereof at 8.31% per annum.

SEVEN ERIK HOLMEN

UNITED STATES DISTRICT JUDGE

JUDGMENT IN CASE NO. 93-C-116-H **APPROVED AS TO FORM AND CONTENT:**



David Phillips

Attorney for Plaintiff



Fred J. Morgan

Assistant District Attorney

*Attorney for Board of County Commissioners of the
County of Tulsa and for Defendant Stanley Glanz*

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JAMES MICHAEL HARTMAN;)
ROSEMARIE HARTMAN; COUNTY)
TREASURER, Tulsa County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

SEP 12 1995

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

ENTERED ON DOCKET

DATE SEP 13 1995

Civil Case No. 95-C 794C

ORDER

Upon the Motion of the **United States** of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, **through** Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is **hereby ORDERED** that this action shall be dismissed without prejudice.

Dated this 11th day of Sept, 1995.

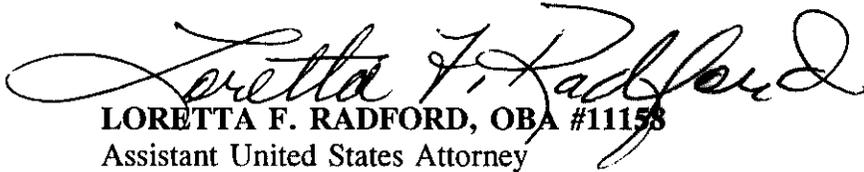
(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

NOTE: THIS DOCUMENT IS TO BE FILED BY ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with a large, looping initial "L".

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

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

F I L E D

SEP 11 1995

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

LOUIS SMITH,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,²

Defendant.

Case No: 93-C-1057-W

ENTERED ON DOCKET

DATE SEP 12 1995

JUDGMENT

Judgment is entered in favor of the Plaintiff, Louis Smith, in accordance with this court's Order filed September 11, 1995.

Dated this 11th day of September, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

²Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant has the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for lifting greater than 20 pounds at a time occasionally or 10 pounds at a time frequently. He concluded that claimant was unable to perform his past relevant work as a welder/electrician in construction or machine operator of heavy or medium work. He determined that claimant's residual functional capacity for the full range of light work was not reduced by any nonexertional impairments, he was 43 years old, which is defined as a younger individual, he had the equivalency of a high school education, and he did not have any acquired work skills which are transferable to the skilled or semiskilled work functions of other work. He concluded there were a significant number of jobs in the national economy which claimant could perform, such as assembly, cashier, office helper, and kitchen helper. Having determined that claimant's impairments did not prevent him

² Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hepner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

from performing light work, the ALJ **concluded** that he was not disabled under the Social Security Act at any time through the **date** of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ failed to fully develop the record.
- (2) The ALJ did not properly evaluate claimant's mental impairment.
- (3) The ALJ mischaracterized and misconstrued the record.
- (4) The ALJ posed an improper hypothetical question to the vocational expert.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any **gainful** work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant's application for supplemental security income filed on June 26, 1991, listed his impairments as heart problems, high blood pressure, dizziness, and knee, back, and shoulder pain (TR 64). His disability report filed on August 7, 1991 also listed swelling in his abdomen and fatigue (TR 87). His reconsideration disability report filed on October 15, 1991 listed post traumatic stress disorder ("PTSD"). (TR 101). The ALJ found that the medical evidence only established that claimant had a bilateral knee impairment (TR 24). All of the claims on appeal relate to the failure to find a disabling mental impairment.

Claimant first argues that the ALJ did not fully develop the record, because he failed to obtain all Veterans Administration ("VA") records. Claimant attaches records which "plaintiff's current counsel has been able to obtain." (Docket #13, pg. 3). The first page

of those records is a letter from the **Disabled American Veterans National Service Office** dated August 17, 1994, stating that **claimant** had been found 50% disabled for PTSD effective July 10, 1991. This decision **was made** a year and a half after the ALJ issued his decision on March 24, 1993, and thus **did not exist** at the time of the decision.

Plaintiff claims that the records **he obtained** showed that "plaintiff had a diagnosis of Post Traumatic Stress Disorder . . . **since 1973.**" (Docket #13, pg. 2). However, there is no evidence in those records that **this diagnosis** was made in 1973, and claimant conceded that the term did not exist in **1973** and was not coined until the 1980s. (Docket #13, pg. 3). He then argues that the **new records** show he was diagnosed as having depression and anxiety in 1973, which **were "hallmarks of PTSD."** (Docket #13, pg. 3).

While the ALJ is charged with **the duty** to fully develop the record as to material issues, this means development of **relevant evidence.** Baca v. Dept. of Health & Human Servs., 5 F.3d 476, 480 (10th Cir. 1993); Dixon v. Heckler, 811 F.2d 506, 510 (10th Cir. 1987) (citing Heckler v. Campbell, 461 U.S. 458, 471 n.1 (1983)).

Claimant did not allege disability **since 1973** and the record shows that he worked at numerous jobs until 1990 and **claimed he became disabled** on June 12, 1990 (TR 64, 81). The record considered by the ALJ **included VA records** for the periods May 14-16, 1991 and September 10-14, 1991 (TR **293-314**). The claimant admits that the records he now submits had not been released to **him** at the time the ALJ made his decision, and many of the records submitted do **not pertain** to the time period after June 12, 1990.

The court notes that the Tenth **Circuit** has held that an ALJ should consider a VA disability rating in making his decision. Baca, 5 F.3d at 480. "Although findings by other

agencies are not binding on the Secretary, they are entitled to weight and must be considered." Id. (citing Fowler v. Califano, 596 F.2d 600, 603 (3rd Cir. 1979)). The new records submitted by claimant show that the VA has given him a 50% disability rating for PTSD, effective July 10, 1991.

The court also notes that a social security examiner, Dr. Donald Inbody, examined claimant on May 1, 1992 and his overall judgment of claimant's psychological, social, and occupational functioning -- his "Global Assessment of Functioning Scale" ("GAF") - was 45 and his highest GAF in the past year was 50.⁴ (TR 317). The court in Irwin v. Shalala, 840 F. Supp. 751, 759 n.5 (D. Or. 1993), described the significance of this score:

The Global Assessment of Functioning Scale ("GAF") ranges from 90 (absent or minimal symptoms) to 1 (persistent danger of severely hurting self or others, or unable to care for herself). A score between 41 and 50 is defined as manifesting "serious symptoms" (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).

The ALJ noted Dr. Inbody's conclusion, but pointed out that it was inconsistent with a mental status examination by the VA on January 4, 1992, which found as follows:

Mental status examination reveals the veteran to be irritable, angry, and extremely tense. He states he has difficulty controlling his anger when relating to other people. He did not appear to be suspicious, distrustful, or paranoid. No delusions or hallucinations were elicited. The mood was depressed and affect flattened. He was oriented in all spheres and there was no memory impairment with adequate insight. The examiner's impression was impulse control disorder with major depression with moderately severe [sic] anxiety features.

(TR 410). The VA doctor gave a 0 percent rating for PTSD and a 50 percent rating for

⁴ Dr. Inbody did diagnose claimant as having "[p]ossible post-traumatic stress disorder, moderate, currently being treated with outpatient counseling." However, from the text of his interview and examination, it appears that the determination of the GAF number was based on claimant's personal history, not the PTSD, as the assessment was consistent with the fact that plaintiff was unemployed, living off of food stamps and help from his mother and children, and had been married 6 times. (TR 316-17).

depression and anxiety (TR 22, 410-411).

The ALJ did not err in stating that a determination made by another agency that a claimant is disabled was not binding on him (TR 22). He clearly considered the VA decision, but concluded that the medical evidence and record as a whole did not reflect a severe mental impairment (TR 22).

Section 405(g) of Title 42 of the United States Code provides that this court "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding for a rehearing The court . . . may, at any time, on good cause shown, order additional evidence to be taken before the Secretary" Under that section, a claimant may submit new evidence regarding a disability, but several requirements must be met before the court remands the case for reconsideration. The evidence must be new and not merely additional and cumulative of what is already in the record, because a plaintiff may not relitigate the same issues. Bradley v. Califano, 573 F.2d 28, 30-31 (10th Cir. 1978). The evidence must also be material, that is, relevant and probative.

The courts have also found that there must be a reasonable possibility that the new evidence would have changed the Secretary's decision had it been before him. Cagle v. Califano, 638 F.2d 219, 221 (10th Cir. 1981), cert. den. 451 U.S. 993 (1982). Implicit in the materiality requirement is the idea that new evidence should relate to the time period for which benefits were denied, and that it not concern evidence of a later-acquired disability or of the subsequent deterioration of the previously non-disabling condition. Haywood v. Sullivan, 888 F.2d 1463, 1471-72 (5th Cir. 1989) (citing Johnson v. Heckler,

767 F.2d 180, 183 (5th Cir. 1985)). The final requirement is that plaintiff must demonstrate good cause for not **having** incorporated the new evidence into the administrative record. Id.

This court may only consider the **new** evidence proffered to determine whether the case should be remanded under 42 U.S.C. § 405(g). Selman v. Califano, 619 F.2d 881, 885 (10th Cir. 1980). Upon remand, **the** Secretary can then consider all the current impairments, "not just that impairment(s) present at the time of the most recent favorable determination," to decide if claimant **is able** to engage in substantial gainful activity. 20 C.F.R. § 404.1594.

At the hearing, claimant stated **his** VA records were sealed at one time and he was still trying to get all of them through a Congressman (TR 49). He has stated that his counsel has only recently been able to **obtain** the VA records he now presents. (Docket #13, pg. 3). The consent form to **release** information from claimant's VA records signed on March 13, 1990 shows that "sensitive records" are not included.⁵ Some of the reports confirm that he has received counseling for his psychological problems, and there is a definite finding that he was 50% disabled by PTSD as of July 10, 1991. This new evidence is material to a decision regarding claimant's disability, because it confirms some of the previous evidence and expands upon it **and** is not cumulative of evidence already in the

⁵There is no hint in these records as to what the nature of the "sensitivity" is. The court can only speculate that, since claimant served as a Special Forces green beret in the Vietnam conflict, some medical records reflecting his activities in that capacity may have been originally classified on national security grounds, or that the records include psychiatric notes and information that would be considered harmful to claimant if he were to read them. As the Vietnam conflict ended over 20 years ago, and in light of current diplomatic initiatives normalizing this country's relationship with that former adversary, there appears to be little basis upon which to withhold relevant information that might advance this veteran's social security claim on national security grounds. In any event, any residual "sensitivity" concerns can be addressed by a protective order issued by the ALJ, limiting access to any sensitive documents to the ALJ, counsel of record, and expert medical and vocational witnesses for use only in connection with Mr. Smith's social security disability claim and not for any other purpose.

record. Such evidence may or may not affect the Secretary's decision that claimant was not disabled and that he can engage in substantial gainful activity.

The social security regulations specify that a special procedure must be followed when evaluating a mental impairment. 20 C.F.R. §§ 404.1520a & 416.920a. The procedure entails recording pertinent information on a standard document. §§ 404.1520a(d) & 416.920a(d). When a claimant's severe mental impairment does not meet a listed mental impairment, the standard document must include an assessment of the residual functional capacity. §§ 404.1520a(c)(3) & 416.920a(c)(3). The document must be completed at the "initial, reconsideration, administrative law judge hearing, and Appeals Council levels." §§ 404.1520a(d) & 416.920a(d). At the initial and reconsideration levels, the document must be completed and signed by a medical consultant. §§ 404.1520a(d)(1) & 416.920a(d)(1). The ALJ, however, may complete the document without the assistance of a medical advisor. §§ 404.1520a(d)(1)(i) & 416.920a(d)(1)(i).

Here the ALJ referred to reports by qualified psychiatrists in completing the standard document, including the residual functional capacity assessment. (TR 21-22, 26-28). However, it is clear at this point that the record was not complete at the time those reports were written.

For the foregoing reason, the case is remanded pursuant to 42 U.S.C § 405(g) for a rehearing addressing whether claimant is disabled after the record is completed. On remand, the Secretary must make every reasonable effort to obtain any remaining records from the VA and must seek assistance of a medical consultant and vocational expert to assess claimant's physical and mental condition in light of the completed record, and the

impact of his combined impairments on his residual functional capacity to do work in the national economy.

Dated this 8th day of September, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

FILED

SEP 11 1995

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

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

BARBARA ANN ALLEN,
Plaintiff,

vs.

CLARENCE I. KING and
FARMERS INSURANCE COMPANY, INC.,
Defendant.

Case No. 95-C-434-H

ENTERED ON CLERK'S
SEP 12 1995
DATE _____

**ORDER SUSTAINING
JOINT STIPULATION OF AMOUNT IN CONTROVERSY AND
JOINT MOTION TO REMAND**

This matter comes on for consideration this 8TH day of September, 1995 of the Joint Stipulation of Amount in Controversy and Joint Motion to Remand (the "Joint Stipulation"). Upon review of the Joint Stipulation and being fully advised, the Court finds that the amount in controversy in the above-styled action, for personal injury, property damage or otherwise, does not aggregately exceed \$50,000.00, inclusive of attorneys fees and costs. Therefore this action should be remanded.

It is therefore ordered, adjudged and decreed that the amount in controversy in the above-styled action, for personal injury, property damage or otherwise, does not aggregately exceed \$50,000.00, inclusive of attorneys fees and costs. It is further ordered, adjudged and decreed that this action be remanded to the District Court of Rogers County, State of Oklahoma, where it was proceeding prior to its removal.



HON. SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LARRY N. DODD aka Larry Dodd;
EDITH E. DODD aka Edith Dodd;
AMERICAN NATIONAL BANK AND
TRUST COMPANY; GENERAL
MOTORS ACCEPTANCE
CORPORATION; CITY OF
DRUMRIGHT, Oklahoma;
COUNTY TREASURER, Creek County,
Oklahoma; BOARD OF COUNTY
COMMISSIONERS, Creek County,
Oklahoma,

Defendants.

FILED

SEP 11 1995

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

Civil Case No. 95-C 421H

ENTERED ON DOCKET

DATE SEP 12 1995

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 8th day of September, 1995.

S/ SVEN ERIK HOLMES

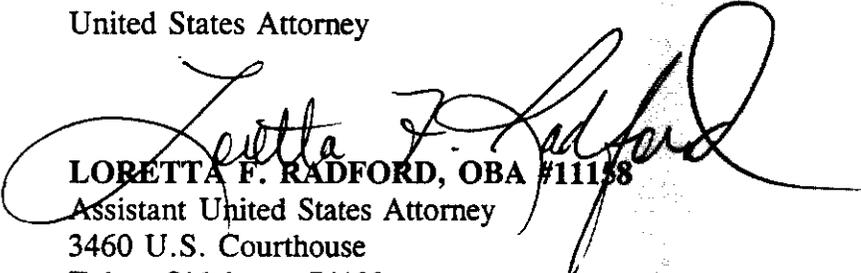
UNITED STATES DISTRICT JUDGE

NOTE:

PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

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

ARLENE BROWN-McLEMORE,

)
)



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

ARLENE BROWN-McLEMORE,

Plaintiff,

vs.

STANLEY GLANZ, individually
and in his official capacity
as Sheriff of Tulsa County,
Oklahoma; and
CORRECTIONAL MEDICAL SYSTEMS,
INC., a corporation; and
AN UNKNOWN NUMBER OF DOES,
individually, and in their
capacity as jailers and
custodians of the inmates
of Tulsa County Jail,

Defendants.

No. 93-CV-1116 H

FILED

SEP 11 1995

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

ORDER DISMISSING CLAIMS OF PLAINTIFF
AGAINST CORRECTIONAL MEDICAL SYSTEMS, INC.
WITH PREJUDICE

ENTERED ON DOCKET

DATE SEP 12 1995

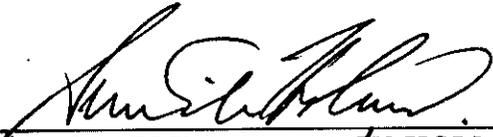
This matter came before the Court on the joint motion of plaintiff Dolores Hardeman as Personal Representative of the Estate of Arlene Brown-McLemore and defendant Correctional Medical Systems, Inc. ("CMS") to dismiss with prejudice the claims of plaintiff against defendant CMS.

The Court finds that, for good cause shown, the joint motion of plaintiff and defendant CMS for order dismissing claims with prejudice should be, and hereby is, granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the claims of plaintiff against defendant CMS are dismissed with prejudice as to defendant CMS only.

Chm

IT IS SO ORDERED this 8TH day of SEPTEMBER, 1995.



THE HONORABLE SVEN ERICK HOLMES,
UNITED STATES JUDGE

United States District Court
for Northern District of Oklahoma
September 11, 1995

William S Leach, Esq.
Rhodes Hieronymus Jones Tucker & Gable
PO Box 21100
100 W 5th St
Suite 400
Tulsa, OK 74121-1100

ENTERED ON DOCKET

DATE SEP 11 1995

C I V I L M I N U T E S

4:95-cv-00773

Emhiser Research v. Fowler

ET ENTRY

MINUTE ORDER: It is ordered that pursuant to the Notice of Dismissal filed on September 7, 1995, the Defendant, Tron-Tek, Inc. is hereby dismissed without prejudice (SEH-J) cc: all counsel [13-1]

PER LC.

Hon. Sven Erik Holmes, Judge

THIS NOTICE SENT TO ALL COUNSEL

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

DANNY HAROLD ASHTON,)
)
 Plaintiff,)
)
 vs.)
)
 CREEK COUNTY DISTRICT COURT, et al.)
)
 Defendants.)

ENTERED ON DOCKET
DATE SEP 11 1995
No. 95-C-645-K
FILED
SEP - 8 1995

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

ORDER

On August 22, 1995, the Court granted Plaintiff, a state inmate, leave to file this civil rights action in forma pauperis. The Court now reviews Plaintiff's allegations and concludes that this action should be dismissed as frivolous.

In his pro se complaint, Plaintiff sues the Creek County District Court, the Creek County District Attorney's Office, the Sapulpa Police Department, and the Creek County Public Defender's Office for malicious prosecution and false and wrongful incarceration. He seeks actual and punitive damages. (Doc. #1.)

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

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theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that this action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. Plaintiff cannot seek money damages for the alleged invalidity of his conviction in Creek County prior to a determination that the conviction and resulting confinement are invalid. The Supreme Court recently held in Heck v Humphrey, 114 S.Ct. 2364, 2372 (1994), that in order to recover damages in an action brought pursuant to 42 U.S.C. § 1983 for an allegedly unconstitutional conviction or imprisonment, or for "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," a prisoner must show that the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."

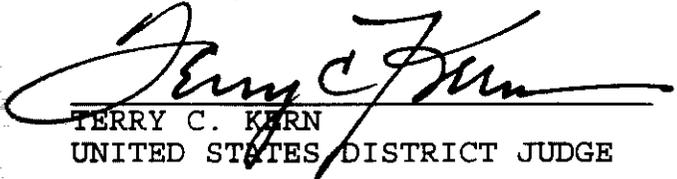
Because the validity of Plaintiff's conviction and sentence has yet to be undermined, the Court must evaluate Plaintiff's claims to determine whether they challenge the constitutionality of his conviction or sentence. The Court concludes that they do. The majority of Plaintiff's allegations amount to claims of ineffective

assistance of appointed counsel. If proved, these claims would call Plaintiff's conviction into question under cases such as Strickland v. Washington, 466 U.S. 668 (1984). Liberally construed, Plaintiff's complaint also alleges that the Creek County District Attorney's Office violated his constitutional rights by withholding exculpatory evidence, and that the Creek County Police Department arrested him without a warrant and planted some evidence.

Although pro se pleadings are to be construed liberally, see Haines, 404 U.S. at 520-21, a review of the complaint reveals neither factual allegations nor legal theories that might arguably support a basis for relief. Neitzke, 490 U.S. at 325. As noted above a decision in Plaintiff's favor would necessarily imply that his conviction and resulting confinement are invalid. Therefore, Plaintiff's complaint must be dismissed as frivolous.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is hereby dismissed without prejudice pursuant to 28 U.S.C. § 1915(d). The Clerk shall mail to Plaintiff (1) a copy of the complaint, (2) Sworn Affidavits (which were not accepted for filing in the Eastern District), and (3) lists of summons and witnesses.

IT IS SO ORDERED this 1 day of September, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON POCKET
DATE SEP 1 1995

LARRY DON MAYNARD,)
)
 Plaintiff,)
)
 vs.)
)
 OSAGE COUNTY DISTRICT COURT,)
 et al.,)
)
 Defendants.)

No. 94-C-707-K

FILED

SEP - 8 1995

ORDER

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

Plaintiff, a state prisoner appearing pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988, against J. R. Pearman, William H. Mattingly, and David Gambil, Osage County District Court Judges; Larry D. Stuart, Osage County District Attorney; Warren L. Smith, Doctor at Eastern State Hospital; Sharon Casebolt, Renee Swope, and Denise Cale, Court Clerks at the Osage County District Court; Merrell Tubbs, court reporter for the Osage County District Court; and Geoffrey M. Standing Bear, court appointed counsel.¹ Plaintiff alleges that Defendants conspired to find him competent to stand trial in Osage County District Court in violation of Okla. Stat. tit. 22, § 1175.2(C), although he had been determined to be incompetent to stand trial in Delaware County District Court. Plaintiff alleges that Delaware County, and not Osage County, had subject matter jurisdiction to redetermine his competency. He further alleges that Defendants Mattingly, Stuart, Casebolt,

¹Plaintiff's reliance on 18 U.S.C. § 241 is misplaced in that this is not a criminal case.

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Pearman, Gambil, Swope, Tubbs, and Cale engaged in an additional conspiracy to deprive Plaintiff of counsel on direct appeal and destroying, withholding, and delaying the preparation and submission of a full record on appeal to the Oklahoma Court of Criminal Appeals. Lastly, Plaintiff alleges that Defendants' actions prevented him from obtaining a Federal writ of Habeas Corpus under 28 U.S.C. § 2254. Plaintiff seeks actual and punitive damages against each Defendant, and declaratory and injunctive relief in the form of an order directing Osage County officials to "return Plaintiff [to the] status quo prior to inception of the deprivation of Plaintiff's liberty without due process or equal protection of the law."

Defendants have moved to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). Plaintiff has objected to Defendants' motions and has moved to extend time for service of process on Defendants Pearman, Cale, and the District Court of Osage County.

I. STANDARD OF REVIEW

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, at 1526 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in

a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

II. DISCUSSION

A. Actual and Punitive Damages

Construing all allegations in the light most favorable to Plaintiff, the Court concludes that Plaintiff cannot seek money damages for the alleged invalidity of his competency determination and conviction in Osage County prior to a determination that the conviction and resulting confinement is invalid. The Supreme Court recently held in Heck v Humphrey, 114 S.Ct. 2364, 2372 (1994), that

in order to recover damages [in an action brought pursuant to 42 U.S.C. § 1983] for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

The facts of Heck are similar to those presented in the instant case. The section 1983 plaintiff in that case, Roy Heck, was convicted of involuntary manslaughter in an Indiana state court and sentenced to a fifteen-year term of imprisonment. Id. at 2368.

He filed his section 1983 lawsuit in federal court while his appeal from his conviction was pending in the Indiana courts, alleging that he had been the victim of a conspiracy by county prosecutors and a police investigator to destroy exculpatory evidence and to use an illegal voice identification procedure at his trial. Id. The district court dismissed Heck's section 1983 action because the issues raised in that action directly implicated the legality of Heck's confinement. Id. While Heck's appeal to the Seventh Circuit was pending, the Indiana Supreme Court affirmed his conviction. Id. The Seventh Circuit affirmed the dismissal of Heck's section 1983 action, following the rule that

[i]f, regardless of the relief sought, the [section 1983] plaintiff is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so.

Heck v. Humphrey, 997 F.2d 355, 357 (7th cir. 1993), aff'd, 114 S.Ct. 2364 (1994).

Although the Supreme Court affirmed the judgment in Heck, it rejected the analysis employed by the Seventh Circuit. The Court adhered to its "teaching that § 1983 contains no exhaustion required beyond what Congress has provided." Heck, 114 S.Ct. at 2370. The Court agreed, however, that Heck could not proceed with his section 1983 action. Using the common law tort of malicious prosecution as an analogy to aid in interpretation of section 1983, the Court concluded that a claim for damages bearing a close relationship to an unconstitutional conviction or sentence that has

not been invalidated is not cognizable under section 1983. Id. at 2372. As the Court remarked a little later in the opinion,

We do not engraft an exhaustion requirement upon § 1983, but rather deny the existence of a cause of action. Even a prisoner who has fully exhausted available state remedies has no cause of action under section 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus. . . . [A] § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.

Id. at 2373-74.

Because the validity of Plaintiff's conviction and sentence has yet to be undermined, the Court must evaluate Plaintiff's claims to determine whether they challenge the constitutionality of his conviction or sentence. The Court concludes that they do. As stated previously, Plaintiff alleges that Defendants conspired to find him competent to stand trial in Osage County District Court although Delaware County District Court retained jurisdiction over his competency determination and had previously found him incompetent to stand trial. This claim clearly impacts on the validity of Plaintiff's confinement. Some of Plaintiff's allegations also amount to claims of ineffective assistance of appointed counsel. If proved, these claims would call Plaintiff's conviction into question under cases such as Strickland v. Washington, 466 U.S. 668 (1984). Lastly, Plaintiff's complaint also alleges the denial of counsel in his first appeal as of right

and the denial of a complete record on appeal.²

Because a decision in Plaintiff's favor would necessarily imply that his conviction and resulting confinement are invalid, his section 1983 claims for damages must be dismissed without prejudice at this time for failure to state a claim.

Additionally, dismissal of Plaintiff's conspiracy claims under section 1985(2) (second portion) and section 1985(3) is proper because Plaintiff has not alleged that Defendants were motivated by an intent to discriminate on the basis of race or some other class-based invidiously discriminatory animus. See Griffin v. Breckenridge, 403 U.S. 88, 100-102 (1971) (in addition to proof of a conspiracy, a plaintiff seeking relief under section 1985(3) must show "some racial, or perhaps other class-based invidiously discriminatory animus behind the conspirator's action"). While section 1985(2) (first portion) does not require a showing of invidious discrimination, dismissal is proper as that section applies only to an action for damages against conspiracies which deter by force, intimidation, or threat a party or witness in federal court. Lastly, as a recovery under section 1986 is dependent upon the existence of a claim under section 1985, Plaintiff cannot establish a cause of action under section 1986. See Taylor v. Nichols, 558 F.2d 561, 568 (10th Cir. 1977).

²A federal district court will not be able to review these constitutional claims in a petition for a writ of habeas corpus unless Plaintiff has presented them to the Osage County District Court in a petition for post-conviction relief and appealed any denial to the Court of Criminal Appeals. See Okla. tit. 22, § 1080, et seq.

B. Injunctive Relief

Plaintiff's request for declaratory and injunctive relief must similarly be dismissed under Fed. R. Civ. P. 12(b)(6). As noted above, Plaintiff's complaint essentially asks for an injunction requiring Osage County to expunge Plaintiff's conviction for lack of subject matter jurisdiction. Although Plaintiff does not request that he be released, the requested order "would be tantamount to a decision on [plaintiff's] entitlement to a speedier release." Duncan v. Gunter, 15 F.3d 989, 991 (10th Cir. 1994). Therefore, Petitioner may seek this relief only in a habeas corpus action after exhausting state judicial remedies. Id. It is well established that habeas corpus is the sole federal remedy for a state prisoner seeking a determination that he is entitled to a speedier release. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).

C. Motion to Extend Time for Service of Process and Request for Personal Service

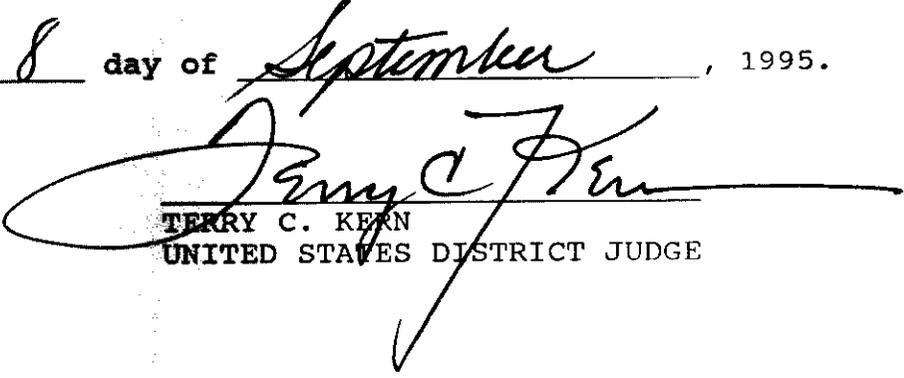
Even if Plaintiff could show good cause for failing to serve the Osage County District Court, Judge Pearman, and Defendant Cale within 120 days after the filing of the complaint, Plaintiff's allegation against these Defendants lack an arguable basis in law and must be dismissed as frivolous. See Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). As noted above, Plaintiff's allegations challenging the validity of his conviction and resulting confinement cannot be raised in a civil rights action prior to a determination that the conviction and resulting confinement was invalid. Heck, 114 S.Ct. at 2372. Accordingly,

Plaintiff's motion for an extension of time to perfect personal service must be denied.

III. CONCLUSION

After liberally construing Plaintiff's complaint in accordance with his pro-se status, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court grants Defendants' motions to dismiss for failure to state a claim (docket #21, #29, #32, and #34) and hereby dismisses without prejudice the claims against Defendants Mattingly, Gambil, Stuart, Smith, Casebolt, Swope, Tubbs and Standing Bear. The Court also dismisses without prejudice the claims against Defendants Osage County District Court, Pearman, and Cale as they are frivolous. Plaintiff's motions to extend time for service and for order directing personal service (docket #31 and #42) are denied. Plaintiff's motions to stay proceedings (docket #38) and to resume the proceedings (docket #41) are moot. The Clerk shall mail to Plaintiff for this time only a copy of his "Rebuttal Response to Motion to Extend Time for Service and Motion to Resume Case, with Brief in Support."

SO ORDERED THIS 8 day of September, 1995.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 8 1995

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

WILLIAM S. FLETCHER, Individual;)
CHARLES A. PRATT, JR., Individual;)
JUANITA WEST, Individual; and BETTY)
WOODY, Individual; on behalf of)
themselves and of all other persons)
similarly situated,)

Plaintiffs,)

vs.)

No. 90-C-248-E

UNITED STATES OF AMERICA; BRUCE)
BABBITT, Secretary of Interior; ADA)
E. DEER, Assistant Secretary of)
Interior for Indian Affairs; GORDON)
JACKSON, Superintendent of the)
Osage Indian Agency; in their)
official capacities; OSAGE TRIBAL)
COUNCIL, and each member thereof;)
CHARLES TILLMAN, JR., as Principal)
Chief of the Osage Tribe and)
Individually; EDWARD RED EAGLE, SR.)
as Assistant Principal Chief of the)
Osage Nation and Individually,)

Defendants.)

ENTERED ON DOCKET
SEP 17 1995
DATE _____

ORDER

Now before the Court is the Motion for Final Summary Judgment (Docket #135), and the Motion for Attorney Fees (Docket #136) of the plaintiffs William Fletcher, et al.; the Motion to Dismiss (Docket #142) of the federal defendants'; and the Motion to Intervene and For Leave to Join as Party Plaintiff (Docket #156) of the Osage Nation.

This action was originally brought by plaintiffs William Fletcher, et al., for a determination of 1) the validity of the 1881 Constitution of the Osage Nation, 2) whether the Constitution defines the membership of the Osage Tribe, thus extending the right

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to vote in tribal elections to others than those possessing a "headright" annuity interest in the Osage Mineral Estate and 3) the constitutionality of the 1906 Osage Allotment Act insofar as it confines voting rights for tribal council members to "headright" owners. Plaintiffs' first cause of action was against the United States, and other "federal defendants", asserting that the rules for voting in Osage elections, promulgated pursuant to the 1906 Act, are "contrary to the 1881 Osage Constitution and contrary to the United States Constitution and the requirements of the due process clause of the Fifth Amendment of the United States Constitution." Plaintiffs also brought a claim against the existing tribal government (tribal defendants), asserting that their organization and supervision of tribal elections violates the equal protection clause of Title II of the Civil Rights Act of 1968 (25 U.S.C. §1302(8)). The issue raised by plaintiffs' complaint was the propriety of the Bureau of Indian Affairs' (BIA) determination, in interpreting the 1906 act, that only headright owners could vote.

The tribal defendants filed motions to dismiss, asserting that tribal sovereign immunity barred this claim against them, and deprived the Court of jurisdiction. The federal defendants joined in that motion, and additionally asserted that the tribal council was a necessary party, thus plaintiffs' entire lawsuit should be dismissed. At a status conference in January, 1992, it became apparent that all parties agreed that a problem existed concerning the enfranchisement issue. A means of resolving the problem was

discussed, and the parties were requested to file suggestions of process to be followed in alleviating the problem. The Motion to Dismiss was taken under advisement.

The Court then entered an Order on September 2, 1992, specifically finding that: "[t]his Court has sufficient jurisdiction pursuant to Harjo v. Kleppe, 420 F.Supp. 1110 (D.D.C. 1976), affirmed, 581 F.2d 949 (D.C. Cir. 1978), to mandate a referendum on the enfranchisement issue and to provide a forum for resolution of the voting conundrum." The Court additionally found that "[u]nder the formal rulemaking provisions of the Administrative Procedures Act, the BIA has the authority to make appropriate revisions of its regulations covering the election procedures for the Osage Tribe found at 25 C.F.R. part 90," and "[t]he 1881 Osage Constitution is extant and sufficiently valid to use, in conjunction with the 1906 Act, as a 'useful point of departure.'" Subsequently, the Court found that the parties have not submitted persuasive evidence that Congress, through the 1906 Act, intended to disenfranchise Osage who might subsequently lose their headright interests. Inherent in these findings is a recognition of the inherent powers of the Osage people to reorganize and reconstitute a government as established and recognized by treaty with the United States of America. The Court specifically retained jurisdiction for the limited purpose of providing a structure for carrying out the Osage Tribe's own address of the voting issues.

In conjunction with these Orders and findings, the Court

supervised a cooperative process whereby a commission was formed, a referendum process undertaken, and elections held. The Osage people ratified a new constitution, the Osage government has been reorganized, and any Osage whose name appears on the Roll of Osage in Oklahoma as certified pursuant to the 1906 Allotment Act, or any Osage who is a lineal blood descendant of a person whose name appears on the roll of Osage in Oklahoma is entitled to register to vote in the Osage elections.

Now that the process has been completed, the parties disagree as to the means of concluding this action. Plaintiffs seek summary judgment and attorneys' fees, the federal defendants seek to dismiss the case as now moot, the tribal defendants seek to reassert their Motion to Dismiss based on Tribal Sovereignty and the newly formed Osage Nation seeks to intervene as a party plaintiff.

I. Final Disposition

In order to end this litigation, the plaintiffs seek summary judgment, and therefore a declaration concerning the validity of the 1881 Constitution of the Osage Nation; whether the Constitution defines the membership of the Osage Tribe; and whether the 1906 Osage Allotment Act is unconstitutional in confining voting rights for tribal council members to "headright" owners. These specific findings have not, to this date, been made by the Court. In contrast, the federal defendants argue that, with the referendum process completed, and the ability of any Osage who is a lineal blood descendant of a person whose name appears on the roll of

Osage in Oklahoma as certified pursuant to the 1906 Allotment Act to vote determined, there is no "case or controversy" which would justify any injunctive or declaratory relief.

Two doctrines of mootness have recently been discussed by the Tenth Circuit in The Building and Construction Department v. Rockwell International Corporation, 7 F.3rd 1487 (10th Cir. 1993). Constitutional mootness is found when the "issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Id. at 1491. A case is "constitutionally" moot when "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Id. (citing County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)). The doctrine of prudential mootness holds that "[i]n some circumstances, a controversy, not [constitutionally] moot, is so attenuated that consideration of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant." The Building and Construction Department v. Rockwell International Corporation, 7 F.3rd at 1491-1492 (citing Chamber of Commerce v. United States Department of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980)). Under the doctrine of prudential mootness, "a court may decline to grant declaratory or injunctive relief where it appears that a defendant, usually the government, has already changed or is in the process of changing its policies or where it appears that any repeat of the actions in question is otherwise highly unlikely." The Building and Construction Department v. Rockwell International Corporation,

7 F.3rd at 1492.

In this case, the completion of the referendum process and the reorganization of the Osage government, as well as the fact that previously disenfranchised Osage are able to vote, all combine to render this matter moot. In the alternative, the Court finds that, in accordance with the powers of self government of the Osage Tribe, the doctrine of prudential mootness should apply.

II. Dismissal of Tribal Defendants

Despite their cooperation in the referendum process and their agreement that an enfranchisement problem existed that needed to be resolved, the Tribal Defendants now seek to reassert their Motion to Dismiss based on sovereign immunity and Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978). In a Status Conference on December 7, 1994, Counsel for the Tribal Defendants stated: "at this point the Tribal Council is unhappy with the way the operation under the new constitution is going and we feel that we still have preserved our rights." Such gamesmanship is inappropriate in the cooperative process that has occurred up to this point.

The Court has found that it had sufficient jurisdiction to mandate a referendum on the enfranchisement issue in order that the Osage Tribe could address the problem to which all parties stipulated, that the BIA had the authority to make appropriate revisions of its regulations covering the election procedures for the Osage Tribe, and that the Osage people have the inherent powers to reorganize and reconstitute a government. Thus the Court had the jurisdiction and authority to mandate a remedy, and the Tribal

Defendants were not necessary parties. See Harjo v. Kleppe, 420 F.Supp 1116-17. Moreover, the jurisdiction of the Court did not interfere with the sovereignty of the Osage Tribe. The Tribal Defendants' motions to dismiss are clearly moot, particularly in light of the Court's finding that constitutional mootness, and or prudential mootness applies to the issues in this case.

III. Intervention of Osage Nation

The Osage Nation now, after the entire process is completed seeks intervention "of right" to pursue a final judgment of this Court recognizing the reconstituted Osage Nation and its government. In light of the findings in this Order, and previous Orders, as well as the mootness of this case, the Court declines to address the Motion to Intervene.

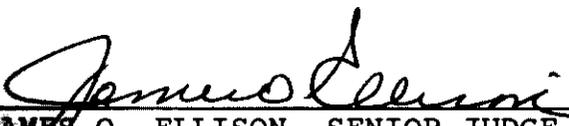
IV. Conclusion

The Osage Tribe now has a constitutional form of government that this Court recognizes as resulting from the sovereign power of the Osage people to reorganize themselves as they see fit.

Plaintiffs' Motion for Reconsideration of Order of May 7, 1993 (Docket #129) is denied as moot; Plaintiffs' Motion for Final Summary Judgment (Docket #135) is denied; Plaintiffs' Motion for Attorney Fees (Docket #136) is set for hearing on the 29 day of September, 1995, at 1:30 p.m.; the Federal Defendants' Motion to Dismiss (Docket #142) is granted; Plaintiffs' Motion to be provided copy of report (Docket #146) is denied as moot; the Osage Nation's Motion to intervene and for leave to join as party plaintiff (Docket #156) is denied; the motions to extend time, file

responses out of time and change briefing time (Docket #'s 159, 161, 164, and 168) are denied as moot.

ORDERED this 8th day of September, 1995.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

MERRIT A. PARKS,)
)
 Plaintiff,)
)
 vs.)
)
 GORDON W. EDWARDS, and DAVID MOSS,)
)
 Defendants.)

ENTERED ON DOCKET

DATE ~~SEP 11 1995~~

No. 95-C-806-K

F I L E D

SEP - 8 1995

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

ORDER

On August 21, 1995, Plaintiff, a state inmate proceeding pro se, filed a motion for leave to proceed in forma pauperis and a civil rights complaint pursuant to 42 U.S.C. § 1983. In reliance upon the representations and information set forth in Plaintiff's motion, the Court concludes that Plaintiff should be granted leave to proceed in forma pauperis. The Court now reviews Plaintiff's allegations and concludes that this action should be dismissed as frivolous.

In his complaint, Plaintiff sues Assistant Tulsa County District Attorney Gordon W. Edwards and Tulsa County District Attorney David Moss on the ground that his latest sentence for Driving Under the Influence is illegal. He alleges that a six-year sentence coupled with the suspension of his driver license constitute double jeopardy under the Eighth and Fourteenth Amendments. Plaintiff seeks actual and punitive damages. (Doc. #1.)

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams,

490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

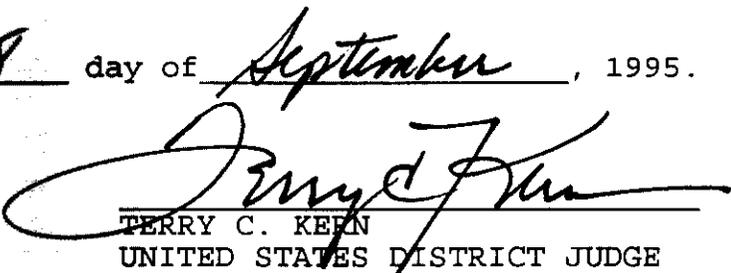
After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that this action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. Plaintiff cannot seek money damages for the alleged invalidity of his conviction in Tulsa County prior to a determination that the conviction and resulting confinement are invalid. The Supreme Court recently held in Heck v Humphrey, 114 S.Ct. 2364, 2372 (1994), that in order to recover damages in an action brought pursuant to 42 U.S.C. § 1983 for an allegedly unconstitutional conviction or imprisonment, or for "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," a prisoner must show that the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such

determination, or called into question by a federal court's issuance of a writ of habeas corpus."

Because the validity of Plaintiff's conviction and sentence has yet to be undermined, the Court must evaluate Plaintiff's claims to determine whether they challenge the constitutionality of his conviction or sentence. The Court concludes that they do. If proved, Plaintiff's claims would call Plaintiff's conviction into question under the Double Jeopardy Clause and would necessarily imply that his conviction and resulting confinement are invalid. Therefore, Plaintiff's complaint must be dismissed as frivolous.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis (docket #2) is granted and this action is hereby dismissed without prejudice pursuant to 28 U.S.C. § 1915(d). The Clerk shall mail a copy of the complaint to Plaintiff.

IT IS SO ORDERED this 8 day of September, 1995.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

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

DEMONTE LAMONZ OUSLEY,
Plaintiff,
vs.
STANLEY GLANZ, et al.,
Defendants.

ENTERED ON DOCKET
DATE SEP 11 1995
No. 94-C-998-K
FILED
SEP - 8 1995

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

ORDER

Plaintiff brings this pro se action pursuant to 42 U.S.C. § 1983 against Sheriff Stanley Glanz, the Tulsa County Sheriff's Department, the Tulsa City/County Jail (TCCJ), and the State of Oklahoma, for being housed in shocking and unhealthy living conditions during his pretrial detention at the TCCJ. Specifically, he alleges that he was required to sleep on the floor near a toilet and human waste, that he was awakened by bugs inside his blanket, and that he was placed in a two-man cell for his own protection while the other inmates involved in the fight were permitted to remain in general population. Plaintiff also alleges that he was not allowed to shower but twice a week while in the two-man cell. Plaintiff seeks actual damages.

Defendant Glanz has moved to dismiss or in the alternative for summary judgment. For the reasons stated below, the Court concludes that Defendant's motion to dismiss should be granted.

I. DEFENDANT'S MOTION TO DISMISS

A. Standard

Title 42 U.S.C. § 1983 provides individuals a federal remedy

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for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 113 S.Ct. 1160, 1163 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade, 841 F.2d at 1526 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards

than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

B. Discussion

Initially, the Court notes that the Fourteenth Amendment Due Process Clause, and not the Eighth Amendment Cruel and Unusual Punishment Clause, applies to a pretrial detainee such as Plaintiff. Bell v. Wolfish, 441 U.S. 520, 535-36 (1979). Accordingly, Plaintiff's Eighth Amendment claims must be dismissed for failure to state a claim and Plaintiff's complaint should be liberally construed, in accordance with his pro se status, to allege the violation of the Fourteenth Amendment.

Construing all allegations in the light most favorable to Plaintiff, it appears beyond doubt that Plaintiff could prove no set of facts in support of his claims which would entitle him to relief. The Constitution is indifferent as to whether the mattress a detainee sleeps on is on the floor or on a bed absent some aggravating circumstances. See Mann v. Smith, 796 F.2d 79, 85 (5th Cir. 1986); Castillo v. Bowles, 687 F.Supp. 277, 281 (N.D. Tex. 1988). Further, Plaintiff has no constitutional right to shower more than twice a week, see Davenport v. DeRoberts, 844 F.2d 1310 (7th Cir.), cert. denied, 488 U.S. 908 (1988); Walker v. Mintzes, 771 F.2d 920 (6th Cir. 1985), or to be incarcerated in a cell which

does not smell of urine. See Bradford v. Gardner, 578 F.Supp. 382 (E.D. Tenn. 1984). Nor does Plaintiff have a constitutional right to be incarcerated in a particular cell or facility and his transfer from the general population on the eighth and ninth floors of the County Jail to a two-man cell in the City Jail does not implicate, in and of itself, a constitutional right of Plaintiff. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976); Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Thus, any expectation Plaintiff may have had in remaining in the general population is too insubstantial to rise to the level of a due process protection. See Meachum, 427 U.S. at 228; Kincaid v. Duckworth, 689 F.2d 702, 704 (7th Cir. 1982), cert. denied, 461 U.S. 946 (1983); see also Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991) (because an inmate has no right to confinement in a particular institution, "[h]e cannot complain of deprivation of his 'right' in violation of due process").¹

Nevertheless, Plaintiff has failed to state a claim against Defendant Glanz in his individual capacity. Plaintiff has failed to allege an affirmative link sufficient to establish liability as to Sheriff Glanz. It is well established that for a supervisor to be liable in a civil rights suit for the actions of others there must be an affirmative link between the supervisor and the

¹ Additionally, Federal courts do not interfere in classification and placement decisions. Such decisions are entrusted to prison administrators, not to the federal courts. Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228; Wilkerson v. Maggio, 703 F.2d 909, 911 (5th Cir. 1983).

constitutional deprivation. Meade v. Grubbs, 841 F.2d 1512, 1527. That link can take the form of personal participation, an exercise of control or discretion, or a failure to supervise. Id. Plaintiff must show that the defendant expressly or otherwise authorized, supervised, or participated in the conduct which caused the deprivation. Snell v. Tunnell, 920 F.2d 673, 700 (10th Cir. 1990), cert. denied, 499 U.S. 976 (1991). Absent such a link, a supervisor is not liable for the actions of his employees. Id.

Plaintiff has also failed to state a claim against Sheriff Glanz in his official capacity as Sheriff of Tulsa County. In order to state a claim against a municipality under section 1983, a plaintiff must show that the municipality itself, through custom or policy, caused the alleged constitutional violation. Monell v. Dept. of Social Servs., 436 U.S. 658 (1978). There are two requirements for liability based on custom: (1) the custom must be attributable to the county through actual or constructive knowledge on the part of the policy-making officials; and (2) the custom must have been the cause of and the moving force behind the constitutional deprivation. Respondeat superior does not give rise to a section 1983 claim. Monell, 436 U.S. at 692-94; see also City of Canton v. Harris, 489 U.S. 378, 385 (1989).

After liberally construing the allegations in the complaint in the light most favorable to Plaintiff, Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court concludes that Plaintiff has failed to allege a custom or policy of deliberate indifference toward pretrial detainees at the jail. Nor has Plaintiff alleged that

Tulsa County was grossly negligent in failing to train and supervise Tulsa County Jail Officials. Taking the facts pled in the complaint, as well as Plaintiff's allegations in his response as true, Plaintiff has not alleged an unconstitutional policy attributable to a municipal policymaker, sufficient to progress past the pleading stage. See Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985) (plurality opinion) (single incident of unconstitutional activity not sufficient for municipal liability unless incident includes proof that it was caused by existing unconstitutional policy attributable to municipal policymaker).

II. LACK OF SERVICE

Plaintiff has failed to serve the Tulsa County Sheriff's Department, the Tulsa City/County Jail, and the State of Oklahoma within 120 days from the date of filing of the complaint. See DiCesare v. Stuart, 12 F.3d 973, 980 (10th Cir. 1993) (a pro se litigant is obligated to follow the requirements of Federal Rule of Civil Procedure 4); Jones v. Frank, 973 F.2d 872 (10th Cir. 1992) (affirming district court's dismissal of pro se litigant's action under Rule 4(m) due to lack of proper service). Accordingly, Plaintiff's action is hereby dismissed for lack of service as to these Defendants. See Fed. R. Civ. P. 4(m). The Court will reinstate this action if Plaintiff shows good cause for his failure to serve these Defendants. Plaintiff is cautioned, however, that neither the Tulsa County Sheriff's Department nor the Tulsa City/County Jail are proper legal entities which can be sued in

this civil rights action under section 1983. Numerous courts have held that such entities are not proper defendants in a section 1983 action. Martinez v. Winner, 771 F.2d 424, 444 (10th Cir. 1985); Johnson v. City of Erie, 834 F.Supp. 873, 878 (W.D.Pa. 1993); PBA Local No. 38 v. Woodbridge Police Dept., 832 F.Supp. 808, 826 (D.N.J. 1993). Moreover, the State of Oklahoma is not a person within the meaning of section 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 64 (1989).

III. CONCLUSION

Accordingly, the motion to dismiss of Defendant Stanley Glanz (docket # 6-1) is hereby **granted** and he is hereby **dismissed with prejudice**. The motion for summary judgment of Defendant Glanz (docket # 6-2) is **denied**. The Tulsa County Sheriff's Department, the Tulsa City/County Jail, and the State of Oklahoma are hereby **dismissed** for lack of service. The Court will **reinstate** this action if Plaintiff shows **good cause** for his failure to serve the Tulsa County Sheriff's Department, the Tulsa City/County Jail, and the State of Oklahoma on or **before** ten (10) days from the date of filing of this order. See Fed. R. Civ. P. 4(m).

SO ORDERED THIS 8 day of September, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

SEP - 8 1995

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

MICHAEL E. MOSHER,
SS# 478-58-1663
Plaintiff,)

v.)

SHIRLEY S. CHATER,¹
Commissioner Social Security
Administration,)
Defendant.)

NO. 94-C-13-M

ENTERED ON DOCKET
DATE SEP 11 1995

JUDGMENT

Judgment is hereby entered for the Plaintiff and against Defendant. Dated this 8 day
of Sept, 1995.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

SEP 08 1995

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

BOBBY DANDERSON,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,¹)
)
Defendant.)

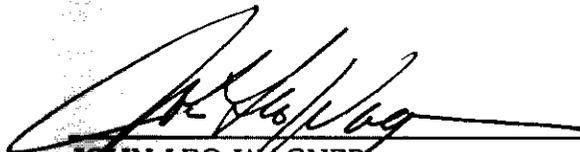
Case No: 94-C-423-W

ENTERED ON DOCKET
DATE SEP 11 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed September 8, 1995.

Dated this 8th day of September, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

F I L E D

BOBBY DANDERSON,

Plaintiff,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

SEP 08 1995

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

Case No. 94-C-423-W

ENTERED ON DOCKET
DATE SEP 11 1995

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge ("ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

²Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hepner v.

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In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertional requirements of light work, provided he alternated between sitting, standing, and walking at one hour intervals. He concluded that claimant was unable to perform his past relevant work as a plumber. He noted that claimant was 50 years old, which is defined as closely approaching advanced age, had the equivalent of a high school education, and had acquired work skills which were transferable to semiskilled work, including lumber and building supply sales and quality control inspector. He concluded that there were a significant number of jobs in the national economy which claimant could perform, such as lumber and building supply sales, quality control inspector, teacher's aid, toll booth attendant, security guard, and self-service gas station attendant. Having determined that claimant's impairments did not prevent him from performing a significant number of jobs, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ's decision that claimant retains the functional capacity to perform the standing/walking requirement of light work is

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

not supported by substantial evidence.

- (2) The ALJ's decision that **claimant has** acquired work skills which are transferable is not **supported** by substantial evidence.
- (3) The ALJ erred in **failing to find** that the medical-vocational guidelines dictated a **finding of disabled** as of September 9, 1993, the date claimant turned fifty years old.

It is well settled that the **claimant bears** the burden of proving his disability that prevents him from engaging in any **gainful work** activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The medical evidence shows that **claimant** suffered a herniated disc in November of 1990 (TR 206). On December 7, 1990, **claimant** underwent a laminectomy of L4-L5 with removal of herniated nucleus pulposus (TR 214). On March 4, 1991, his treating physician, Dr. Gerard Voelkers, released **him** to perform light duty work, which the doctor described as "bench work with **light-weight** material." (TR 199). He underwent ten physical therapy sessions between **March 5** and March 27, 1991 (TR 226-229) and returned to work hanging pipes (TR 93).

On April 1, 1991, claimant was **re-evaluated** by Dr. Voelkers, who noted that he had begun work, was having little **discomfort**, and was doing "fairly well." (TR 198). However, on April 9, 1991, he was **seen by** Dr. M. Rahimifar for the worsening of his pain and difficulty doing his job (TR 237). **The doctor** concluded he had "lumbar radiculopathy with neurological deficit" in both legs, **prescribed** a lumbar brace, and performed epidural spinal injections over a two-month **period** (TR 230-240). A myelogram performed on April 19, 1991, showed a recurrence of the **herniated** disc at L4-L5 (TR 244). Claimant's last medical visit for treatment was with **Dr. Rahimifar** on June 5, 1991 (TR 230).

On August 20, 1991, claimant was evaluated by Dr. Norman Kramer, an orthopedic specialist, for workmen's compensation purposes (TR 262-266). His x-rays confirmed that there was a narrowing of the L4-5 interspace, especially on the right (TR 264). The doctor concluded that "[h]is disability precludes heavy work, including lifting over 25 pounds" and that he could not work as a plumber (TR 266). The doctor recommended medications, a corset, and epidural injections (TR 265). No other restrictions were placed on claimant's ability to stand or walk.

Dr. William Dandridge evaluated claimant for the Social Security Administration on August 25, 1992 (TR 249-254). He noted that claimant was taking no medication for his condition and found claimant's mobility to be essentially unrestricted (TR 249-54). He concluded that plaintiff could sit and stand for one hour at a time for a total of six hours each in an eight-hour workday and could lift up to 50 pounds infrequently, 25 pounds occasionally, and 20 pounds frequently (TR 249-254). Similar findings had been made by Dr. Jack Shauffer in a residual functional capacity assessment done on April 5, 1991.

There is no merit to the claimant's first contention that there is not substantial evidence to support the ALJ's conclusion that claimant has the capacity to perform the standing/walking requirements of light work. While claimant testified that he cannot sit or stand for any length of time without severe pain (TR 63-65, 67-68), these claims are not supported by objective medical evidence. The Tenth Circuit has held that the ALJ may discount the significance of subjective complaints because of the lack of objective corroborative evidence. Talley v. Sullivan, 908 F.2d 585, 587 (10th Cir. 1990). No doctor put any restrictions on claimant's ability to stand or walk, and he did not consult a

physician for pain from June 5, 1991, until the date of his hearing on October 13, 1992.

The court also notes that the ALJ found that claimant's testimony exhibited "troubling inconsistencies" and was not credible where it was inconsistent with the medical evidence (TR 33). The ALJ commented as follows:

Claimant alleges that he is disabled by his vertebrogenic disorders. However, two of claimant's treating physicians have released claimant to perform light work. Claimant says he went back to work and couldn't perform the work. However, it is noted that claimant's treating physician, Dr. Voelkers, stated claimant was doing fairly well when he returned to work.

The objective medical evidence clearly indicates that claimant has no significant restriction of range of motion in his spine. Yet, claimant, when he was referred to an agreed doctor for workmen's compensation purposes, displayed a significant restriction in range of motion. It is interesting to note that the treating physicians findings, and those of the consulting examiner, bracket the date of the workmen's compensation evaluation. These examinations did not show any significant loss of range of motion. Such a finding indicates the claimant exhibited a strong secondary gain motive and embellished his symptomatology to the workmen's compensation evaluator. Whether this was intentional, or a by product of claimant's actual belief in his own functional limitation despite objective medical evidence to the contrary, the fact of the matter is this indicates that claimant has magnified his symptoms. It casts a pall upon the reliability and validity of the testimony. It is interesting to note that even the workmen's compensation evaluator found discrepancies between claimant's ability to bend his back and the straight-leg-raising sign.

...

Claimant takes no pain relief medication including apparently mild pain relief remedies that are obtainable over the counter. This is a sign that the claimant is able to function appropriately without prescriptive pain relief medication. Claimant shows no sign of muscle wasting or atrophy. These are clear signs that claimant is exercising all of his muscle groups sufficient to keep them maintained and toned. Such a finding clearly indicates that the claimant is not favoring one group of muscles over another due to complaints of pain. Claimant's lack of pain relief medication, lack of attempts to seek same or other further pain relief type treatment, and the physical signs and findings, all tend to refute claimant's testimony that he suffers from significant severe and disabling pain.

(TR 25-26). The determination of **credibility** is left to the observations made by the ALJ as the trier of fact and is generally **binding on a reviewing court**. Broadbent v. Harris, 698 F.2d 407, 413 (10th Cir. 1983).

The ALJ also relied on the **findings** of claimant's physicians: Dr. Dandridge concluded claimant could sit, stand, **and walk** one hour, each, for six hours in an eight-hour work day and could lift up to **fifty pounds**, Dr. Voelkers released him to light duty work, and Drs. Kramer and Rahimifar **limited** him to light work (TR 27-28).

There is also no merit to **claimant's second** contention that there is not substantial evidence to support the ALJ's **conclusion** that claimant has acquired work skills that are transferable to other light jobs. **The vocational** experts listed some of plaintiff's transferrable skills as pipe fitting, **measuring**, leveling, using hand tools, and reading blueprints (TR 75, 113). There is no **evidence** in the record that claimant did not have these skills or that they would not **be transferable** to the jobs listed by the vocational expert, including plumbing supervisor, **lumber yard sales**, and quality control inspector (TR 116-117). While claimant's **limitation to standing** or sitting for one hour and then changing positions might affect the **number** of such jobs available to him, as the vocational expert stated (TR 120, 122), the ALJ **had the burden** of showing that claimant was able to perform jobs which exist in **significant numbers** in the national economy. 20 C.F.R. § 416.966. The vocational expert **testified that** there were 171,000 lumber yard sales jobs and 40,000 quality control inspector **jobs in the national economy** (TR 117).

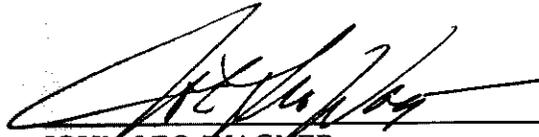
Finally, there is no merit to **claimant's** contention that the medical-vocational guidelines dictated a finding of **disabled as of** September 9, 1993, when claimant turned

fifty years old. If a claimant has both **exertional** and nonexertional impairments, an ALJ must use the **guidelines** first to **determine** if the claimant is disabled by reason of the exertional impairment alone, and, if **he is not**, the ALJ must then make a second individualized determination using the **guidelines** only as a framework for consideration of how much the individual's work **capability** is further diminished in terms of jobs that would be contraindicated by the **nonexertional** limitations. Thompson v. Sullivan, 987 F.2d 1482, 1492 (10th Cir. 1993).

The ALJ properly used the **guidelines** as a framework in finding that claimant was not disabled. The ALJ found claimant **could** do light work which allowed him to alternate between sitting, standing, and walking **at one-hour** intervals (TR 30). Since claimant's skills were transferable, the grids directed a finding of "not disabled" under both Table No. 1 for sedentary work or Table No. 2 for **light** work, both before and after he reached age 50. 20 C.F.R. Part 404, Subpt. P, App. 2, Rules 201.22, 202.22, 201.15, 202.12. Rule 201.14, which claimant contends is **applicable** to him as of September 9, 1993, directs a finding of "disabled" only when work **skills** are not transferrable. As already discussed, the ALJ elicited vocational expert testimony, and both experts testified that plaintiff had transferrable skills (TR 74-75, 113).

The decision of the ALJ is **supported** by substantial evidence and is a correct application of the regulations. The **decision** is affirmed.

Dated this 8th day of September, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:danderson

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

FILED

SEP 08 1995

ROBERT F. KROBOTH,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,¹)
)
 Defendant.)

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

Case No: 94-C-380-W

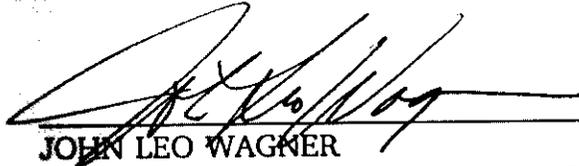
ENTERED ON DOCKET

DATE ~~SEP 11 1995~~

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed September 8, 1995.

Dated this 8th day of September, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

FILED

ROBERT F. KROBOTH,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

SEP 08 1995

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

Case No. 94-C-380-W

ENTERED ON DOCKET
DATE SEP 11 1995

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge ("ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v.

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In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of light work, except for lifting/carrying more than 15 pounds occasionally and 10 pounds frequently, rapid use of the left foot, and frequent/repetitive bending/stooping. He concluded that claimant was unable to perform his past relevant work as a police officer. He found that claimant was 53 years old, which is defined as "closely approaching advanced age," had a high school education plus 1-1/2 years of college plus electrical technology training, and did not have any acquired work skills which were transferable to the skilled or semiskilled work functions of other work. He concluded that there were a significant number of jobs in the national economy which claimant could perform, including gate tender/security guard, dispatcher, parking lot attendant, news vendor, and telephone sales. Having determined that claimant's impairments did not prevent him from performing jobs in the national economy, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

- (1) The ALJ erred in failing to find that claimant met Listing 1.05(C) of the Listing of Impairments.
- (2) The ALJ did not properly evaluate claimant's subjective complaints of pain under the Tenth Circuit's pain standard.
- (3) The ALJ did not properly evaluate claimant's credibility.
- (4) The ALJ's vocational findings are not based on substantial evidence.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant filed an application for disability benefits on May 19, 1992, alleging an onset date of November 7, 1981 (TR 80-82). He was last insured for benefits on September 30, 1988 (TR 12).

Claimant was employed as a police officer from 1965 to 1982 and suffered several back injuries (TR 121, 125-129). In May of 1981, his doctor reported that he had persistent severe back and leg pain that was consistent with a herniated disc on the left side (TR 155-156). Nerve conduction studies earlier in 1981 had showed evidence of hyperirritation phenomenon in the low back which was consistent with a mild left L5/S1 radiculopathy (TR 163-166). A CAT scan was done on October 27, 1981, and was "suggestive" of disc herniation at L5-S1 and showed extensive hypertrophic changes along the articular facets, but the evaluation at higher discriminatory levels showed no definite narrowing of the spinal canal (TR 175). He was treated with analgesics, muscle relaxants, physiotherapy, and a lumbosacral support (TR 173).

Claimant was found to be "physically incapacitated for the performance of full police

duty" by a police department medical board on February 25, 1982 (TR 178-179). On November 30, 1982, Dr. C. Akin Phillips stated he had not improved and that he was unable to perform any duties as a police officer with this condition and was totally disabled from any gainful employment (TR 171-173).

On August 3, 1983, his doctor stated that claimant had retired from the police department with disability pay and had been advised to have surgery, but had refused (TR 195). The doctor stated he had constant back pain and pain and numbness in his left leg (TR 195). Feldene was prescribed and x-rays were suggested, but claimant refused to take new ones (TR 195). The doctor reported that claimant did not wish to have any additional procedures done, including a CT scan, myelogram, and surgery (TR 195). The doctor agreed to refill the prescription, but told claimant, if he returned, an x-ray would have to be done and the doctor would require a copy of a CT scan done in New York (TR 195).

Although claimant alleges continuous pain from 1977-1988, he pursued little treatment between 1983 and 1988. Dr. Wittenburg, his treating physician, saw him only 13 times between 1983 and May of 1991 and only one visit mentioned back complaints (TR 181-183). He had thirteen chiropractic visits from October to December of 1987 (TR 250) and regular weekly chiropractic visits during the spring and summer of 1988 (TR 251-252).

Claimant testified that his daily activities were very limited from 1982-1988 (TR 48-56). He claimed he had difficulty with concentration and had almost continuous pain and numbness in his leg (TR 53, 57-58). However, as the ALJ noted:

[C]laimant retains a wide range of normal activity and some strenuous activities, some of which require significant performance of standing,

walking, or other activities he alleges he cannot do. For instance, his early record indicates that he goes fishing in his own pond, which would require prolonged sitting or standing, depending whether boat or bank, and his later allegation that he has not done so for some 2 years is self-serving and not credible.

(TR 16, 53-54).

The ALJ pointed out that the determinative cut-off date in the case was September 30, 1988, the claimant's date last insured, so even if the claimant had not been fishing for two years, his date last insured had already expired (TR 16). The ALJ also concluded that claimant admitted doing plumbing repair and "minor repairs as a leaky faucet require significant gripping and grasping of tools and usually requires the application of [a] significant amount [of] torque" (TR 16, 51).

The ALJ discussed claimant's activities with his Angora goats, an hour or so each day, and found this "evidence of activities he says, otherwise, he cannot do" (TR 16, 47). The ALJ also noted that claimant had been raising a tomato garden and mowing his own lawn all along and only recently began saying that he could not do these because of severe pain (TR 16, 51-52). The ALJ concluded:

[T]he record also shows that his activities include cooking, doing the dishes, occasional laundry, attending church, walking 150 feet to the mail box, participating in his hobbies of photography and crossword puzzles, all of which seem to be a full range of daily activities. The claimant's motivation is somewhat questionable. In the initial report, the doctor indicated that the claimant did not want to file a worker's compensation claim, even though the incident had occurred on the job, because he "wanted to get a promotion," which suggests that he wanted to wait until he would be paid at a higher rate. Therefore, since the claimant went ahead and worked for several more years, the undersigned doubts that he was severely disabled since 1977.

(TR 16-17).

The ALJ noted that claimant saw Dr. Wittenberg only a few times from 1983-1988,

mostly for unrelated complaints such as the excision of lesions, seborrheic keratosis, high cholesterol, and heart problems. The ALJ concluded:

[C]laimant's medication list includes 2 prescriptions newly prescribed in September 1992 and one in August 1992, which shows that although he had not seen Dr. Wittenberg in over a year, he suddenly returned after his initial denial of benefits and complained of severe pain requiring additional medications. This long gap in treatment, along with the extended lapses in the available record, with the treatment that was obtained being for some reason other than his alleged severe and excruciating back pain, his refusal to have more definitive tests, and his continuing rather strenuous activities, are persuasive to the undersigned that the claimant's symptoms have not been as severe as he alleges.

(TR 17).

There is no merit to claimant's first claim that the ALJ erred in failing to find that claimant's condition met the Listing of Impairments, based on the fact that Dr. Harold Goldman, the medical expert who testified at the hearing, stated that he qualified to meet Listing 1.05(C). The claimant argues that if an individual's impairment meets or equals the Listing of Impairments under Appendix I, Subpart P of Regulations No. 4, 20 C.F.R. § 404.1520, then that individual must be found to be disabled, without any consideration of his age, education, or past occupational experience.

However, claimant mischaracterizes the testimony of the expert, who testified that if certain things were assumed, then the claimant would have met the Listing in 1981 (TR 37).⁴ However, he emphasized that the diagnostic criteria necessary to make any

⁴ The medical expert reviewed the medical reports completed in 1980 and 1981 and stated:

[T]he exhibit that was given to me this morning, Exhibit 34, is 1980 and there really isn't any, any definitive document relating to his neurological examination and so he would be considered under 105C. 105C has two, has two portions. The first portion is that portion which deals with symptomatology, pain muscle spasm and significant limitation of motion of his spine. There was a document in 1981 which did disclose pain, muscle spasm, limitation of motion of the spine. Number two, appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss. He does -- I don't have anything after 1982 but on the examinations of Dr. Chandie, he had some weakness of his left great toe. There was another examination which disclosed weakness

determination of disability after that time were inadequate to make such a conclusion (TR 37). The expert concluded that, based on the 1982 evidence, claimant was capable of sitting, standing or walking for a total of six to eight hours in an eight-hour day, with each limited to thirty minutes at a time (TR 40). He also found that, at that time, claimant would be able to infrequently bend, stoop, crawl, or climb and could use his arms for rapid, alternating movements and grasping but would have difficulty with rapid, alternating movements of his legs (TR 40). He noted that claimant's back problem would have only allowed him to lift ten pounds frequently and fifteen pounds occasionally (TR 40). The ALJ did not arbitrarily substitute "his non-medical opinion in derogation of Dr. Goldman's plain statement and medical expertise," as claimant contends. (Claimant's brief, Docket #7, pg. 4).

There is also no merit to claimant's second contention that the ALJ failed to properly apply the Tenth Circuit Court of Appeals pain standard found in Luna v. Bowen, 834 F.2d 161, 164 (10th Cir. 1987). The court in Luna, discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility

of his left great toe and his peroneus longus and another examination in nineteen hundred -- that was the first examination I discussed in which he had atrophy of his quadriceps which has not been mentioned again. These are all treating physicians and if one assumes that his motor loss, the loss of an extensor, hallucis longus and peroneus longus or extensor hallucis is significant then he would then and he does have sensory loss. He would then qualify to listing 105C. The difficulty I have is the interpretation of whether -- I'm looking back at something in 1981 but on that basis at that time, with his muscle atrophy as demonstrated by another position and the one measurement, I would say that at, at that time, he had, he would have qualified for the listing.

Q Okay. Do you indicate as to whether the claimant would qualify for the listing in nineteen, say 1988?

A I have no idea. Herniated discs do get better. Herniated discs may, may resolve without surgery and muscle weakness may disappear. I would suggest that, that one cannot decide what happened to him without further medical documentation.

(TR 36-37).

of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had a back problem producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). "[T]he absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations."

Luna, 834 F.2d at 165.

The ALJ specifically discussed the factors in Luna, including the nature of claimant's complaints, medications and side effects, treatment, restrictions, and measures used to relieve pain, and, as already discussed, concluded that he did not suffer from disabling pain (TR 15-16). There is substantial evidence to support this conclusion.

There is no merit to claimant's third contention that the ALJ's credibility finding was not supported by substantial evidence. The reasons for the finding have been discussed, and substantial evidence supports it. The evidence shows that, prior to 1988, he took care of a lawn and garden (TR 51-52), went fishing (TR 53), oversaw the building of a friend's house, spending over 200 hours at the site (TR 45-46), and had sheep which he let out to graze and brought in at night (TR 47). Most importantly, he refused diagnostic testing or treatment. He refused his doctor's request to take new x-rays, as all previous x-rays were "negative," and did not leave a copy of the 1981 CAT scan for review and refused to have another taken (TR 195). He also refused a myelogram on two occasions and surgical procedures (TR 156, 195, 210). The determination of credibility is left to the observations made by the ALJ as the trier of fact and is generally binding on a reviewing court. Broadbent v. Harris, 698 F.2d 407, 413 (10th Cir. 1983).

Finally, there is no merit to claimant's contention that the ALJ's vocational findings are not based on substantial evidence. Claimant contends that, when the vocational expert testified that claimant's past work was medium work (TR 71), he ignored the fact that claimant's release from the police force indicated that he could not do any type of police work, even though there were police occupations at lesser exertional levels, and that Dr.

Phillips found he was disabled from any gainful employment (TR 171-173, 178). Claimant contends that the finding that he was "incapacitated for the performance of full police duty" on February 25, 1982 (TR 178) should have been given "full faith and credit" by the ALJ, since the court in Baca v. Department of Health & Human Servs., 5 F.3d 476, 480 (10th Cir. 1993), found that a Veteran's Administration evaluation should have been considered by the ALJ in making a disability decision.

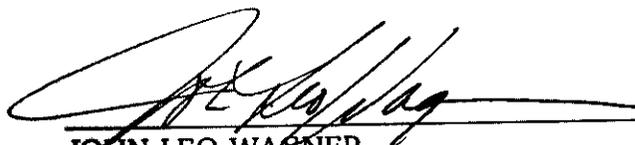
The finding that claimant could not perform "full police duty" was not binding on the ALJ. A determination by such a police board is analogous to the situation where another governmental agency determines that a social security disability benefits claimant is disabled. Such a determination is not binding on the Secretary, but is entitled to some weight and should be considered. Cutler v. Weinberger, 516 F.2d 1282, 1286 (2nd Cir. 1975); De Paepe v. Richardson, 464 F.2d 92, 101 (5th Cir. 1972). The ALJ clearly considered the police board decision, but chose not to accept it as binding on him (TR 14).

The vocational expert's testimony was based on the medical expert's assessment of claimant's residual functional capacity (TR 72-73). Based on the ALJ's findings that claimant lacked credibility and the medical evidence, the ALJ discounted certain unsupported allegations. He was not required to include in his hypothetical questions to the vocational expert impairments not accepted as true. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). There is no evidence in the record that claimant could not perform the jobs listed by the vocational expert, prior to December of 1988, including gate tender/security guard, dispatcher, parking lot attendant, news vendor, and telephone sales (TR 21, 72-73). While claimant's limitations might affect the number of such jobs

available to him, the ALJ had the burden only of showing that claimant was able to perform jobs which exist in significant numbers in the national economy. 20 C.F.R. § 416.966. The vocational expert testified that there were thousands of the jobs listed above available in the national economy (TR 21, 72-73).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 8th day of September, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:kroboth