

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

**FILED**

DEC 19 1995

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

KRISTINE WHEATON,

Plaintiff,

vs.

GREEN COMPANIES DEVELOPMENT GROUP, INC.,

an Oklahoma corporation, and

ARTHUR C. SCHNEIDER, an individual,

Defendants.

Case No. 95-C-975H

ENTERED ON DOCKET

DATE 12-20-95

JUDGMENT

Defendants in the above-entitled action having served upon the plaintiff an Offer to Confess Judgment and plaintiff having within ten days after service thereof served written Notice of Acceptance of Offer of Judgment upon the Defendants, and the said Offer to Confess Judgment and Notice of Acceptance and proof of service thereof having been filed by the plaintiff, it is hereby

ORDERED, ADJUDGED AND DECREED that Judgment is hereby entered on the causes of action stated in the above entitled action in favor of the Plaintiff, Kristine Wheaton, and against the Defendants Green Companies Development Group, Inc. and Arthur C. Schneider, jointly and severally, in the sum of \$10,001.00, and, pursuant to Rule 68 of the Rules of Civil Procedure, with costs then accrued.

Dated this 18TH day of December, 1995.

*Arthur C. Schneider*



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

ENTERED ON DOCKET

DATE 12-20-95

DAVID LEE MAYWALD,

Plaintiff,

vs.

CHERYL LYNN MAYWALD,  
JAMES D. GARNER,

Defendants.

No. 95-C-1144-H

**FILED**

DEC 19 1995



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

**ORDER**

Plaintiff, a Tulsa county inmate, has filed with the Court a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. He alleges his ex-wife and her attorney procured a restraining order and an order terminating visitation rights of baby son while Petitioner was incarcerated at the Tulsa County Jail. Plaintiff seeks declaratory relief in the form of an order reinstating his visitation rights and rescinding the restraining order.

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

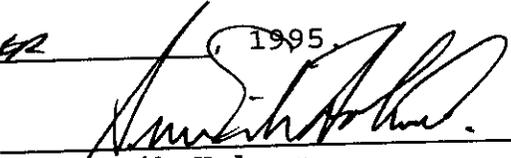
theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

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 Plaintiff's action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. Plaintiff has not alleged a constitutional violation. Moreover, the conduct of Plaintiff's ex-wife and her attorney does not constitute action under color of state law for purposes of a section 1983 violation. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970) (for a complaint under section 1983 to be sufficient a plaintiff must allege 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).

**ACCORDINGLY, IT IS HEREBY ORDERED** that Plaintiff's motion for leave to proceed in forma pauperis (doc. #2) is **granted**, and Plaintiff's civil rights action is hereby **dismissed** as frivolous pursuant to 28 U.S.C. § 1915(d). The Clerk shall **mail** a copy of the complaint to Plaintiff.

IT IS SO ORDERED.

This 18<sup>TH</sup> day of December, 1995.

  
Sven Erik Holmes  
United States District Judge

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

ENTERED ON DOCKET  
DATE 12-20-95

CHESTER RAY ROLLAND,  
Petitioner,  
vs.  
RON CHAMPION,  
Respondent.

No. 94-C-1104-H

FILED

DEC 19 1995

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

ORDER

This is a proceeding on a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his conviction for Unlawful Possession of a Controlled Substance, After Former Conviction of Two or More Felonies, Tulsa County District Court Case No. CRF-88-3864. Respondent has filed a Rule 5 response to which Petitioner has replied. As more fully set out below the Court concludes that this petition should be denied as procedurally barred.

**I. BACKGROUND**

On February 22, 1989, a Tulsa County jury returned a verdict of guilty as charged, and assessed punishment at thirty-five years imprisonment. The trial court imposed sentence in accordance with the jury verdict and Petitioner timely appealed. On June 25, 1992, the Court of Criminal Appeals affirmed the conviction and sentence by unpublished opinion. See Rolland v. State, F-89-982 (Okla. Crim. App. 1992).

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Thereafter, Petitioner sought post-conviction relief on the ground (1) that his sentence was improperly enhanced under Okla. Stat. tit. 21, § 51 instead of Okla. Stat. tit. 23, § 2-402(B)(1), and (2) that the trial court committed error by allowing Petitioner to be questioned on cross-examination as to the type of controlled substance which was the basis for his prior conviction. The Tulsa County District Court denied relief on the ground that Petitioner's issues could have been raised on direct appeal and Petitioner had failed to state sufficient reason for failing to do so. The Court of Criminal Appeals affirmed.

In the present petition for a writ of habeas corpus, Petitioner alleges the same grounds alleged in his post-conviction petition. Respondents rely on the procedural default doctrine.

## II. ANALYSIS

As a preliminary matter, the Court finds that Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

### A. Procedural Bar

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest

court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[s] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S. Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991).

Petitioner does not dispute that the state procedural bar applied to his case was independent and adequate state ground. See Maes, 46 F.3d at 985. He argues, however, that the lower state courts have arbitrarily narrowed the scope of the post-conviction act and that his application for post-conviction relief should be heard because it alleges violations of the Constitution and laws of the United States. This Court does not agree. As the state court correctly stated, the issue of bypass is governed by Okla. Stat. tit. 22, § 1086. The Court of Criminal Appeals has construed this statute "to bar the assertion of alleged errors which could have been raised on direct appeal, but were not." Jones v. State, 704 P.2d 1138, 1139 (Okla. Crim. App. 1985).

Because of this procedural default, this Court may not consider Petitioner's claims unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause standard

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

The Court liberally construes the petition, in accordance with Petitioner's pro se status, to allege ineffective assistance of appellate counsel as cause for the default. As explanation for his failure to raise the claims on appeal, Petitioner alleges that counsel refused to raise these issues on appeal even when Petitioner requested him to do so. (Petition at 6 and 8.)

To prove ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, Id. at 694. Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to

appellate counsel. See, e.g., Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992); cert. denied, 113 S. Ct. 2347 (1993).

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

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

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

In assessing the attorney's performance, a reviewing court

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

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

In the instant case, counsel's failure to argue on appeal grounds one and two of the petition does not fall below the standard of reasonably effective assistance. Petitioner's claims are meritless. Since Petitioner had at least two non-drug related prior convictions, the use of the general enhancement statute, 21

O.S. 1981, § 51(B), rather than the specific statute dealing with second or subsequent drug convictions found in 63 O.S. 1981, § 2-402, was within the prosecutor's discretion. See Cooper v. State, 806 P.2d 1136, 1138 (Okla. Crim. App. 1991) ("if any of the previous convictions are non-drug related, enhancement may be under either section at the prosecutor's option") (citing Mitchell v. State, 733 P.2d 412 (Okla. Crim. App. 1987)). Similarly, as Petitioner admitted the former convictions on direct examination, the trial court did not commit any error when it allowed Petitioner to be questioned on cross-examination as to the type of controlled substance which was the basis for his prior conviction.<sup>1</sup> Therefore, appellate counsel's decision not to present grounds one and two on direct appeal did not amount to ineffective assistance of counsel.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992). Petitioner,

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<sup>1</sup> In any event, on federal habeas corpus review, this Court is concerned only with whether federal constitutional rights were infringed. "State court rulings on the admissibility of evidence may not be questioned in federal habeas proceedings unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights. Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980). Thus, a federal habeas court "will not disturb a state court's admission of evidence of prior crimes, wrongs or acts unless the probative value of such evidence is so greatly outweighed by the prejudice flowing from its admission that the admission denies defendant due process of law." Hopkins v. Shillinger, 866 F.2d 1185, 1197 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

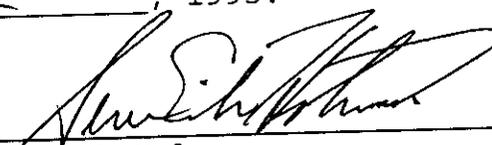
however, does not claim that he is actually innocent of the crime at issue in this habeas action.

### III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that Petitioner's claims are procedurally barred and that Petitioner cannot show cause and prejudice, or a fundamental miscarriage of justice. Accordingly, the petition for a writ of habeas corpus is hereby DENIED. Petitioner's motion to expedite proceedings (docket #6) is DENIED AS MOOT.

IT IS SO ORDERED.

This 18<sup>TH</sup> day of DECEMBER, 1995.

  
Sven Erik Holmes  
United States District Judge

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

RECORDED ON DOCKET  
DATE 12-20-95

GREGORY EUGENE TOLIVER,

Petitioner,

vs.

EDWARD L. EVANS, JR.,

Respondent.

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No. 94-C-877-H ✓

**FILED**

DEC 19 1995

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



ORDER

This matter comes before the Court on Petitioner's Motion to Vacate and Set Aside Judgment pursuant to Fed. R. Civ. P. 60.

Having reviewed the motion and the order of November 7, 1995, the Court finds Petitioner is not in custody in violation of the Constitution or laws of the United States. Accordingly, Petitioner's Motion to Vacate and Set Aside Judgment (docket #14) is hereby DENIED.

IT IS SO ORDERED.

This 18<sup>TH</sup> day of DECEMBER, 1995.

  
Sven Erik Holmes  
United States District Judge

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

ENTERED ON DOCKET

DATE 12-20-95

DALE COX, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 L. L. YOUNG, et al., )  
 )  
 Respondents. )

No. 95-C-684-H

FILED

DEC 19 1995

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

ORDER

This is a proceeding on a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections (DOC), challenges his rape conviction in Mayes County District Court, Case No. CF-92-142. Respondent has filed a Rule 5 response. As more fully set out below the Court concludes that this petition should be denied.

I. BACKGROUND

On September 3, 1992, Petitioner pled guilty to rape in the first degree and rape by instrumentation and received a twenty-year sentence on each count to run concurrent. The trial court advised Petitioner of his right to withdraw his guilty plea within ten days of sentencing and of his appeal rights. Because Petitioner could not read and write, the trial court ordered counsel to confer with Petitioner about his appeal rights within seven days of

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sentencing.<sup>1</sup> (Transcript, ex. C attached to Response, at 21-22.) Petitioner, however, did not appeal his guilty plea or move to withdraw the same. Subsequently he filed a petition for post-conviction relief seeking an appeal out of time. The district court denied relief and the Oklahoma Court of Criminal Appeals affirmed on the basis that Petitioner failed to prove that he was denied an appeal through no fault of his own.

In the instant petition for a writ of habeas corpus, Petitioner alleges that he was denied his Fourteenth Amendment right to a direct criminal appeal. The Court liberally construes the petition, in accordance with Petitioner's pro se status, to allege ineffective assistance of counsel.

## II. ANALYSIS

To prove ineffective assistance of counsel, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that if counsel had filed an appeal that petitioner would have had a reasonable probability of obtaining relief. Lockhart v. Fretwell, 113 S.Ct. 838, 842 (1993); Strickland v. Washington, 466 U.S. 668, 694 (1984). A federal

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<sup>1</sup> At sentencing the trial court stated as follows:

THE COURT: Because you do not read and write sufficiently to do that on your own, I'm going to order that you remain in the court for 10 days, and I am going to ask Mr. Ramsey to confer with you within the next seven days as to whether you wish to give notice of intent to appeal these case.

MR. RAMSEY: I will judge.

habeas court need not consider whether a petitioner established the second prong of the Strickland test if it finds that counsel was constitutionally inadequate in failing to perfect an appeal--i.e., if the criminal defendant asked his lawyer to file an appeal and the lawyer failed to do so. See Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (holding that when a court has found counsel constitutionally inadequate because counsel failed to properly perfect an appeal, it need not consider the merits of arguments that the defendant might have made on appeal); see also Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994); Lozada v. Deeds, 964 F.2d 956, 958 (9th Cir. 1992).

Petitioner's allegations are unclear. On one hand he alleges that counsel abandoned him during the ten-day period in which he could withdraw his guilty plea. On the other hand, he alleges: "I inadvertently waived my right [to an appeal] by my will being overborne by defense counsel, which was not a product of my free will." (Petition, docket #1, at 6.)

Generally an attorney has no absolute duty to advise a defendant of his appeal rights or to file an appeal following a guilty plea conviction. Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989) (citing Marrow v. United States, 772 F.2d 525, 527 (9th Cir. 1985); Carey v. Laverette, 605 F.2d 745, 746 (4th Cir.) (per curiam) (there is "no constitutional requirement that defendants must always be informed of their right to appeal following a guilty plea"), cert. denied, 444 U.S. 983 (1979)); see also Hardiman, 971 F.2d at 506; Castellanos v. United States, 26

F.3d 717 (7th Cir. 1994); Davis v. Wainwright, 462 F.2d 1354 (5th Cir. 1972).<sup>2</sup>

In his affidavit counsel attests he advised Petitioner of his appeal rights following the guilty plea and sentencing, but that Petitioner did not wish to appeal. (Affidavit of Counsel, Ex. D to Response.) Because Petitioner does not dispute that counsel advised him of his appeal rights within the ten-day period following sentencing, the Court finds that counsel was not ineffective in the constitutional sense.

### III. CONCLUSION

After carefully reviewing the record in this case, the Court finds Petitioner cannot establish he is in custody in violation of the Constitution or laws of the United States. Accordingly, the petition for a writ of habeas corpus is hereby DENIED. The Attorney General is hereby DISMISSED as a party in this case. See Rule 2(a) and (b) of the Rules Governing Section 2254 Cases (Attorney General not a proper party when Petitioner is in custody

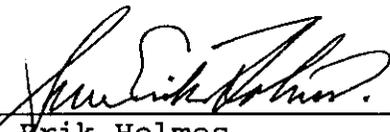
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<sup>2</sup> Only "[i]f a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right" does counsel have a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock, 880 F.2d at 1188; see also Shaw v. Cody, No. 94-6172, 1995 WL 20425, \*2 (10th Cir. Jan. 20, 1995) (unpublished opinion); Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (counsel's failure to file a requested appellate brief, when he had not yet been relieved of his duties through a successful withdrawal, amounted to constitutionally ineffective assistance). "This duty arises when 'counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim.'" Hardiman, 971 F.2d at 506 (quoting Marrow v. United States, 772 F.2d 525, 529 (9th Cir. 1985)).

pursuant to the state judgment in question).

IT IS SO ORDERED.

This 18<sup>TH</sup> day of DECEMBER, 1995.

  
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Sven Erik Holmes  
United States District Judge

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

CECIL WAYNE HALLMARK, )  
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 Petitioner, )  
 )  
 vs. )  
 )  
 EDWARD EVANS, )  
 )  
 Respondent. )

No. 95-C-822-H

ENTERED ON DOCKET  
DATE 12-20-95

FILED

DEC 19 1995

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

ORDER

At issue before the Court is Petitioner's pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

In his petition, Petitioner alleges, delays associated with prosecuting his direct criminal and ineffective assistance of counsel in perfecting his direct appeal. By summary opinion issued on November 22, 1995, the Court of Criminal Appeals affirmed in part and reversed in part Petitioner's conviction.<sup>1</sup> Therefore, to obtain habeas relief based on the delay in adjudicating his direct criminal appeal, Petitioner must show "actual prejudice to the appeal itself, arising from the delay." Harris v. Champion, 15 F.3d 1538, 1566 (10th Cir. 1994) (Harris II). Quoting from Diaz v. Henderson, 905 F.2d 652, 653 (2nd Cir. 1990), the Tenth Circuit Court of Appeals reasoned as follows:

An untainted affirmance of a petitioner's state appeal while his habeas petition is pending makes clear that the petitioner was confined pursuant to a valid judgment of conviction throughout the period of delay. The affirmance established that if the delay had not occurred

<sup>1</sup> The Court remanded with instructions to dismiss Counts III and IV and remanded for resentencing Counts I and II in accordance with Okla. tit. 22, § 982.

and petitioner's due process right to a timely appeal had been fully satisfied, he would have been subject to exactly the same term of confinement. Because the due process violation did not result in an illegal confinement, it cannot justify granting the habeas remedy of unconditional release.

Harris II, 15 F.3d at 1566 (10th Cir. 1994).

Petitioner has not established that, but for the appellate delay, his appeal would have been decided differently. See id. (citing Mwakkil v. Hoke, 968 F.2d 284, 285 (2d Cir.), cert. denied, 113 S.Ct. 664 (1992)). He merely contends that the inordinate delay cannot be corrected by the state deciding his appeal after almost three years. It is well established, however, that inordinate delay alone is not an available remedy if a petitioner's conviction has been affirmed. Id. Nor is there anything inherently objectionable in the Oklahoma court's use of summary opinions in unpublished cases. "The United States Supreme Court has recognized that 'courts of appeal should have wide latitude in their decisions of whether or how to write opinions.'" King v. Champion, 55 F.3d 522, 526 (10th Cir. 1995) (quoting Taylor v. McKeithen, 407 U.S. 191, 194 N.4 (1972) (per curiam)).

Because Petitioner has not indicated how the merits determination of his appeal would have been different if his appeal had been decided more quickly, his request for habeas relief on the basis of appellate delay should be dismissed. This dismissal, however, is without prejudice to Petitioner filing a separate habeas action alleging non-delay constitutional claims in connection with his conviction in CRF-92-5203. But see Harris v. Champion, 48 F.3d 1127, 1131 (10th Cir. 1995); King, 55 F.3d at 526

n.4.

IT IS SO ORDERED.

This 18<sup>th</sup> day of DECEMBER 1995.

  
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Sven Erik Holmes  
United States District Judge

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

**FILED**  
DEC 19 1995

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

WILLIE LEONARD GRANT, )  
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 Petitioner, )  
 )  
 vs. )  
 )  
 RONALD J. CHAMPION, et al., )  
 )  
 Respondent. )

No. 94-C-1031-E

ENTERED ON DOCKET  
DATE DEC 20 1995

ORDER

Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now before the Court for consideration. Respondent has filed a Rule 5 response to which Petitioner has not replied. For the reasons stated below, Petitioner's application for a writ of habeas corpus should be denied.

**I. BACKGROUND**

On February 28, 1984, Petitioner pled guilty to Robbery by Force and Assault and Battery with intent to kill. The Tulsa County District Court assessed punishment at fifteen years with all but seven years suspended. On November 27, 1991, the State moved to revoke Petitioner's suspended sentence on the basis that Petitioner unlawfully possessed cocaine with intent to distribute as charged in Tulsa County case number CF-91-4222.

At a January 29, 1992 revocation hearing, Officer Steven Middleton testified that while conducting nighttime surveillance of an apartment building, he observed Petitioner doing something unidentifiable near a dumpster. Petitioner then stopped at the

building and counted money. Next, three people appeared and went into the building with Petitioner. Petitioner came outside and put an unidentifiable object under a cement parking barrier, then remained in the area. Officer Thomas Reece looked under the barrier and retrieved a small brown sack which contained six small bundles of what appeared to be cocaine. Officer Glen Moore conducted a Becton-Dickinson field test, and determined the substance to be cocaine.

On the basis of this evidence, the district court granted the State's application to revoke Petitioner's suspended sentence. The court found the evidence established by a preponderance of the evidence that Petitioner violated the rules and conditions of probation. The Oklahoma Court of Criminal Appeals affirmed on direct appeal.

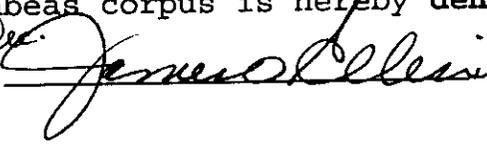
#### ANALYSIS

Though revocation of a suspended sentence is not a stage of a criminal prosecution, it does result in a loss of liberty, Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973), and the probationer consequently cannot be denied due process. Morrisey v. Brewer, 408 U.S. 471, 482 (1972). In defining the scope of due process protection in revocation proceedings, the Supreme Court has insisted upon procedural guarantees sufficient to assure that the finding of a violation will be "based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." Id. at 484. In Moore v.

State, 644 P.2d 1079, 1081 (Okla. Crim. App. 1982), the Oklahoma Court of Criminal Appeals held that revocation of a suspended sentence can be based upon an offense for which a probationer has been exonerated through acquittal as long as the evidence presented at the revocation hearing established that the probationer had violated the terms of his suspended sentence by a preponderance of the evidence.

This Court must presume the State court's factual findings correct. Sumner v. Mata, 455 U.S. 591, 597 (1982). Petitioner has not demonstrated that any of the seven exceptions to the presumption of correctness set forth in section 2254(d)(1)-(7) apply to this case, or that the factual determinations made by the State court are not fairly supported by the evidence in the state court record. Petitioner generally argues that there was insufficient evidence to prove that the substance was cocaine. Therefore, the State court's findings that Petitioner possessed cocaine in violation of the terms of his suspended sentence are entitled to a presumption of correctness.

The petition for a writ of habeas corpus is hereby denied.

SO ORDERED THIS 19<sup>th</sup> day of Dec. 

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JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

DEC 19 1995  
Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

MERRELL HARRIS,  
Plaintiff(s),  
vs.  
DELTA AIRLINES, INC.,  
Defendant(s).

Case No. 94-C-1186-B ✓

ENTERED ON DOCKET  
DATE DEC 20 1995

**JUDGMENT DISMISSING ACTION**  
**BY REASON OF SETTLEMENT**

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 ORDERED** that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

**IT IS FURTHER ORDERED** that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

**IT IS SO ORDERED** this 18th day of December, 1995.

  
THOMAS R. BRET, CHIEF JUDGE  
UNITED STATES DISTRICT COURT





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

**FILED**

DEC 19 1995

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

JOE McMURRY, JR. and  
MICHAEL W. GIBSON, d/b/a  
SPRING RIVER RANCH,

Plaintiffs,

v.

DAVID STARKEY, and ANDREA  
STARKEY, d/b/a GREEN ACRES  
EXOTICS,

Defendants.

Case No. 94-C-806-K

ENTERED ON DOCKET  
DATE DEC 20 1995

ORDER OF DISMISSAL

NOW, on the 19 day of December, 1995, Plaintiffs' Motion to Dismiss Without Prejudice comes before this Court. This Court being fully advised in the premises, FINDS that opposing counsel does not object to this Motion.

THE COURT FURTHER FINDS that Defendant will not be prejudiced by dismissal of this action, and Plaintiffs' Motion to Dismiss without prejudice should be granted.

IT IS THEREFORE ORDERED that this matter is dismissed without prejudice.

s/ TERRY C. KERN

\_\_\_\_\_  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

BHARATI NARUMANCHI; PADMINI )  
NARUMANCHI; BHARAT KUMAR )  
NARUMANCHI, by his father )  
Radha Ramana Murty Narumanchi;) )  
RADHA RAMANA MURTY NARUMANCHI;) )  
and RADHA B.D. NARUMANCHI, )

Plaintiffs, )

vs. )

KINARK CORPORATION, a Delaware )  
corporation; PAUL CHASTAIN, )  
individually; JOHN Q. HAMMONS, )  
individually; JAMES M. REED, )  
individually; HALL, ESTILL, )  
HARDWICK, GABLE, GOLDEN & )  
NELSON, an Oklahoma )  
professional corporation; and )  
LATA ENTERPRISES LTD., an )  
Illinois corporation, )

Defendants. )

No. 95-C-220-K

ENTERED ON DOCKET  
DATE DEC 20 1995

FILED

DEC 19 1995

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

ORDER

Before the Court is the motion of the defendants to dismiss. Plaintiffs filed their first amended complaint September 26, 1995, making the following allegations. In Count One, plaintiffs purport to state a cause pursuant to Rule 23.1 F.R.Cv.P., which permits the shareholder of a corporation to bring a "derivative" action, i.e., a suit which seeks to enforce any right which belongs to the corporation and is not being enforced. Count Two is brought on behalf of plaintiffs Radha Ramana Murty Narumanchi ("RRMN") and Rahda B.D. Narumanchi ("RBDN")<sup>1</sup> and claims "special damages"

<sup>1</sup>The use of these initials to designate the plaintiffs is contained in the amended complaint itself.

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arising out of their fiduciary duties and execution of personal guarantees.

Plaintiffs represent 100% of the shareholders of defendant Lata Enterprises, Ltd. ("Lata"). Kinark Corporation ("Kinark") owned and operated the Camelot Hotel ("the Camelot") in Tulsa, Oklahoma. In March, 1991, Lata purchased the Camelot from Kinark. Kinark financed a portion of the purchase price by accepting from Lata a \$950,000.00 promissory note and a mortgage. During this original purchase transaction the principals of Lata dealt primarily with defendant Paul Chastain, the CEO of Kinark.

Shortly after Lata's purchase of the Camelot, Lata began experiencing cash flow problems. Accordingly, Lata began looking for a financially strong, outside party to either become a partner with Lata or assume Lata's obligations to Kinark. Lata retained Bauer & Associates ("Bauer") to locate a prospective investor. Bauer located defendant John Q. Hammons ("Hammons"), and introduced him to Lata's principals as a prospective purchaser of the Camelot. Lata apparently related to Kinark all the details of its negotiations with Hammons. However, during Lata's negotiations with Hammons, Kinark began a foreclosure action against Lata for failure to make payments on the original note from Lata to Kinark.

According to plaintiffs, defendant law firm Hall, Estill, Hardwick, Gable, Golden & Nelson ("Hall Estill") represented both Lata and Kinark during the original sales transaction involving the Camelot. Defendant James M. Reed is the Hall Estill partner with whom Lata primarily dealt on the Camelot transaction. After the

original sale to Lata was complete, Hall Estill continued to represent Kinark. During Lata's negotiations with Hammons, Lata apparently related the details of that negotiation to Hall Estill. Hall Estill is also the firm that filed the foreclosure action against Lata on behalf of Kinark.

After negotiations had proceeded smoothly with Hammons for some time, Hammons abruptly stopped communicating with Lata. Eventually, Hammons purchased Lata's note and mortgage from Kinark and substituted himself as the named plaintiff in Kinark's foreclosure action. Plaintiffs allege all the defendants, except Lata, were part of a conspiracy to defraud Lata and cause it to lose its property rights in the Camelot.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A reviewing court presumes all plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff. Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir.1991). A pro se litigant's pleadings are construed liberally. Miller v. Glanz, 948 F.2d 1562, 1565 (10th Cir.1991).

Defendants move to dismiss Count One of the complaint on multiple grounds. Rule 23.1 states in pertinent part:

The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort.

"Federal law governs the issue whether plaintiff has made a sufficient demand on the directors." 7C Wright, Miller & Kane, Federal Practice and Procedure, §1831 at 100 (footnote omitted). Although courts have generally been lenient in excusing demand, the complaint should be dismissed if the plaintiff fails to make this allegation. Walden v. Elrod, 72 F.R.D. 5, 13 (W.D.Okla.1976).<sup>2</sup> The affidavits verifying the complaint state that plaintiffs were required to bring a shareholder derivative action because the corporation was unable to locate an attorney to represent its interests. See Affidavits at ¶9. The complaint itself contains no statement in compliance with Rule 23.1. Dismissal on this basis is appropriate.

Defendants also move to dismiss based upon lack of corporate capacity. The allegedly wronged corporation is an indispensable party to a derivative action. Hazen v. Southern Hills National Bank of Tulsa, 414 F.2d 778, 779 (10th Cir.1969). The general rule is the corporation is properly realigned as a plaintiff since it is the real party in interest. Duffey v. Wheeler, 820 F.2d 1161, 1163 (11th Cir.1987). In a derivative action, the underlying substantive law and standing to sue are determined by state law. Walden, 72 F.R.D. at 14. It is undisputed Lata's corporate charter has been suspended. 68 O.S. §1212(c) denies such a corporation the right to sue or defend in any court of the state. This provision

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<sup>2</sup>Factual allegations which establish that such a demand would have been futile may excuse a demand and refusal. See generally Wilhelm v. Consolidated Oil Corp., 84 F.2d 739, 748 (10th Cir.1936). No such allegations are present.

applies to foreign corporations as well as domestic corporations. State Ins. Fund v. AAA Eng. & Drafting, 863 P.2d 1218, 1221 (Okla.1993). Since Lata, the real party in interest, lacks the capacity to sue or be sued in Oklahoma, the derivative action detailed in Count One may not proceed.<sup>3</sup>

Moreover, plaintiffs' pro se status precludes them from proceeding in Count One. Since a corporation may not appear except through an attorney, likewise the representative shareholder cannot appear without an attorney. Phillips v. Tobin, 548 F.2d 408, 411 (2d Cir.1976). Oklahoma law also provides for a shareholders' derivative suit. 18 O.S. §1126. The same principle, that a pro se litigant may not appear for or on behalf of a corporation, is recognized under Oklahoma state law. See Massongill v. McDevitt, 828 P.2d 438, 439-40 (Okla. Ct. App.1989). For all the reasons recited above, Count One of the amended complaint is properly dismissed.

Count Two of the amended complaint, as already noted, seeks to bring essentially the same claims as are contained in Count One on behalf of individual plaintiffs RRMN and RBDN. Defendants cite seven grounds for dismissal, which shall be addressed in turn. (1) plaintiffs have failed to state a claim for fraud as they have failed to allege any material misrepresentations by the defendants, they have failed to allege any detrimental reliance on any of the

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<sup>3</sup>By its nature, a derivative action suit is brought by a shareholder on behalf of the corporation. The cause of action belongs to the corporation itself and the stockholder is at best a nominal plaintiff. Gibson v. BoPar Dock Co. Corp., 780 F.Supp. 371, 373 (W.D.Va.1991).

defendants' actions, the defendants had no duty to inform Lata or plaintiffs of negotiations between Kinark and Hammons regarding Hammons' purchase of the Kinark loan, and plaintiffs were on notice of the latter negotiations; (2) plaintiffs have failed to state a claim for tortious interference with prospective contractual relations because Oklahoma law only recognizes a claim for interference with contractual relations, which cause of action presupposes a contract between the plaintiff and a third party with which the defendant has interfered, and no such contract is alleged in the instant case; (3) plaintiffs have failed to state a claim for tortious interference with prospective economic advantage as plaintiffs' conclusory allegations of wanton and malicious conduct on the part of defendants are insufficient as a matter of law to show the requisite intent and plaintiffs have shown no reasonable expectation of profit; (4) plaintiffs have no actionable claim for breach of fiduciary duty as there are no allegations showing a special or confidential relationship between Lata and any of the defendants; (5) plaintiffs' RICO claims fail because plaintiffs have no standing to bring RICO claims on behalf of Lata, plaintiffs have failed to plead the elements of their RICO claims with the required particularity, and the conduct of which plaintiffs complain does not constitute a "pattern of racketeering activity"; (6) plaintiffs have failed to state a claim for conspiracy to defraud as there are no allegations of the necessary agreement and concerted action for a conspiracy and the underlying fraud claim is also insufficient; (7) plaintiffs have failed to plead their

alleged special damages with the required specificity under Rule 9 F.R.Cv.P.

The Court rejects defendants' first argument. In interpreting the state law analog to Rule 9(b), the Supreme Court of Oklahoma has stated "[t]his section requires only the degree of specificity necessary to enable the opposing party to prepare his responsive pleadings and defenses. 'Particularity' does not mean the plaintiff has to plead detailed evidentiary matters." Brown v. Founders Bank and Trust Co., 890 P.2d 855, 862 n.17 (Okla.1994). The amended complaint, liberally construed, sets forth the time, place and manner of the misrepresentations or omissions, actions or inactions on defendants' part which plaintiffs allege are fraudulent. Defendants aver they owed no duty to plaintiffs regarding disclosure or nondisclosure, but have cited no authority in which a motion to dismiss was granted on that basis, let alone under similar factual allegations. Discovery must proceed before it can be determined if plaintiffs' fraud claim ultimately survives.

The Court likewise cannot accept defendants' second and third propositions. The United States Court of Appeals for the Tenth Circuit recently reviewed a case which proceeded to the jury on claims of interference with prospective contractual relations. The court set forth the elements of a claim for tortious interference with contract or business relations. See Continental Trend Resources, Inc. v. OXY USA, Inc., 44 F.3d 1465, 1472 (10th Cir.1995). This Court, again liberally construing the amended

complaint, does not conclude it is beyond doubt plaintiffs can prove no set of facts entitling them to relief.

For reasons previously stated, the Court also finds the amended complaint's allegations of breach of fiduciary duty are adequate to survive a motion to dismiss under Rule 12(b)(6). The claim is by its nature fact-intensive. The winnowing process of discovery will help determine if the claim should proceed to trial.

The Court finds defendants' arguments concerning the RICO claims to be well taken. Plaintiffs' allegations consist of the following: "Defendants 'Kinark', 'Chastain', 'Hammons', 'Reed' and 'Hall & Estill' were also involved in 'Racketeering Activity' and 'Prohibited Activities' as those terms and phrases are defined in 18 USCS §1961 et seq., by using interstate mail and interstate wire." Amended complaint, p.6 ¶2(b) and p.21 ¶10. In Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982, 989 (10th Cir.1992), the court upheld the dismissal of a RICO claim where plaintiff claimed mail fraud as one of the predicate acts but failed to plead specific mail fraud violations. Dismissal is appropriate on this basis. Moreover, plaintiffs have failed to plead a "pattern of racketeering activity" i.e., a relationship between the predicate acts coupled with the threat of continued criminal activity. See McDonald v. Schencker, 18 F.3d 491, 497 (7th Cir.1994). For this reason also, the allegations of RICO violations are dismissed.

Next, defendants contend the allegation of civil conspiracy must fail in view of the failure of the underlying alleged objects of the conspiracy. The Court has ruled that several of the alleged

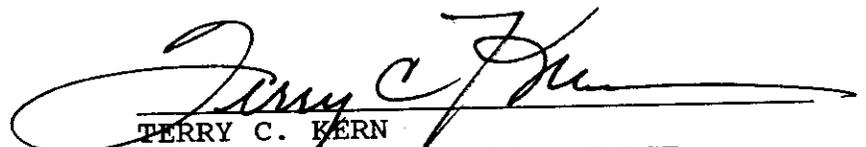
objects survive the motion to dismiss; for similar reasons, the allegation of a conspiracy to accomplish those objects persists.

Finally, the Court concludes the amended complaint sufficiently alleges "special damages" on plaintiffs' part to pass muster under Rule 9(b). Again, the discovery process will serve to flesh out the specific nature and amount of these alleged damages.

It is the Order of the Court that the motion and renewed motion of the defendants to dismiss (#13, #37) are hereby GRANTED as to Count One of the amended complaint and as to the RICO claims in Count Two of the amended complaint. In all other respects, the motion is DENIED. The motion of the defendants to strike (#11) is hereby declared moot.

It is the further Order of the Court that this case be referred to Magistrate Judge Joyner for case management/scheduling conference.

ORDERED this 19 day of December, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

DEC 18 1995

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAULINE M. ROBERSON; LOUIS J.  
ROBERSON aka LOUIS JAMES  
ROBERSON; BANCOKLAHOMA  
MORTGAGE CORPORATION;  
FEDERAL NATIONAL MORTGAGE  
ASSOCIATION; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

Civil Case No. 95-CV 885BU

ENTERED ON DOCKET

DATE DEC 18 1995

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 18<sup>th</sup> day of December  
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 not having claimed no interest in the  
subject property; the Defendant, FEDERAL NATIONAL MORTGAGE ASSOCIATION,  
appears not having previously filed its Disclaimer; the Defendant, BANCOKLAHOMA  
MORTGAGE CORPORATION, appears by its Attorney Richard J. Cipolla, Jr.; and the  
Defendants, PAULINE M. ROBERSON and LOUIS J. ROBERSON aka LOUIS JAMES  
ROBERSON, appear not, but make default.

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The Court being fully advised and having examined the court file finds that the Defendant, LOUIS J. ROBERSON aka LOUIS JAMES ROBERSON will hereinafter be referred to as ("LOUIS J. ROBERSON"). The Defendant, LOUIS J. ROBERSON and PAULINE M. ROBERSON, were granted a divorce in case number FD 89-02668, in Tulsa County, Oklahoma, however a decree has not been entered.

The Court being fully advised and having examined the court file finds that the Defendant, PAULINE M. ROBERSON, waived service of Summons on September 9, 1995; and that the Defendant, LOUIS J. ROBERSON, waived service of Summons on September 11, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on September 27, 1995; that the Defendant, BANCOKLAHOMA MORTGAGE CORPORATION, filed its Answer on November 7, 1995; that the Defendant, FEDERAL NATIONAL MORTGAGE ASSOCIATION, filed its Disclaimer on September 29, 1995; and that the Defendants, PAULINE M. ROBERSON and LOUIS J. ROBERSON, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Twenty-One (21), Block Two (2), ANELEN HEIGHTS  
SECOND ADDITION to Tulsa, Tulsa County, State of  
Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on November 11, 1977, Terry Lynn Cramer and Candace D. Cramer, executed and delivered to MAGER MORTGAGE COMPANY their mortgage note in the amount of \$18,500.00, payable in monthly installments, with interest thereon at the rate of eight and one-half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Terry Lynn Cramer and Candace D. Cramer, husband and wife, executed and delivered to Mager Mortgage Company a mortgage dated November 11, 1977, covering the above-described property. Said mortgage was recorded on November 15, 1977, in Book 4294, Page 2333, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 26, 1978, Mager Mortgage Company assigned the above-described mortgage note and mortgage to the Richard Gill Company. This Assignment of Mortgage was recorded on February 24, 1978, in Book 4312, Page 270, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 30, 1983, The Richard Gill Company assigned the above-described mortgage note and mortgage to Standard Federal Savings and Loan Association. This Assignment of Mortgage was recorded on February 23, 1984, in Book 4769, Page 48, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 29, 1986, Standard Federal Savings and Loan Association assigned the above-described mortgage note and mortgage to BancPlus Mortgage Corporation. This Assignment of Mortgage was recorded on December 1, 1986, in Book 4985, Page 2150, in the records of Tulsa County, Oklahoma. Said Assignment was rerecorded on May 7, 1990, in Book 5251, Page 1509 in the records of Tulsa County, Oklahoma.

The Court further finds that on July 6, 1989, BancPlus Mortgage Corporation assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, his successors and assigns. This Assignment of Mortgage was recorded on July 26, 1989, in Book 5196, Page 2584, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, LOUIS J. ROBERSON and PAULINE M. ROBERSON, became the current title owners of the property by virtue of a General Warranty deed dated March 22, 1985, and recorded on March 26, 1985 in Book 4851, Page 2493, in the records of Tulsa County, Oklahoma. The Defendants, LOUIS J. ROBERSON and PAULINE M. ROBERSON, became the current assumptors of the subject indebtedness.

The Court further finds that on January 28, 1993, the Defendant, LOUIS J. ROBERSON and PAULINE M. ROBERSON, filed their voluntary petition for Chapter 7 relief in the United States Bankruptcy Court for the Northern District of Oklahoma, case number 93-00254-W, which was discharged on May 28, 1993, and subsequently closed on August 26, 1993. The subject property was listed in the schedules.

The Court further finds that on June 14, 1989, the Defendant, PAULINE M. ROBERSON, 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 May 31, 1991.

The Court further finds that the Defendant, PAULINE M. ROBERSON, 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 her failure to make the monthly

installments due thereon, which default has continued, and that by reason thereof the Defendant, PAULINE M. ROBERSON, is indebted to the Plaintiff in the principal sum of \$24,432.86, plus interest at the rate of 8.5 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, BANCOKLAHOMA MORTGAGE CORPORATION has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$13,540.55 with interest and fees, which became a lien on the property as of August 4, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, PAULINE M. ROBERSON and LOUIS J. ROBERSON, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, FEDERAL NATIONAL MORTGAGE ASSOCIATION, disclaims any right, title, or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma and 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 Defendant, PAULINE M. ROBERSON, in the principal sum of \$24,432,86, plus interest at the rate of 8.5 percent per annum from November 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.35 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, BANCOKLAHOMA MORTGAGE CORPORATION have and recover judgment in rem in the amount of \$13,540.55, plus costs and interest, for a judgment, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, PAULINE M. ROBERSON, LOUIS J. ROBERSON, FEDERAL NATIONAL MORTGAGE ASSOCIATION, COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, PAULINE M. ROBERSON, 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, BANCOKLAHOMA MORTGAGE CORPORATION, in the amount of \$13,540.55, for a judgment.

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

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

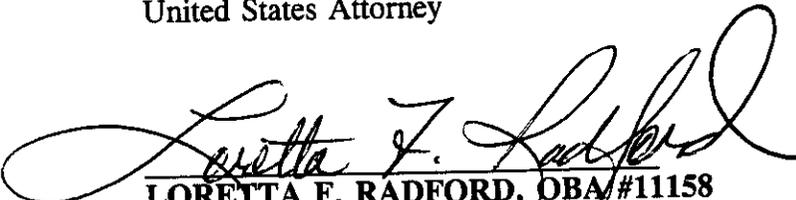
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the

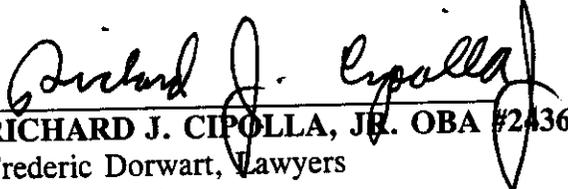
Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

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

  
RICHARD J. CIPOLLA, JR. OBA #2436  
Frederic Dorwart, Lawyers  
Old City Hall  
124 East Fourth St.  
Tulsa, Oklahoma 74103-5010  
(918) 583-9922  
Attorney for Defendant,  
BancOklahoma Mortgage Corporaiton

Judgment of Foreclosure  
Civil Action No. 95-CV 885BU

LFR/lg

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

**FILED**

DEC 13 1995

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

MARKUS ALLEC RICE, )  
)  
Plaintiff, )  
)  
v. )  
)  
UNITED STATES OF AMERICA )  
)  
Defendant. )

NO. 94-C-264-K

ENTERED ON BOOKS  
DATE DEC 19 1995

**ORDER**

The Court has before it Plaintiff, Markus Allec Rice's, MOTION FOR PROTECTIVE ORDER AND MOTION TO QUASH WITH REQUEST FOR ATTORNEY FEES FOR RESPONDING TO SAME [Dkt.26]. The Court has reviewed the relevant briefs, [Dkt. 26, 27], and heard argument of counsel at the November 28, 1995 hearing.

**MOTION TO QUASH SUBPOENA**

Defendant has issued subpoenas duces tecum to third parties pursuant to Fed.R.Civ.P. 45 to obtain medical records, school records and Social Security records pertaining to the minor Plaintiff's mother, Angela Rice, in this medical negligence action. The subpoenas were issued after the discovery cut-off date of October 31, 1995. Plaintiff seeks to quash the subpoenas, arguing, *inter alia*, that the records sought are irrelevant, that production would be violative of Ms. Rice's privacy and that the subpoenas are an attempt to circumvent the discovery deadline. Defendant argues that subpoenas issued pursuant to Fed.R.Civ.P. 45 do not constitute discovery within the meaning of Fed.R.Civ.P. 26 and the Court's Case Management Order. Defendant maintains that the discovery deadline should not preclude investigation of Plaintiff's background for impeachment material.

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RECEIVED DEC 15 1995

The Court agrees with the general proposition that the discovery deadline does not preclude either party from conducting an investigation for impeachment materials or performing other general trial preparation. However, this case presents more than mere independent investigation. Here the defendant has issued several subpoenas to obtain information it would not be able to obtain without the aid of the subpoena power of the court. Thus, the question is whether the Court's discovery deadline precludes a party's use of the Court's power, i.e. the subpoena, to obtain information not otherwise sought before the close of discovery.

After careful consideration, the Court finds that the Rule 45 subpoenas duces tecum in this case constitute discovery. Rule 26 sets out the general provisions governing the scope and limits of discovery. Rule 26(a)(5) addresses methods of discovery and provides:

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; **production of documents or things** or permission to enter upon land or other property under Rule 34 or **45(a)(1)(C)**, for inspection and other purposes; physical and mental examinations; and requests for admission. [emphasis supplied]

Rule 45 addresses the form and issuance of subpoenas. Rule 45(a)(1)(C) sets forth the purposes for which a subpoena may be issued:

(C) [Every subpoena shall] command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified;

Fed. R.Civ.P. 34(c) addresses production of documents from non-parties, as follows: "A person not a party to the action may be compelled to produce documents and things or to submit to an

inspection as provided in Rule 45." The inclusion of references to Rule 45 within Rules 26 and 34 is a clear indication that procuring documents from non-parties can constitute discovery, although Defendant cited cases in which courts have seemingly held to the contrary.

The Defendant cited language from *O'Boyle v. Jensen*, 150 F.R.D. 519 (M.D. Pa. 1993) which suggests that subpoenas directed to third parties are not discovery and therefore are not governed by the discovery deadline. *O'Boyle* held that the discovery deadline only precluded the parties from conducting further discovery addressed to each other or requiring one another's presence or participation. The deadline was not intended to preclude parties from gathering additional information on their own case or that of their opponent through independent lines of inquiry. The *O'Boyle* decision does not attempt to set out a policy for the general treatment of Rule 45 subpoenas issued after discovery deadlines, rather the *O'Boyle* Court was simply giving a general explanation of the intended meaning of its own discovery deadline.

The Court likewise finds *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683 (D.Kan. 1995), cited by Defendant to be unpersuasive. In *Midland Brake* the court refused to quash a subpoena on the grounds that the discovery deadline had passed. However, in that case the deadline involved was one which the scheduling order set for serving "all requests for production under Fed.R.Civ.P. 34." *Id.* at 686. The Court stated that its order was clear and unambiguous, and that the deadline applied only to requests served under Rule 34 and not to "discovery under Fed.R.Civ.P. 45." *Id.* By employing the term "discovery" in describing Rule 45 subpoenas, it may be implied that the Court concluded that Rule 45 subpoenas were discovery, but that the Court's deadline only applied to requests for production under Rule 34. The *Midland Brake* case also presents an individual court's explanation of the intended meaning of its own order.

The research conducted by the undersigned United States Magistrate Judge failed to reveal any authority persuasively reasoning that a party should be allowed to employ a subpoena after a discovery deadline to obtain materials from third parties that could have been produced during discovery. However, the Court has found cases in which subpoenas were quashed when they were used as a means to reopen discovery after the cut-off date. *Ghandi v. Police Dept. of City of Detroit*, 747 F.2d 338, 354-5 (6th Cir. 1984) (affirming district court's decision to quash subpoena issued on the eve of trial seeking documents available during discovery); *Buhrmaster v. Overnite Transportation Company*, 61 F.3d 461 (6th Cir. 1995) (affirming district court's decision to quash subpoena of material that could have been produced through normal discovery where plaintiff used subpoena to circumvent discovery deadline).

In the instant case, the district court set a number of dates at the May 11, 1995 Case Management Conference, including: discovery deadline (10/31/95); dispositive motion and motion in limine deadline (11/16/95); final witness and exhibit exchange, including experts (10/2/95). The parties' briefs do not inform the Court exactly when the subpoenas in question were issued, but there is no disagreement that they were issued after the witness and exhibit exchange and after the discovery deadline. While Rule 45 contains no time limit for its use to procure documents from third parties, neither does Rule 34. However, there has been a time limit imposed by the Court.

With an eye toward reducing expense and delay, Fed.R.Civ.P. 16(b) requires the court to enter an order setting deadlines at an early point in the litigation. According to Rule 16, the deadlines set may not be modified, except upon a showing of good cause and by leave of court. Adherence to the schedule set by the court under Rule 16 serves several general purposes,

including sharpening the preparation and presentation of cases, eliminating trial surprise and facilitating the early settlement of disputes. Circumventing the deadlines would thwart these goals. Thus the better reasoned view is that the Rule 45 subpoenas duces tecum at issue before the Court are a form of discovery and, therefore, are subject to the Court's discovery deadline.<sup>1</sup>

The information sought by Defendant through the Rule 45 subpoenas duces tecum should have been obtained during discovery. The undersigned is of the opinion that, by setting a discovery deadline the Court intended to limit the time during which the parties could serve discovery requests or invoke the Court's subpoena power to obtain documents from third parties. If Defendant believed the information to be of importance to its case, it could have attempted to show good cause for modifying the deadlines. Defendant was not free, however, to issue subpoenas duces tecum after the discovery deadline. Accordingly the subpoenas must be quashed as untimely under the Court's Case Management Order.

#### **MOTION FOR ATTORNEYS FEES**

Plaintiff's motion for attorneys fees is denied. Plaintiff's motion fails to comply with N.D.LR 7.1E and 37.1A which require that the first page of any non-dispositive motion contain a statement whether opposing counsel objects to the motion and a certification that counsel for the involved parties have personally met and conferred in good faith concerning resolution of the matter. Plaintiff's motion was subject to being rejected without further consideration for failure to comply with those rules. Moreover, although Plaintiff sought to quash subpoenas, the motion failed to provide the court with such elementary information as: the date the subpoenas

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<sup>1</sup> *The Court notes that not all uses of Rule 45 subpoenas would constitute discovery and thereby be affected by discovery deadlines. For instance, a Rule 45 subpoena may be employed to secure the production at trial of original documents previously disclosed by discovery.*

were issued, or served; the identity of the entity to whom subpoenas duces tecum were issued; and the specific materials sought by the subpoenas.

### CONCLUSION

Plaintiff's motion to quash subpoenas [Dkt. 26-2] is GRANTED. The subpoenas duces tecum issued by the defendant after October 31, 1995 are hereby QUASHED and of no further force and effect. Plaintiff's motion for protective order [Dkt. 26-1] is GRANTED. Absent an order of the Court, there shall be no further discovery in this case. Plaintiff's motion for attorneys fees [Dkt. 26-3] is DENIED.

SO ORDERED this 13<sup>th</sup> day of December, 1995.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JACK L. DUNCANSON,

Plaintiff,

v.

SHIRLEY CHATER, Commissioner of the  
Social Security Administration,

Defendant.

**FILED**

DEC 13 1995

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

CASE NO. 95-C-149-J ✓

JUDGMENT

ENTERED ON DOCKET

DATE 12-19-95

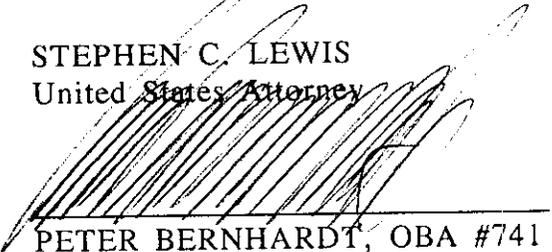
Judgment is hereby entered pursuant to the Order entered herein on the  
18 day of December, 1995 remanding this case to the Commissioner.



SAM A. JOYNER  
UNITED STATES MAGISTRATE JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney



PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
333 W. Fourth St., Suite 3460  
Tulsa, OK 74103-3809

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE 12-19-95

JACK L. DUNCANSON,

Plaintiff,

v.

SHIRLEY CHATER, Commissioner of the  
Social Security Administration,

Defendant.

**FILED**

DEC 18 1995

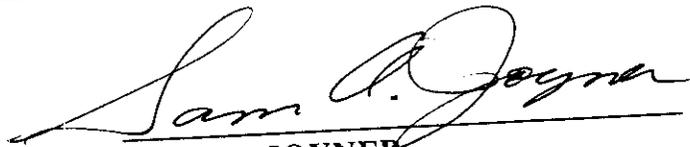
Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

CASE NO. 95-C-149-J ✓

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, to which there is no objection, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further evaluation pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), sentence four.

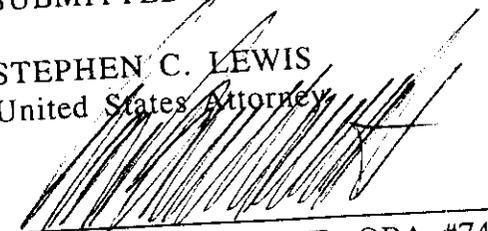
DATED this 18 day of December, 1995.



SAM A. JOYNER  
UNITED STATES MAGISTRATE JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney

  
PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
333 W. Fourth St., Suite 3460  
Tulsa, OK 74103-3809

18

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
Plaintiff, )  
vs. )  
JIM SHAFFER aka JAMES A. )  
SHAFFER; LU ANN SHAFFER; )  
TERESA SHAFFER; UNKNOWN )  
SPOUSE, IF ANY OF TERESA )  
SHAFFER; AMERICAN BANK AND )  
TRUST COMPANY OF TULSA, )  
OKLAHOMA; COUNTY TREASURER, )  
Tulsa County, Oklahoma; BOARD OF )  
COUNTY COMMISSIONERS, Tulsa )  
County, Oklahoma, )  
Defendants.

**FILED**

DEC 15 1995

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

ENTERED ON DOCKET  
DATE ~~DEC 19 1995~~

Civil Case No. 95-C 89B

**ORDER**

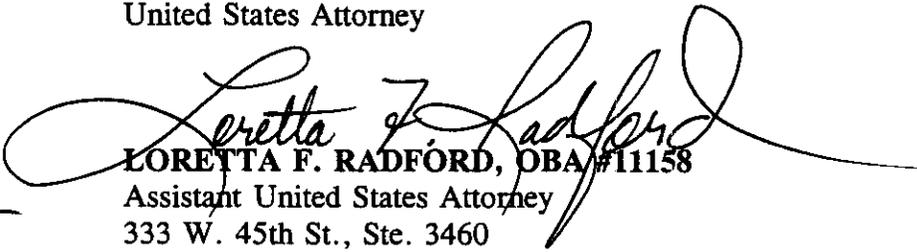
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED**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

Dated this 15 day of Dec., 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  
333 W. 45th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JAMES BRYAN LOGAN aka JAMES B. )  
LOGAN aka JAMES LOGAN; BETTY )  
EILEEN LOGAN aka BETTY E. )  
LOGAN; STATE OF OKLAHOMA ex rel )  
OKLAHOMA TAX COMMISSION; )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma; BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
Oklahoma, )  
Defendants.

**FILED**

DEC 15 1995

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

ENTERED ON DOCKET  
DATE DEC 19 1995

Civil Case No. 95-C 672B

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 15 day of Dec.,  
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, appears not claiming no interest in the  
subject property; the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX  
COMMISSION, appears not having previously filed its Disclaimer; and the Defendants,  
JAMES BRYAN LOGAN aka JAMES B. LOGAN aka JAMES LOGAN and BETTY  
EILEEN LOGAN aka BETTY E. LOGAN, appear not, but make default.

The Court being fully advised and having examined the court file finds that the  
Defendant, JAMES BRYAN LOGAN aka JAMES B. LOGAN aka JAMES LOGAN will  
hereinafter be referred to as ("JAMES BRYAN LOGAN") and the Defendant, BETTY

NOTE: THIS DOCUMENT IS NOT TO BE FILED  
BY MAIL  
PRO SE LITIGANT  
UPON RECEIPT.

EILEEN LOGAN aka BETTY E.LOGAN will hereinafter be referred to as ("BETTY EILEEN LOGAN"). The Defendants, JAMES BRYAN LOGAN and BETTY EILEEN LOGAN are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, JAMES BRYAN LOGAN, acknowledged receipt of Summons and Complaint via certified mail on September 14, 1995; and that the Defendant, BETTY EILEEN LOGAN, was served with process on October 20, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on August 14, 1995; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, filed its Disclaimer on August 17, 1995; and that the Defendants, JAMES BRYAN LOGAN and BETTY EILEEN LOGAN, 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 Eleven (11), Block Four (4), WINNETKA HEIGHTS  
ADDITION to the City of Tulsa, Tulsa County, State of  
Oklahoma, according to the recorded plat thereof.

The Court further finds that on March 6, 1987, the Defendants, JAMES BRYAN LOGAN and BETTY EILEEN LOGAN, executed and delivered to Mercury Mortgage co., Inc. their mortgage note in the amount of \$45,412.00, payable in monthly installments, with interest thereon at the rate of nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, JAMES BRYAN LOGAN and BETTY EILEEN LOGAN, husband and wife, executed and delivered to Mercury Mortgage Co., Inc. a mortgage dated March 6, 1987, covering the above-described property. Said mortgage was recorded on March 17, 1987, in Book 5008, Page 1547, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 27, 1988, Mercury Mortgage Co., Inc. 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 27, 1988, in Book 5130, Page 1827, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 22, 1988, the Defendants, JAMES BRYAN LOGAN and BETTY EILEEN LOGAN, 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 November 2, 1989, September 26, 1990, and March 1, 1991.

The Court further finds that the Defendants, JAMES BRYAN LOGAN and BETTY EILEEN LOGAN, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, JAMES BRYAN LOGAN and BETTY EILEEN LOGAN, are indebted to the Plaintiff in the principal sum of \$63,541.18, plus interest at the rate of 9

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, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, disclaims any right, title, or interest in the subject property.

The Court further finds that the Defendants, JAMES BRYAN LOGAN and BETTY EILEEN LOGAN, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa 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 against the Defendants, JAMES BRYAN LOGAN and BETTY EILEEN LOGAN, in the principal sum of \$63,541.18, plus interest at the rate of 9 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.35 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, JAMES BRYAN LOGAN, BETTY EILEEN LOGAN, STATE OF OKLAHOMA ex re OKLAHOMA TAX COMMISSION, COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, JAMES BRYAN LOGAN and BETTY EILEEN LOGAN, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

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.

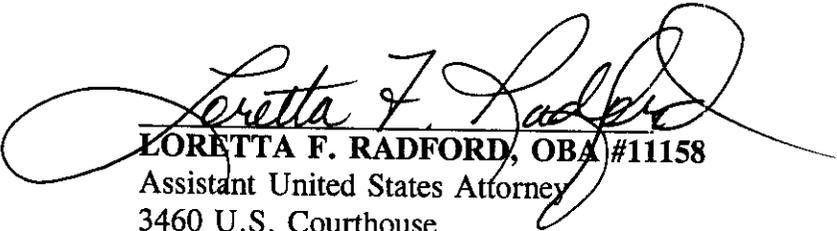
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed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

Judgment of Foreclosure  
Civil Action No. 95-C 672B

LFR/lg

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DONALD G. KAISER aka Donald Gene )  
 Kaiser; DOROTHY ANN KAISER; CITY )  
 OF CATOOSA, Oklahoma; )  
 COUNTY TREASURER, Rogers County, )  
 Oklahoma; BOARD OF COUNTY )  
 COMMISSIONERS, Rogers County, )  
 Oklahoma, )  
 )  
 Defendants. )

DEC 18 1995

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

ENTERED ON DOCKET  
DATE DEC 19 1995

Civil Case No. 95-C 560B

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 18 day of Dec.,  
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, Rogers County, Oklahoma, and BOARD OF  
COUNTY COMMISSIONERS, Rogers County, Oklahoma, appear by Michele L. Schultz,  
Assistant District Attorney, Rogers County, Oklahoma; and the Defendants, DONALD G.  
KAISER aka Donald Gene Kaiser, DOROTHY ANN KAISER and CITY OF CATOOSA,  
Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the  
Defendant, CITY OF CATOOSA, Oklahoma, was served a copy of Summons and Complaint  
on June 22, 1995, by Certified Mail; that Defendant, COUNTY TREASURER, Rogers  
County, Oklahoma, was served a copy of Summons and Complaint on June 22, 1995; and

NOTICE TO DEFENDANTS TO BE SERVED  
BY MAIL AND BY CERTIFIED MAIL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

that Defendant, BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, was served a copy of Summons and Complaint on June 22, 1995.

The Court further finds that the Defendants, DONALD G. KAISER aka Donald Gene Kaiser and DOROTHY ANN KAISER, were served by publishing notice of this action in the Claremore Daily Progress, a newspaper of general circulation in Rogers County, Oklahoma, once a week for six (6) consecutive weeks beginning September 29, 1995, and continuing through November 3, 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, DONALD G. KAISER aka Donald Gene Kaiser and DOROTHY ANN KAISER, 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, DONALD G. KAISER aka Donald Gene Kaiser and DOROTHY ANN KAISER. 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, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, filed their Answer on June 26, 1995; and that the Defendants, DONALD G. KAISER aka Donald Gene Kaiser, DOROTHY ANN KAISER and CITY OF CATOOSA, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, DONALD G. KAISER, is one and the same person as Donald Gene Kaiser, and will hereinafter be referred to as "DONALD G. KAISER." The Defendants, DONALD G. KAISER and DOROTHY ANN KAISER, are both single unmarried persons, and are mother and son.

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

**Lot 3, Block 7, SHADOW VALLEY SUBDIVISION to the  
City of Catoosa, Rogers County, State of Oklahoma,  
according to the recorded plat thereof.**

The Court further finds that on July 17, 1986, the Defendants, DONALD G. KAISER and DOROTHY ANN KAISER, executed and delivered to Investors Universal Service Corp., their mortgage note in the amount of \$66,795.00, payable in monthly installments, with interest thereon at the rate of Nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, DONALD G. KAISER, a single person and DOROTHY ANN

KAISER, a single person, executed and delivered to Investors Universal Service Corp., a mortgage dated July 17, 1986, covering the above-described property. Said mortgage was recorded on July 23, 1986, in Book 736, Page 731, in the records of Rogers County, Oklahoma.

The Court further finds that on July 31, 1986, INVESTORS UNIVERSAL SERVICE CORP., assigned the above-described mortgage note and mortgage to FLEET MORTGAGE CORP. This Assignment of Mortgage was recorded on August 14, 1986, in Book 738, Page 606, in the records of Rogers County, Oklahoma.

The Court further finds that on April 25, 1988, FLEET MORTGAGE CORP., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on April 27, 1988, in Book 783, Page 339, in the records of Rogers County, Oklahoma.

The Court further finds that on May 1, 1988, the Defendants, DONALD G. KAISER and DOROTHY ANN KAISER, 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 November 1, 1988, June 1, 1989, May 1, 1990 and May 1, 1991.

The Court further finds that the Defendants, DONALD G. KAISER and DOROTHY ANN KAISER, 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, DONALD G. KAISER and DOROTHY ANN

KAISER, are indebted to the Plaintiff in the principal sum of \$112,120.20, plus interest at the rate of 9 percent per annum from March 28, 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, DONALD G. KAISER aka Donald Gene Kaiser, DOROTHY ANN KAISER and CITY OF CATOOSA, Oklahoma, 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, Rogers 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, DONALD G. KAISER and DOROTHY ANN KAISER, in the principal sum of \$112,120.20, plus interest at the rate of 9 percent per annum from March 28, 1995 until judgment, plus interest thereafter at the current legal rate of 5.35 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, Rogers County, Oklahoma, DONALD G. KAISER aka Donald Gene Kaiser, DOROTHY

ANN KAISER and CITY OF CATOOSA, 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, DONALD G. KAISER and DOROTHY ANN KAISER, 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

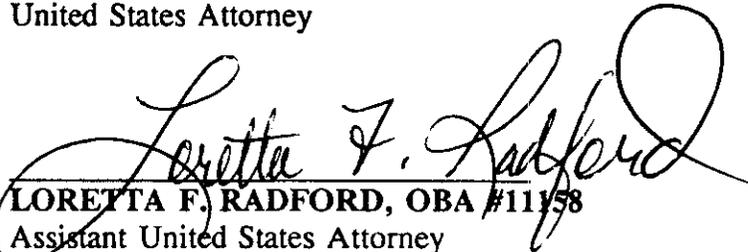
Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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



**MICHELE L. SCHULTZ, OBA #13771**  
Assistant District Attorney  
219 S. Missouri, Room 1-111  
Claremore, Oklahoma 74017  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Rogers County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95 C 560B

LFR:flv

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

**FILED**  
DEC 18 1995

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

DYNAMIC ENERGY RESOURCES, )  
INC., a Delaware corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
WILLIAM STUART PRICE, an )  
individual, and DENVER OIL )  
& MINERAL CORPORATION, an )  
Oklahoma corporation, )  
 )  
Defendants. )

Case No. 95-C-661-BU

ENTERED ON DOCKET  
DATE DEC 19 1995

ADMINISTRATIVE CLOSING ORDER

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

If the parties have not reopened this case within 60 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 18<sup>th</sup> day of December, 1995.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**  
DEC 18 1995

DYNAMIC ENERGY RESOURCES, )  
INC., a Delaware corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
WILLIAM STUART PRICE, an )  
individual, and DENVER OIL )  
& MINERAL CORPORATION, an )  
Oklahoma corporation, )  
 )  
Defendants. )

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

Case No. 95-C-661-BU

**O R D E R**

In light of the parties' settlement of this matter, the Court declares **MOOT** the defendants, William Stuart Price and Denver Oil & Mineral Corporation's Motion to Dismiss (Docket Entry #4).

ENTERED this 18<sup>th</sup> day of December, 1995.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

DEC 18 1995

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

LIONEL DEWAYNE HOLLAND, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STEVE HARGETT, )  
 )  
 Respondent. )

No. 95-C-444-BU

ENTERED ON DOCKET  
DATE DEC 19 1995

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his conviction in the District Court for Craig County, Case No. CRF-87-76. Respondent has filed a Rule 5 response to which Petitioner has replied. As set out below, this petition is hereby denied.

**I. BACKGROUND**

In August 1987, Petitioner was charged with five counts of sexual abuse against his oldest daughter. In November 1987, a jury found Petitioner guilty of three counts of rape and two counts of sodomy. On January 13, 1988, the trial court sentenced Petitioner, in accordance with the jury verdict, to three consecutive terms of one-hundred years on the rape counts and two consecutive terms of ten years on the sodomy counts. The Oklahoma Court of Criminal Appeals affirmed the judgement and sentence by unpublished opinion. Thereafter, Petitioner filed an application for post-conviction relief which the district court denied and the Court of Criminal Appeals affirmed.

In the present petition for a writ of habeas corpus, Petitioner challenges the admissibility of evidence, the adequacy of jury instructions, and the imposition of consecutive sentences.

## II. ANALYSIS

As a preliminary matter, the Court finds Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

### A. Evidentiary Rulings

In his first ground for habeas relief, Petitioner contends the State made numerous references to highly prejudicial other-crimes evidence, including (1) evidence of a deferred sentence; (2) evidence that Petitioner had sexually abused one of his other daughters; and (3) evidence that Petitioner possessed adult films.

On federal habeas corpus review, this Court is concerned only with whether federal constitutional rights were infringed. "State court rulings on the admissability of evidence may not be questioned in federal habeas proceedings unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights. Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980). Thus, a federal

habeas court "will not disturb a state court's admission of evidence of prior crimes, wrongs or acts unless the probative value of such evidence is so greatly outweighed by the prejudice flowing from its admission that the admission denies defendant due process of law." Hopkins v. Shillinger, 866 F.2d 1185, 1197 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

Given the overwhelming evidence at trial against Petitioner, the Court finds the introduction of evidence and testimony in question did not render Petitioner's trial fundamentally unfair. Petitioner opened the door on direct examination to evidence of the deferred sentence when he denied any problems with the law. Moreover, the testimony of Petitioner's youngest daughter was proper to rebut Petitioner's assertion that he had never sexually molested any of his children. See Boyd v. State, 743 P.2d 658, 662 (Okla. Crim. App. 1987) (rebuttal evidence may be offered to explain, repel, disprove or contradict facts given in evidence by the adverse party; Hall v. State, 698 P.2d 33, 37 (Okla. Crim. App. 1985) (same). Petitioner's reliance on state law to support this proposition of error is misplaced. "In a habeas action, the inquiry is not whether the state court has properly applied its own rules of evidence, but whether errors of constitutional magnitude have been committed. The State court is the final arbiter of state rules, and [this Court] must uphold its ruling unless the state evidentiary rule itself denies defendants due process." Hopkinson, 866 F.2d at 1197 n.7. Lastly, even if the trial court erroneously admitted the testimony that the adult films had been confiscated,

the Court finds the error harmless as it did not have a substantial injurious effect or influence in determining the jury's verdict. See Brecht v. Abrahamson, 113 S.Ct. 1710 (1993), as limited by O'Neal v. McAninch, 115 S.Ct. 992 (1995).<sup>1</sup> Accordingly, Petitioner is not entitled to habeas relief.

#### B. Jury Instructions

In his second ground, Petitioner claims the trial court failed to instruct the jury on all elements of the crimes of rape and sodomy. He contends the court did not define "sexual intercourse" and did not include the element of penetration. Petitioner concedes, however, that neither he nor his counsel raised any objections at trial or offered any supplemental instructions.

A habeas corpus petitioner "bears a 'great burden . . . when [he] seeks to collaterally attack a state court judgment based on an erroneous jury instruction.'" Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir. 1993) (quoting Hunter v. New Mexico, 916 F.2d 595, 598

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<sup>1</sup> Prior to the Supreme Court's decision in Brecht the standard for determining whether a conviction must be set aside because of federal constitutional error was whether the error "was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). The error now must have "'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, 113 S.Ct. at 1722 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). "Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" Brecht, 113 S.Ct. at 1722 (cited case omitted). "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan v. Louisiana, 113 S.Ct. 2078, 2081 (1993).

(10th Cir. 1990), cert. denied, 500 U.S. 909 (1991)), cert. denied, 114 S.Ct. 1074 (1994). Federal habeas corpus relief is not available for alleged errors of state law, and this Court examines only "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Moreover, it is well established that "[h]abeas proceedings may not be used to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense." Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir.) (quoting Brinlee v. Crisp, 608 F.2d 839, 854 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980)), cert. denied, 498 U.S. 961 (1990).

Petitioner has not met his burden of establishing fundamental unfairness in his trial as a result of the jury instruction which would be sufficient to set aside his conviction for the crimes of rape and sodomy. Petitioner's theory that the jury did not know the meaning of sexual intercourse is patently frivolous. Moreover, instruction #14 specifically required penetration for both rape and sodomy. Accordingly, Petitioner is not entitled to habeas relief on ground two of the petition.

### C. Procedural Bar

In his last three grounds of error, Petitioner challenges his

sentence under 22 O.S. 1981, § 926. Because Petitioner raised these issues for the first time in his application for post-conviction relief, the Oklahoma state courts found the claims procedurally barred.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on independent and adequate state procedural grounds. Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

Applying these principles to the instant case, the Court finds Petitioner's claims barred by the procedural default doctrine. The state court's procedural bar was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which could have been raised on direct appeal. Okla. Stat. tit. 22, § 1086; Hale v. State, 807 P.2d 264, 266 (Okla. Crim. App. 1991).

Because of this procedural default, this Court may not consider Petitioner's third, fourth, and fifth claims unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

The fact that Petitioner is a layman does not constitute sufficient cause. See Rodriguez v. Maynard, 948 F.2d 684, 688 (10th Cir. 1991) (petitioner's pro se status and lack of awareness and training of legal issues do not constitute sufficient cause under the cause and prejudice standard). Nor does this case present one of those "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey, 499 U.S. at 494. Therefore, Petitioner's third, fourth, and fifth grounds are procedurally barred.

III. CONCLUSION

As Petitioner is not in custody in violation of the Constitution or laws of the United States, the petition for a writ of habeas corpus is hereby DENIED.

SO ORDERED THIS 18 day of December, 1995.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**

DEC 18 1995

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

ORLIN WILSON DILL, III )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
STANLEY GLANZ, et al., )  
 )  
Defendants. )

No. 95-C-939-BU ✓

ENTERED ON DOCKET  
DATE DEC 19 1995

ORDER

Before the Court is Defendant Stanley Glanz's motion to dismiss, or in the alternative for summary judgment, filed on November 22, 1995, and Dr. Satyabama Johnson's motion to dismiss for insufficient service of process, filed on November 3, 1995. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motions constitutes a waiver of objection to the motions, and a confession of the matters raised by the motions. See Local Rule 7.1.C.<sup>1</sup> Accordingly, Defendants' motions to dismiss (docket #6 and #11) are **granted** and the above captioned case is hereby **dismissed without prejudice** at this time.

SO ORDERED THIS 18<sup>th</sup> day of December, 1995.

Michael Burrage  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

<sup>1</sup>Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

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

DEC 18 1995

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

RAYMOND W. STRIPLING, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 EDWARD WALKER, et al., )  
 )  
 Defendants. )

No. 95-C-503-BU ✓

ENTERED ON DOCKET  
DATE DEC 19 1995

**ORDER**

This matter comes before the Court on Plaintiff's motion to dismiss. Defendants do not object.

Accordingly, Plaintiff's motion to dismiss is GRANTED and this action is hereby DISMISSED WITHOUT PREJUDICE. Defendants' motions to dismiss and for summary judgment (docket #7) are DENIED as moot.

IT IS SO ORDERED this 18<sup>th</sup> day of December, 1995.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

DEC 17 1995  
FILED

JOYCE KAY PRICE,  
  
Plaintiff,  
  
vs.  
  
UNUM LIFE INSURANCE COMPANY OF  
AMERICA, and WHITTLE COMMUNICATIONS, L. P.,  
  
Defendants.

Case No. 95-C-359-BU /

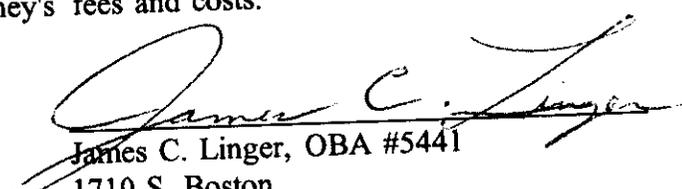
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DATE DEC 19 1995

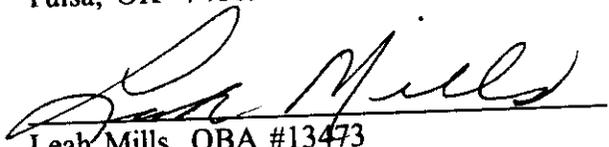
**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiff, Joyce Kay Price, and Defendants, UNUM Life Insurance Company of America and Whittle Communications, L.P., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of this cause with prejudice.

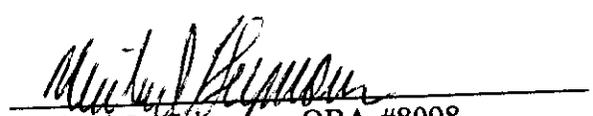
The parties are to bear their own attorney's fees and costs.

DATED: December 15, 1995.

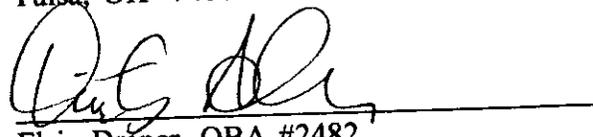
  
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Timothy A. Carney, OBA #11784  
GABLE & GOTWALS  
15 W. 6th Street, Suite 2000  
Tulsa, OK 74119

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DEBORAH ANN OSBY aka DEBORAH )  
 A. OSBY aka DEBORAH ANN WHITE )  
 OSBY; COUNTY TREASURER, Tulsa )  
 County, Oklahoma; BOARD OF )  
 COUNTY COMMISSIONERS, Tulsa )  
 County, Oklahoma, )  
 Defendants. )

DEC 18 1995

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

Civil Case No. 95-C 540BU  
ENTERED ON DOCKET  
DATE DEC 19 1995

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 18 day of Dec,  
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 Defendant, DEBORAH ANN OSBY aka  
DEBORAH A. OSBY aka DEBORAH ANN WHITE OSBY, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the  
Defendant, DEBORAH ANN OSBY aka DEBORAH A. OSBY aka DEBORAH ANN  
WHITE OSBY will hereinafter be referred to as ("DEBORAH ANN OSBY"). The  
Defendant, DEBORAH ANN OSBY is a single, unmarried person.

The Court further finds that the Defendant, DEBORAH ANN OSBY, was  
served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a  
newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6)

consecutive weeks beginning September 28, 1995, and continuing through November 2, 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 Defendant, DEBORAH ANN OSBY, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, DEBORAH ANN OSBY. 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 party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed

their Answer on June 27, 1995; and that the Defendant, DEBORAH ANN OSBY, has failed to answer and her default has therefore been entered by the Clerk of this Court.

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

Lot One (1), Block One (1), SUBURBAN HILLS ADDITION  
to the City of Tulsa, Tulsa County, State of Oklahoma,  
according to the recorded Plat thereof.

The Court further finds that on August 12, 1983, the Defendant, DEBORAH ANN OSBY, and Don E. Osby, executed and delivered to MERCURY MORTGAGE CO., INC. their mortgage note in the amount of \$34,000.00, payable in monthly installments, with interest thereon at the rate of thirteen and one-half percent (13.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, DEBORAH ANN OSBY and Don E. Osby, then Husband and Wife, executed and delivered to MERCURY MORTGAGE CO., INC., a mortgage dated August 12, 1983, covering the above-described property. Said mortgage was recorded on August 15, 1983, in Book 4717, Page 772, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 24, 1989, MERCURY MORTGAGE CO., INC. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, his successors and assigns. This Assignment of Mortgage was recorded on January 24, 1989, in Book 5163, Page 97, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 11, 1989, the Defendant, DEBORAH ANN OSBY, and Don E. Osby, then husband and wife, 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 November 2, 1989, April 19, 1991, October 4, 1991, and February 12, 1992.

The Court further finds that on September 26, 1988, the Defendant, DEBORAH ANN OSBY, and Don E. Osby, then husband and wife, filed their petition for Chapter 7 relief in the United States Bankruptcy Court for the Northern District of Oklahoma, case number 88-2884, which was discharged on January 6, 1989, and was subsequently closed on March 20, 1989.

The Court further finds that on April 21, 1992, Don E. Osby granted a Quit Claim Deed to the Defendant, DEBORAH ANN OSBY, pursuant to a divorce decree. This Deed was recorded on April 27, 1992 in Book 5399, Page 2475, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, DEBORAH ANN OSBY, 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 her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, DEBORAH ANN OSBY, is indebted to the Plaintiff in the principal sum of \$64,338.55, plus interest at the rate of 13.5 percent per annum from April 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 \$6.00 which became a lien on the property as of June 23, 1994. 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 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 Defendant, DEBORAH ANN OSBY, in the principal sum of \$64,338.55, plus interest at the rate of 13.5 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.35 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 \$6.00, plus costs and interest, for personal property taxes for the year 1993, plus the costs of this action.

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

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, DEBORAH ANN OSBY, 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 \$6.00, 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.

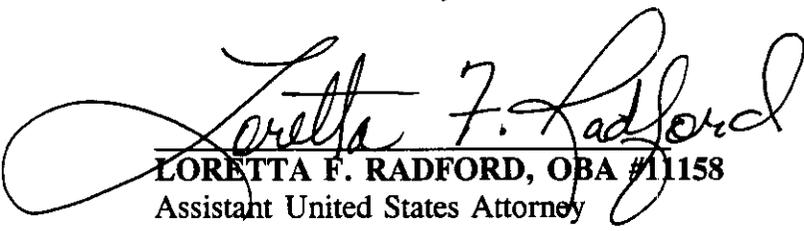
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed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

**s/ MICHAEL BURRAGE**

**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 540BU

LFR/lg





The role of the court in reviewing the decision of the Secretary under 42 USC § 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.

The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has adequately and correctly set forth both the relevant facts of this case and the required sequential analysis. The Court therefore incorporates this information into this order as the duplication of this effort would serve no useful purpose.

Plaintiff alleges that the record does not support the determination of the Secretary by substantial evidence and that the ALJ failed to perform the correct analysis. Specifically, Plaintiff alleges that the ALJ failed to consider the Veteran's Administration rating of Plaintiff as 100% disabled due to his mental problems. The Tenth Circuit has held that, "[a]lthough findings by other agencies are not binding on the Secretary, they are entitled to weight and must be considered." *Baca v. Department of Health and Human Services*, 5 F.3d 476, 480 (10th Cir. 1993), quoting *Fowler v. Califano*, 596 F.2d 600, 604 (3rd Cir. 1979).

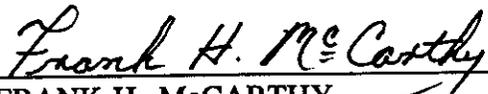
The Secretary argues that the only evidence cited by Plaintiff in support of the 100% disability rating by the VA is a consultation report found at page 191 of the record, which report the Secretary's brief characterizes as "ambiguous at best." The Court notes that the "ambiguous" reference in the record is dated February 26, 1984, within the relevant time frame. As well, the Court notes other references to Plaintiff's Veteran's disability rating related to his mental impairment. One note, dated April 9, 1982, relates that "records show he is 70% NSC [not service connected] for schizophrenia" [R. 221]. Another note dated June 7, 1982 states he was 10% NSC [R. 211]. The Secretary correctly points out that there is no disability rating document in the record. The record is not clear as to Plaintiff's exact VA disability rating. However, the problem is not that the VA disability rating is ambiguous. The problem is that the ALJ completely failed to consider the VA rating at all.

Moreover, the ALJ has a basic duty of inquiry to fully and fairly develop the record as to material issues. This duty exists even when claimant is represented by counsel. *Baca*, 5 F.3d at 479-80. The ALJ was, therefore, required to make reasonable efforts to obtain VA disability rating documentation and to resolve the so-called "ambiguity" surrounding the VA disability rating which the record suggests was increased from 70% to 100% between 1982 and 1984.

The time frame under consideration in this case is January 1978 through June 1984, some 9-15 years before the Social Security hearing. When the relevant time frame is in the distant past a VA disability rating made during that time frame is probably the best evidence of Plaintiff's condition during that time frame and may even be determinative. Yet, the ALJ failed to even consider the rating.

The Court concludes that the ALJ both failed to adequately develop the record and failed to conduct the proper legal analysis. Accordingly, the cause must be REVERSED and REMANDED for full consideration of the VA disability rating.

SO ORDERED this 14<sup>th</sup> day of December, 1995.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

DEC 15 1995

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

*RL*

NORAM GAS TRANSMISSION CO., )  
a Delaware Corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
ENTERPRISE RESOURCE CORP., )  
an Arkansas Corporation; )  
ALAN G. MIKELL; and TIDEMARK )  
EXPLORATION, INC., an )  
Oklahoma Corporation, )  
 )  
Defendants. )

No. 94-C-773-H ✓

ENTERED ON DOCKET  
DATE 12-18-95

ORDER

This matter comes before the Court on Defendants' Motion for Partial Summary Judgment (Docket #29).

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Winton Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

[t]he 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 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific

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facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); see Anderson, 477 U.S. at 250 ("There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.") (citations omitted).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party

opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

In April 1989, Plaintiff Noram Gas Transmission Company ("NGT") entered into a Settlement Agreement with Defendants Alan G. Mikell and Enterprise Resource Corporation ("ERC"). This action arose out of the alleged breach of that Agreement by Defendants. Among its claims, NGT asserts that Mr. Mikell and ERC breached the Agreement by failing to make refunds of NGT's prepayment when they did not deliver the amount of gas requested by NGT.

Section 2(c) of the Agreement controls NGT's ability to recoup its prepayment. Section 2(c) provides in applicable part:

If in any calendar quarter(s) or portion(s) thereof during the Recoupment Period, Buyer, Buyer's designee, or both, request the delivery of and Seller fails for any reason to tender and deliver free and clear of any adverse claims a daily average volume of gas equal to at least the Mcf per day volumes outlined in subsection (b) (ii) above (850 Mcf per day in 1989 to 500 Mcf per day in 1994), then Seller, in addition to all other rights and remedies available to Buyer, shall be required to refund, in cash, an amount equal to the difference between the daily volume set forth in subsection (b) (ii) in effect for such year multiplied by the number of days in such calendar quarter and the volume actually delivered during such calendar quarter, multiplied by the applicable price in effect at the time of the request. Each such refund shall be paid within fifteen days of the end of the month immediately following the end of the calendar quarter in which such gas was requested but not delivered.

Under Oklahoma law, "the language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity." 15 Okla. Stat. Ann. § 154. The interpretation of an unambiguous contract is a question of law for the Court. Public Serv. Co. of Okl. v. Burlington N. R.R. Co., 53

F.3d 1090, 1097 (10th Cir. 1995). The Court concludes that the Agreement in the present case is unambiguous.

Section 2(c) clearly contemplates a three-step analysis. First, NGT must request delivery of the minimum daily volume of gas outlined in section 2(b)(ii) of the Agreement. Second, ERC and Mr. Mikell must fail to deliver the minimum daily volume. Finally, upon occurrence of those conditions precedent, ERC and Mr. Mikell become obligated to refund in cash to NGT an amount equal to the difference between the minimum daily volume and the volume actually delivered multiplied by the price at the time of delivery.

It is undisputed that NGT never requested delivery of the minimum daily volume. Thus, although it was clearly within the power of NGT to invoke section 2(c) by requesting such delivery, the provision was never invoked, and the obligations of ERC and Mr. Mikell to refund the prepayment did not come due. The Court therefore holds that ERC and Mr. Mikell did not breach section 2(c) of the Agreement.

Defendants' Motion for Partial Summary Judgment (Docket #29) is hereby granted.

IT IS SO ORDERED.

This 14<sup>TH</sup> day of December, 1995.

  
Sven Erik Holmes  
United States District Judge

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

**FILED**

DEC 15 1995

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

Case No. 95-C-200-BU

KENDALL D. ASHLOCK,  
Plaintiff,

vs.

UNITED LINEN AND UNIFORM  
RENTAL, INC., an Oklahoma  
Corporation,

Defendant.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

ENTERED ON BOOKS

DATE DEC 15 1995

**FRCP RULE 41 JOINT STIPULATED DISMISSAL WITH PREJUDICE**

COMES NOW the Plaintiff and the Defendant, by and through their attorneys of record, and hereby file this FRCP Rule 41 Joint Stipulated Dismissal in the above-captioned cause with prejudice to refiling.

Respectfully submitted,

DAVID A. BLADES, ESQ.

BRIGGS, SMITH & GATCHELL

BY:

  
DAVID R. BLADES, ESQ., OBA #15187  
P.O. Box 960  
Jay, OK 74346  
Telephone: (918) 253-4215  
ATTORNEY FOR PLAINTIFF

BY:

  
ROBERT L. BRIGGS, OBA #10215  
Oil Capital Building  
507 S. Main, Suite 605  
Tulsa, OK 74103  
Telephone: (918) 599-7780  
Facsimile: (918) 599-0089  
ATTORNEY FOR DEFENDANT

**FILED**

DEC 15 1995

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

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

IN THE MATTER OF THE EXTRADITION)  
OF )  
BARBARITO DE LEON COMPEAN )

MISC. NO. 95-M-17-H

ENTERED ON DOCKET

DATE DEC 18 1995

ORDER CLOSING MATTER

On July 14, 1995, this Court found and ordered, *inter alia*, as follows:

1. There was probable cause to believe (1) that Barbarito De Leon Compean, who was before this Court, was the same person who was the fugitive for whom warrants of arrest had been issued and who was the subject of the extradition request, and (2) that he was the same person who committed the offenses for which his extradition was sought;

2. Barbarito De Leon Compean was extraditable for each offense for which extradition was being requested by the United Mexican States and certified this finding to the Secretary of State of the United States as required under Title 18, United States Code, Section 3184; and,

3. Barbarito De Leon Compean be and he was thereby committed to the custody of the United States Marshal for this District pending final disposition of this matter by the Secretary of State and his surrender to designated agents of the Government of the United Mexican States pursuant to applicable provisions of the Treaty and law.

F. L. Dunn, III, Assistant United States Attorney, has notified the court of the following:

1. On December 6, 1995, the Secretary of State of the United States issued his surrender warrant to the United States Marshal of the Northern District of Oklahoma requiring the United States Marshal to surrender custody of Barbarito De Leon Compean to duly authorized agents of the government of the United Mexican States ; and,

2. On December 13, 1995, the United States Marshal of the Northern District of Oklahoma surrendered custody of the person of Barbarito De Leon Compean to duly authorized agents of the government of the United Mexican States.

The United States requests that this matter be judicially ordered closed and the Court, based upon the information presented, FINDS that this matter should be and the same is hereby closed.

IT IS SO ORDERED this 15<sup>th</sup> Day of December, 1995.

  
FRANK H. MCCARTHY  
UNITED STATES MAGISTRATE JUDGE

**FILED**

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

DEC 15 1995

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

IN THE MATTER OF THE EXTRADITION)  
OF )  
ARMANDO DE LEON COMPEAN )

MISC. NO. 95-M-16-B

ENTERED ON DOCKET

DATE DEC 18 1995

ORDER CLOSING MATTER

On October 11, 1995, this Court found and ordered, *inter alia*, as follows:

1. There was probable cause to believe (1) that Armando De Leon Compean, who was before this Court, was the same person who was the fugitive for whom warrants of arrest had been issued and who was the subject of the extradition request, and (2) that he was the same person who committed the offenses for which his extradition was sought;

2. Armando De Leon Compean was extraditable for each offense for which extradition was being requested by the United Mexican States and certified this finding to the Secretary of State of the United States as required under Title 18, United States Code, Section 3184; and,

3. Armando De Leon Compean be and he was thereby committed to the custody of the United States Marshal for this District pending final disposition of this matter by the Secretary of State and his surrender to designated agents of the Government of the United Mexican States pursuant to applicable provisions of the Treaty and law.

F. L. Dunn, III, Assistant United States Attorney, has notified the court of the following:

1. On December 6, 1995, the Secretary of State of the United States issued his surrender warrant to the United States Marshal of the Northern District of Oklahoma requiring the United States Marshal to surrender custody of Armando De Leon Compean to duly authorized agents of the government of the United Mexican States ; and,

2. On December 13, 1995, the United States Marshal of the Northern District of Oklahoma surrendered custody of the person of Armando De Leon Compean to duly authorized agents of the government of the United Mexican States.

The United States requests that this matter be judicially ordered closed and the Court, based upon the information presented, FINDS that this matter should be and the same is hereby closed.

IT IS SO ORDERED this 15<sup>th</sup> Day of December, 1995.

  
FRANK H. MCCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

FILED

DEC 15 1995

BRENDA GORDON,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant.

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

Case No.: 94-C-893-K

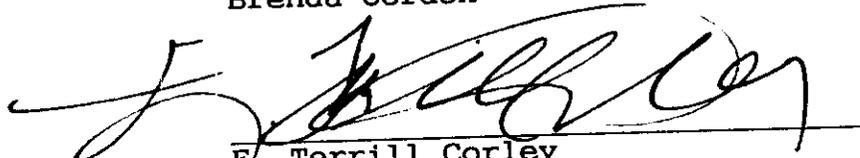
ENTERED ON DOCKET

DATE DEC 18 1995

STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Brenda Gordon, and her attorney of record, E. Terrill Corley, and the attorney for the Defendant, Paul T. Boudreaux, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, and jointly request this court to enter an order dismissing the above-styled matter without prejudice, for the reason and upon the grounds that the parties have agreed to submit all claims of any kind to binding arbitration.

  
\_\_\_\_\_  
Brenda Gordon

  
\_\_\_\_\_  
E. Terrill Corley  
Attorney for Plaintiff

  
\_\_\_\_\_  
Paul T. Boudreaux  
Attorney for Defendant

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

ENTERED ON DOCKET  
DATE DEC 15 1995

TERRELL WILLIAMSON,  
SSN: 344-26-3975,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner  
Social Security Administration,

Defendant.

NO. 94-C-670-M ✓

**FILED**

DEC 14 1995

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

JUDGMENT

Judgment is hereby entered for the Plaintiff and against Defendant. Dated this 14<sup>th</sup> day  
of Dec., 1995.

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

ENTERED ON DOCKET  
DEC 15 1995

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

TERRELL WILLIAMSON,  
SSN: 344-26-3975,  
Plaintiff,  
v.  
SHIRLEY S. CHATER,<sup>1</sup> Commissioner  
Social Security Administration,  
Defendant.

NO. 94-C-670-M

**FILED**  
DEC 14 1995  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff, Terrell Williamson, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits<sup>2</sup>. In accordance with 28 U.S.C. §636(c) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this decision will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 USC § 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

<sup>1</sup> 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. 103-206. However, this Order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

<sup>2</sup> Plaintiff's February 27, 1992 application for disability benefits was denied March 17, 1992, the denial was affirmed on reconsideration, June 15, 1992. A hearing before an Administrative Law Judge ("ALJ") was held January 5, 1993. By decision dated March 24, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on August 14, 1994. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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, (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, at 1427. The record of the proceedings before the Social Security Administration has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has adequately and correctly set forth both the relevant facts of this case and the required sequential analysis. The Court therefore incorporates that information into this order as the duplication of this effort would serve no useful purpose.

The ALJ employed the vocational/medical guidelines (grids) as a framework for decision and concluded that there are a significant number of jobs in the national economy that Plaintiff can perform, and that therefore, he is not disabled. Plaintiff alleges that the ALJ failed to properly evaluate Plaintiff's credibility and Plaintiff's residual functional capacity, that he improperly relied on the grids in finding Plaintiff not disabled and that the record does not support the determination of the Secretary by substantial evidence.

The parties agree that the term for disability insurance benefits under which Plaintiff was covered ended December 31, 1988. For Plaintiff to be qualified for benefits, it must be established that he was actually disabled prior to the expiration of his disability insurance coverage. 42 USC §§ 401 et seq., 406-433, 423 (d)(1)(A); 20 C.F.R. §404.1520; *Potter v. Secretary of Health & Human Services*, 905 F.2d 1346 (10th Cir. 1990).

Plaintiff asserted a plethora of physical and mental complaints: "bilateral hearing loss; anxiety neurosis; posttraumatic stress disorder; memory loss; bleeding skin rash; chronic peritendinitis biceps, brachialis tendon, right shoulder; chronic lumbosacral strain with sciatic neuritis; internal derangement, right knee p.o.; and otitis media" [R. 126].

Plaintiff complains of disabling pain associated with back injuries sustained in Viet Nam in 1970 [R. 70, 203, 212, 215, 260, 291, 293, 294] and while working for Inman Trucking in 1982 [R. 69, 70, 147, 153, 215]. The Veterans Administration (VA) medical records contain back X-rays taken in 1982, which were normal [R. 303]. Around that same time, physician notes indicate that a CT scan was found to be normal and there were no localizing neurological signs, no definite sensory loss, no muscle atrophy [R. 147] and no spinal deformity [R. 220]. He was placed on a home program using heat or ice packs [R. 220, 222]. Plaintiff was instructed in "Williams exercises" but he discontinued that therapy on his own [R. 219]. In 1983, physician notes indicate Plaintiff complained of back pain on flexion and extension with mild spasm but reported negative SLR, DTR's active and equal and no muscle weakness, atrophy or loss of tone in lower extremities [R. 213-215] and that his posture was good [R. 212]. X-rays in 1984 also were normal [R. 279]. Physician examination notes reported moderate pain to pressure, reduced flexion and range of motion but stated that Plaintiff appeared "to be in moderate distress" [R. 278].

The VA records document pain based upon subjective complaints from Plaintiff and objective evidence such as antalgic gait [R. 170], decreased range of motion [R. 176, 177], and EMG revealing mild but definite abnormality in muscles of the left leg which are supplied by the L-5 nerve root [R. 151]. Treatment consisted of prescribed muscle relaxants, pain

medication, and attempts at physical therapy [R. 147 through 305]. The Court notes that the VA physicians indicated Plaintiff had been rated as 60% SC (service connected) disabled in 1984, though no details of the basis for that rating were provided [R. 201].

The Tenth Circuit has set forth the framework for the proper analysis of the evidence of allegedly disabling pain in *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987). *Luna* requires the ALJ to:

consider (1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a "loose nexus" between the proven impairment and the Claimant's subjective allegations of pain; and (3) if so, whether considering all the evidence, both objective and subjective, Claimant's pain is in fact disabling.

*Glass v. Shalala*, 43 F.3d 1392, 1395 (10th Cir. 1994) (quoting *Musgrave v. Sullivan*, 966 F.2d 1371, 1375-76 (10th Cir. 1992) (citing *Luna*, 834 F.2d at 163-64)).

In this case the ALJ noted the general regulations, the law governing assessment of pain and the criteria established for the evaluation of pain. He stated that he was applying the framework set forth in *Luna*, but he did not explain why the specific evidence relevant to each factor led him to conclude Plaintiff's subjective complaints were not credible. The Tenth Circuit recently rejected such a conclusory pain analysis and ordered a limited remand to require express findings concerning Plaintiff's pain in accordance with *Luna*, with reference to relevant evidence as appropriate. *Kepler v. Chater*, 68 F.3d 387 (10th Cir. 1995). In fact, the precise language rejected by the Court in *Kepler* is contained in the ALJ's decision in this case.

In addition to the erroneous conclusory pain analysis, although the ALJ discussed Plaintiff's use of pain medication, he mistakenly discussed Plaintiffs present medications, not the medications prescribed during 1982-88. Plaintiff's present medications are Methocarbamol

and Ibuprofen, which the ALJ described as "mild prescription pain relief medication" [R. 37]. The medications prescribed during the relevant time period however, included Tylenol No. 3 [R. 186 - 208] and Flexeril.<sup>3</sup> Tylenol No. 3 is described in the *Physician's Desk Reference*, pg. 1473-1474 (49th ed. 1995) (PDR) as containing acetaminophen and codeine, is indicated for the relief of mild to moderately severe pain and can cause lightheadedness, dizziness, sedation, shortness of breath, nausea and vomiting along with allergic reactions and, at higher doses, has most of the disadvantages of morphine. At page 1550, the PDR states that Flexeril is prescribed for muscle spasm associated with acute, painful musculoskeletal conditions. Precaution warnings state that Flexeril may impair mental and/or physical abilities required for performance of hazardous tasks, such as operating machinery or driving a motor vehicle and may enhance the effects of alcohol, barbiturates and other CNS depressants.

In responding to Plaintiff's allegations of error regarding the ALJ's analysis of the effects of Plaintiff's medications, the Secretary has asserted that a finding of a compensable claim based on the effects of Plaintiff's medications is precluded because the medical records for the relevant time frame do not reveal any complaints by Plaintiff to his doctors of any problem with his concentration as a result of the medications [Brief In Support of Defendant's Administrative Decision Denying Disability Benefits to Plaintiff, Dkt. 5, page 8]. Indeed, the record does not contain any notation of side effects, other than occasional complaints of an irritated stomach [R. 184, 193, 194]. However, in his discussion of Plaintiff's mental impairments, the ALJ attributed Plaintiff's restricted ability to pay bills and maintain a residence to "confusion induced

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<sup>3</sup> In July, 1983, Plaintiff was placed on Tylenol No. 3 and Flexeril [R. 211] which were refilled regularly until March 1, 1985 [R. 185-194]. The VA physicians prescribed Motrin in 1986 [R.184] while Flexeril was continued through 1988 [R. 179 - 185].

by his medication for pain relief" [R. 34]. Similarly, difficulties with concentration were attributed to "the combined effects of the multiple pain relief medication he uses." [R. 35].

It is unclear from the ALJ's decision whether he actually found confusion and a lack of concentration to exist as a result of the medications, or whether he found those complaints to lack credibility. Regardless, the ALJ was required to include a discussion of medication side-effects within the pain analysis and also in relation to Plaintiff's residual functional capacity. Further, to the extent confusion and lack of concentration due to pain medication are present, they constitute a non-exertional impairment that would render reliance on the vocational/medical guidelines ("grids") inappropriate. *Teter v. Heckler*, 775 F.2d 1104, 1105 (10th Cir. 1985).

The Court concludes that the ALJ failed to conduct a proper analysis. Accordingly, the cause must be reversed and remanded. The case is REVERSED and REMANDED for: (1) a pain analysis, conducted in accordance with *Luna*, supra, and SSR 88-13; (2) consideration of the side-effects of Tylenol No. 3 and Flexeril on Plaintiff's residual functional capacity; and (3) re-evaluation of Plaintiff's claim in light of the foregoing.

SO ORDERED THIS 14<sup>th</sup> day of Dec., 1995.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
PEGGY I. THOMPSON aka PEGGY I. )  
HAYNES aka PEGGY THOMPSON aka )  
PEGGY IRENE THOMPSON; ROY D. )  
HAYNES; DONNIE R. JACKSON aka )  
DONNIE J. JACKSON; JAMES M. )  
SHANNON; COUNTY TREASURER, )  
Rogers County, Oklahoma; BOARD OF )  
COUNTY COMMISSIONERS, Rogers )  
County, Oklahoma, )  
Defendants. )

**FILED**

DEC 14 1995

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

ENTERED  
DEC 15 1995  
DATE

Civil Case No. 95-C 313BU

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 14 day of Dec,  
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, Rogers County, Oklahoma, and BOARD OF  
COUNTY COMMISSIONERS, Rogers County, Oklahoma, appear by Michele L. Schultz,  
Assistant District Attorney, Rogers County, Oklahoma; and the Defendants, PEGGY I.  
THOMPSON aka PEGGY I. HAYNES aka PEGGY THOMPSON aka PEGGY IRENE  
THOMPSON, ROY D. HAYNES, DONNIE R. JACKSON aka DONNIE J. JACKSON, and  
JAMES M. SHANNON, appear not, but make default.

The Court being fully advised and having examined the court file finds that the  
Defendant, PEGGY I. THOMPSON aka PEGGY I. HAYNES aka PEGGY THOMPSON  
aka PEGGY IRENE THOMPSON will hereinafter be referred to as ("PEGGY I.

NOTE: THIS ORDER MUST BE REVIEWED  
BY MOVING TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

THOMPSON"). The Defendant, PEGGY I. THOMPSON, is a single person and has been a single person since becoming the record title holder of the subject property.

The Court being fully advised and having examined the court file finds that the Defendant, JAMES M. SHANNON, waived service of Summons on May 1, 1995; that Defendant, COUNTY TREASURER, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint via certified mail on April 6, 1995; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint via certified mail on April 6, 1995.

The Court further finds that the Defendants, PEGGY I. THOMPSON, ROY D. HAYNES, and DONNIE R. JACKSON aka DONNIE J. JACKSON, were served by publishing notice of this action in the Claremore Daily Progress, a newspaper of general circulation in Rogers County, Oklahoma, once a week for six (6) consecutive weeks beginning September 13, 1995, and continuing through October 18, 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, PEGGY I. THOMPSON, ROY D. HAYNES, and DONNIE R. JACKSON aka DONNIE J. JACKSON, 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, PEGGY I. THOMPSON, ROY D. HAYNES, and DONNIE R. JACKSON aka DONNIE J.

JACKSON. 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, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, filed their Answer on May 12, 1995; and that the Defendants, PEGGY I. THOMPSON, ROY D. HAYNES, DONNIE R. JACKSON aka DONNIE J. JACKSON, and JAMES M. SHANNON, 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 Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot 7 in Block 2 of Parkland Estates III, Amended, an addition to the City of Claremore, Rogers County, Oklahoma, according to the recorded plat thereof.

The Court further finds that on February 27, 1986, DONNIE R. JACKSON and Sue Jackson, executed and delivered to First Federal Savings Bank of Oklahoma their mortgage note in the amount of \$63,421.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, DONNIE R. JACKSON and Sue Jackson, husband and wife, executed and delivered to First Federal Savings Bank of Oklahoma a mortgage dated February 27, 1986, covering the above-described property. Said mortgage was recorded on February 28, 1986, in Book 724, Page 655, in the records of Rogers County, Oklahoma.

The Court further finds that on September 26, 1990, First Federal Savings Bank of Oklahoma assigned the above-described mortgage note and mortgage to the Secretary of Housing & Urban Development, his/her successor and assigns. This Assignment of Mortgage was recorded on September 27, 1990, in Book 839, Page 896, in the records of Rogers County, Oklahoma.

The Court further finds that the Defendant, PEGGY I. THOMPSON, is the current title owner of the property by virtue of a General Warranty Deed dated August 1, 1988, and recorded on August 2, 1988 in Book 789, Page 566, in the records of Rogers County, Oklahoma. The Defendant, PEGGY I. THOMPSON, is the current assumpor of the subject indebtedness.

The Court further finds that on September 21, 1990, the Defendant, PEGGY I. THOMPSON, 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 June 5, 1991, August 12, 1992, February 12, 1993, March 17, 1993, and July 26, 1993.

The Court further finds that the Defendant, PEGGY I. THOMPSON, 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 her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, PEGGY I. THOMPSON, is indebted to the Plaintiff in the principal sum of \$88,823.43, plus interest at the rate of 10.5 percent per annum from September 7, 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, Rogers 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 \$145.31. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, PEGGY I. THOMPSON, ROY D. HAYNES, DONNIE R. JACKSON aka DONNIE J. JACKSON, and JAMES M. SHANNON, 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, Rogers 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 Defendant, PEGGY I. THOMPSON, in the principal sum of \$88,823.43, plus interest at the rate of 10.5 percent per annum from September 7, 1994 until judgment, plus interest thereafter at the current legal rate of 5.35 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, Rogers County, Oklahoma, have and recover judgment in the amount of \$145.31, plus costs and interest, for personal property taxes for the years 1992-1994, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, PEGGY I. THOMPSON, ROY D. HAYNES, DONNIE R. JACKSON aka DONNIE J. JACKSON, JAMES M. SHANNON and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, PEGGY I. THOMPSON, 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, Rogers County, Oklahoma, in the amount of \$145.31, 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.

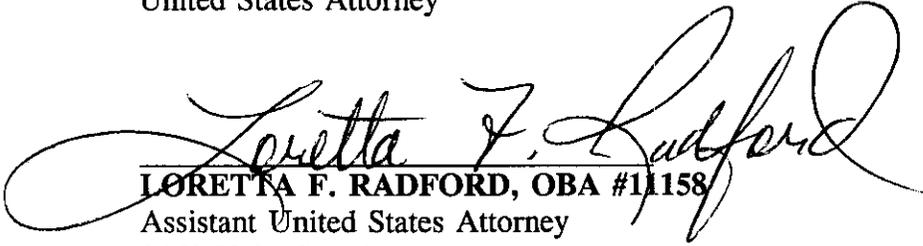
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the

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/ MICHAEL BURRAGE~~  
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



**MICHELE L. SCHULTZ, OBA #13771**

Assistant District Attorney  
219 S. Missouri, Room 1-111  
Claremore, OK 74107  
(918) 341-3164  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95-C 313BU

LFR/lg

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

SHIRLEY MANNING, )  
SS# 441-50-9627, )  
Plaintiff, )  
v. )  
SHIRLEY S. CHATER, Commissioner, <sup>1</sup> )  
Social Security Administration, )  
Defendant. )

NO. 93-C-979-B

**FILED**

DEC 14 1995

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

ENTERED ON DOCKET  
DATE DEC 15 1995

REPORT AND RECOMMENDATION

Plaintiff, Shirley Manning, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.<sup>2</sup>

The role of the court in reviewing the decision of the Secretary under 42 USC § 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

<sup>1</sup> 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 report continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

<sup>2</sup> Plaintiff's application for benefits was filed February 27, 1992 and was denied April 20, 1992. The denial was affirmed on reconsideration, September 16, 1992. A hearing before an Administrative Law Judge ("ALJ") was held March 16, 1993. By decision dated April 13, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on September 17, 1993. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

(9)

substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390 (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401.

After a hearing before an Administrative Law Judge ("ALJ") at which Plaintiff was not represented by counsel, the ALJ determined that although Plaintiff is not able to return to her past relevant work as a laundry worker; she can perform the full range of sedentary work and is therefore not disabled [R. 18-9]. Plaintiff alleges that the record does not support the determination of non-disability by substantial evidence and that the ALJ failed to perform the correct analysis. Specifically, Plaintiff argues that the ALJ: (1) improperly disregarded the opinion of her treating physician; (2) failed to properly evaluate her allegations of pain; and (3) improperly failed to consult a vocational expert.

#### TREATING PHYSICIAN

In this case Plaintiff's treating physician, Dr. Bartlett, submitted two letters, the text of which follow:

March 15, 1993  
To Whom It May Concern:

Re: Shirley Manning

This lady is under my care for treatment of multiple medical problems. She is a non insulin dependent diabetic with hypertension and also has debilitating arthritis, involving the hips, knees and feet. She has considerable difficulty ambulating, which has progressed to the point that she is now ambulating with the aid of a cane. Although she is on anti-inflammatory medications, she gets only slight relief from pain.

It is my opinion that she would find it quite difficult to engage in any activity requiring constant movement, and because of persistent degrees of severe joint pain, sedentary jobs might be difficult to maintain.

Sincerely, /s/ M.S. Bartlett, M.D. [R. 145].

The next letter is:

June 9, 1993

John Young  
Attorney At Law  
2 North Main  
Sapulpa, OK 74066

Re: Shirley Manning  
SS#: 441-50-9627

Dear Sir:

Ms. Manning has been under my care for close to two years. During that time she has been found to have several medical problems. She is a non Insulin dependent diabetic and has had maintained fair control of her diabetes. She also has problems with hypertension which has responded satisfactorily to medication. However, her primary complaint is related to chronic joint pain, primarily of the back which results in severe back pain which has responded poorly to an anti-inflammatory, and analgesic medication.

She has been observed on examination to have difficulty walking and has found it necessary to ambulate with the aid of a cane. X-rays taken of the low back, thoracic and lumbar spine have shown degenerative arthritic changes.

This lady finds it difficult to ambulate, as well as sitting and resting. This chronic pain has created some degree of depressed affect which has contributed to a further decline in her physical and mental well being. She has found a considerable difficulty in buying adequate medications, and we have attempted to help provide medication through samples, as needed. She actually needs further investigation of her low back with consideration of possible herniated disc, but her resources and inability to find referring physicians who would take her case have been unsuccessful.

She will continue under our care and it is felt at this time that her activities, especially with reference to any lifting, should be avoided.

Sincerely,  
/s/ M.S. Bartlett, M.D. [R. 6]

The record also contains Dr. Bartlett's treatment notes from May to August, 1992, which do not contradict the opinions set forth in the foregoing letters.

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments including the claimant's symptoms, diagnosis and prognosis, and any physical and mental restrictions. See 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). The Secretary will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. §§ 404.1527(d)(2), 416.927(d)(2). A treating physicians' opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. Specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ. *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987). And, while a physician may proffer an opinion that a claimant is totally disabled, that opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Secretary. See 20 C.F. R. §§ 404.1527(e)(2), 416.927(e)(2); *Goatcher v. United States Dept. of Health & Human Services*, 52 F.3d 288 (10th Cir. 1995); *Castellano v. Secretary of Health and Human Services*, 26 F.3d 1027, 1028 (10th Cir. 1994), *Eggleston v. Bowen*, 851 F.2d 1244, 1246-7 (10th Cir. 1988) (if treating physician's progress notes contradict his opinion, it may be rejected).

In addressing and rejecting Dr. Bartlett's opinion that Plaintiff would be unable to perform sedentary work, the ALJ made the following comments:

Because as to be discussed more fully below the medical evidence does not contain clinical findings and laboratory tests to support the claimant's allegations of totally disabling pain...a determination of disability must rest solely on subjective complaints. [R. 13]

\* \* \*

Dr. Bartlett felt claimant suffered from non-insulin dependent diabetes, hypertension and "debilitating arthritis, involving the hips, knees, and feet". As indicated previously, the Administrative Law Judge understands Dr. Bartlett's position to be that the claimant's arthritis is only significantly severe in the areas specified by him. Thus, it is recognized that the claimant would have difficulty engaging in activity that required movement, by which the Administrative Law Judge understands Dr. Bartlett to mean movement on [sic] the claimant's legs and feet. Nonetheless, the Administrative Law Judge does not feel Dr. Bartlett's statement that the claimant would have difficulty performing sedentary work is substantiated in that Dr. Bartlett specified as the basis for this "persistent degrees of joint pain" but identified as severe, only her hips, knees and feet. [R.16]

Based on the forgoing analysis of the treating physician's opinions, the ALJ concluded that a reasonable interpretation of Dr. Bartlett's opinion in light of his treatment notes supports a residual functional capacity for sedentary work. There are numerous factual and legal deficiencies in the ALJ's evaluation of this matter. The ALJ focused on Dr. Bartlett's March 15, 1993 letter which referred only to the arthritis in claimant's hips, knees and feet as being debilitating. However, he failed to mention that Dr. Bartlett's June 9, 1993 letter referred to Plaintiff's chronic joint pain as being primarily of the back, as follows:

However, her primary complaint is related to chronic joint pain, primarily of the back which results in severe back pain which has responded poorly to an anti-inflammatory, and analgesic medication. [Emphasis added]. [R. 6]

Additionally, the ALJ fails to note that in the same June 9th letter, Dr. Bartlett reported that x-rays taken of the low back, thoracic and lumbar spine had shown degenerative arthritic changes. These opinions concerning Plaintiff's back pain are consistent with the report of the consultive examination performed at the request of the Secretary by Paul J. Krautter, M.D. where Plaintiff was found to have "chronic musculoskeletal back pain, undetermined etiology, and possible

peripheral neuropathy." [R. 122]. Thus, the evidence from the treating physician and from the consultive physician is consistent. Plaintiff has chronic back pain; this being in addition to the pain from the hips, knees and feet discussed by the ALJ. Despite the consistent medical findings concerning back pain, the ALJ failed to address Dr. Bartlett's opinion that severe joint pain would prevent Plaintiff from the sitting requirements of sedentary work. Based upon the clinical and diagnostic support for the treating physician's opinion, the absence of contradictory evidence of record, and the consistent findings of the consultive physician, the Court finds that the ALJ erred in rejecting the treating physician's opinion that Plaintiff was not able to perform sedentary work due to pain.

In addition, the Court is concerned by the failure of the ALJ to fully and fairly develop the record as required by *Henrie v. U.S. Dept. of Health and Human Services*, 13 F.3d 359, 360-1 (10th Cir. 1993); *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992) and 42 U.S.C. § 423(d)(5)(B).<sup>3</sup> The first sentence of Dr. Bartlett's letter of June 9, 1993 states that Plaintiff had been under his care for close to two years. However, the record contains treatment notes for only four months, from May 19, 1992 to August, 1992. There is no explanation as to why additional treatment notes are not contained within the record. Further, this same correspondence refers to x-rays which display degenerative arthritic changes but there are no x-ray reports contained within the record. Finally, although the report of the consultive exam,

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<sup>3</sup> 42 U.S.C. § 423(d)(5)(B). requires: In making any determination with respect to whether an individual is under a disability or continues to be under a disability, the Commissioner of Social Security . . . shall develop a complete medical history of at least the preceding twelve months for any case in which a determination is made that the individual is not under a disability. In making any determination the Commissioner of Social Security shall make every reasonable effort to obtain from the individual's treating physician . . . all medical evidence. . . [emphasis supplied].

performed at the request of the Secretary notes the presence of musculoskeletal back pain, no diagnostic testing or x-rays were performed. The language from *Baker v. Bowen*, 886 F.2d 289, 291 (10th Cir. 1989) seems particularly applicable to the current case:

Mrs. Baker additionally asserts that the Secretary failed its burden to fully and fairly develop the record. See *Jordan v. Heckler*, 835 F.2d 1314, 1315 (10th Cir. 1987). We agree. We are at a loss to understand why the Secretary ordered a consultative physical examination without requesting that recent x-rays of Mrs. Baker's spine be taken. This failure is especially egregious in light of the fact that Mrs. Baker was not represented by counsel, was unable to secure her treating physician's records or afford new x-rays, and was complaining primarily of pain and stiffness due to arthritis, a disease commonly confirmed by x-ray.

As in *Baker*, the Court finds that the ALJ failed to fully and fairly develop the record.

What remains is for the Court to determine whether to reverse and remand for further proceedings before the Secretary, or for an immediate award of benefits. The Court's power with regard to remanding matters to the Secretary is controlled by 42 USC §405(g). A remand under sentence 4 of § 405(g) occurs after the merits of an appeal are considered and the Court determines that further proceedings are necessary. Sentence 6 of § 405(g) provides for a remand upon request by the Secretary that the case be remanded to allow the introduction of additional evidence, or to permit the Secretary to take further action in the matter. A remand under sentence 6 requires a showing of good cause by the Secretary. *Shalala v. Schaefer*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 2625, 125 L.Ed 2d 239 (1993); *Melkonyan v. Sullivan*, 501 U.S. 89, 111 S.Ct. 2157, 115 L.Ed.2d 78 (1991). While there is no question that the reversal in this case is on the merits and thus controlled by sentence 4 of Section 405(g), the sentence 6 requirement of a showing of good cause which Congress imposed in 1980 "to speed up the judicial process so that these cases would not just go on and on and on" 125 Cong. Record 23383 (1979); might serve

as a useful point of consideration when the Court exercises its discretion regarding whether to remand for the immediate award of benefits.

The ALJ decided this case at step-5 in the sequential evaluation process. At step-5 it is the Secretary who bears the burden of proof. The Court can discern no justification for the Secretary's failure in this case to obtain the treating physician's treatment notes and x-ray reports or to order new x-rays in conjunction with the consultive examination. On this record a request made under sentence 6 for a remand would be denied for lack of good cause. On this record Plaintiff is entitled to Social Security benefits based upon her treating physician's opinions which are supported by the record and not contradicted by any other medical evidence of record. The Court finds a remand for further development of the record would exacerbate the long delay already resulting from the Secretary's failure to satisfy her burden at Step 5. Accordingly, it is the recommendation of this Court that discretionary authority be exercised to remand this case for the immediate award of benefits. *Ragland v. Shalala*, 992 F.2d 1056 (10th Cir. 1993); *Dixon v. Heckler*, 811 F.2d 506 (10th Cir. 1987).

Based upon the above analysis and authorities, it is the recommendation of the undersigned United States Magistrate Judge that the Court REVERSE THE DECISION OF THE SECRETARY AND REMAND THIS MATTER FOR THE IMMEDIATE AWARD OF BENEFITS.

In accordance with 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this Report. Failure to file objections within the time specified waives the right to appeal from a judgment of the district court based upon the findings and

recommendations of the magistrate. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED THIS 14<sup>th</sup> day of Dec., 1995.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

**FILED**

**DEC 14 1995**

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

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

DAVID B. McDERMOTT,  
Petitioner,

vs.

U. S. MARSHAL'S SERVICE and  
TULSA COUNTY SHERIFF'S  
DEPARTMENT, et al.,  
Respondent.

No. 95-C-1196-E ✓

ENTERED ON DOCKET  
DATE DEC 15 1995 ✓

ORDER

Now before the Court is the Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2241 (c)(3) (Docket #1) of the Petitioner David B. McDermott.

McDermott argues in his petition that collateral estoppel, res judicata, and double jeopardy bar his retrial, and therefore mandate his release, by virtue of three different events: 1) the civil forfeiture proceeding against his property, which was dismissed upon motion of the government, after McDermott's property was criminally forfeited in this proceeding; 2) the criminal forfeiture of his property (and ultimate disposition and sale of his property), notwithstanding the reversal of his conviction in this criminal proceeding; and 3) the voluntary dismissal of Count II of the Indictment at the prior sentencing of McDermott.

These identical arguments were raised by McDermott during the pretrial for the retrial of his criminal case, held December 6th, 1995. At that time the Court took the issues of collateral estoppel, res judicata, and double jeopardy under advisement, and shortly thereafter entered a written Order denying the motions containing those arguments. That Order directly applies to

McDermott's Petition for Writ of Habeas Corpus:

McDermott's first argument has previously been addressed on appeal, and rejected. See United States v. McDermott, 64 F.3d 1448 (10th Cir. 1995). The voluntary dismissal, therefore, of the civil forfeiture proceeding does not give rise to double jeopardy.

The Court also rejects McDermott's second and third arguments regarding double jeopardy, collateral estoppel, and res judicata. Generally, the double jeopardy clause of the Constitution does not bar re-prosecution of a defendant whose conviction is overturned on appeal. United States v. Apki, 26 F.3d 24 (10th Cir. 1994). Moreover, the jury's failure to return a conviction on count 2 of the indictment is not an acquittal, see United States v. Ham, 58 F.3d 78, 85 (4th Cir. 1995), and the voluntary dismissal of count two does not give rise to res judicata or collateral estoppel.

Given that these arguments have been considered and addressed, the Court finds that McDermott's Petition for Writ of Habeas Corpus (Docket #1)<sup>1</sup> is without merit and should be dismissed.<sup>2</sup>

ORDERED this 14<sup>TH</sup> day of December, 1995.

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

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<sup>1</sup> The Court notes that, in the Habeas case, McDermott has filed a Motion for Access to a Law Library to Use for Responding to Respondent's Reply to Habeas 28 U.S.C. §2241 (Docket #2). The Motion for Access to a Law Library, has, like the arguments in the Petition itself, been addressed and denied in the related pending criminal matter.

<sup>2</sup> Because it appears from the application that McDermott is not entitled to the relief requested, and because only issues of law are presented by the application, the Petition is denied without a response or hearing. See 28 U.S.C. §2243.

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

**FILED**

DEC 14 1995

DOLLAR SYSTEMS, INC.,  
a Delaware Corporation,

Plaintiff,

v.

PACIFIC INTERNATIONAL  
SERVICES CORP.,  
a California Corporation

Defendant.

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

Case No. 95-C-488-B

ENTERED ON DOCKET

DATE DEC 15 1995

**REVISED AND EXTENDED ADMINISTRATIVE CLOSING ORDER**

Upon joint application of the parties hereto, the Court orders that this matter should be administratively closed until December 15, 1995, or such time as either of the parties shall move to reopen this matter for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation. It is further ordered that all deadlines for the filing of pleadings be extended by the length of time from June 21, 1995 until this action is reopened.

Dated this 14 day of Dec, 1995.

S/ THOMAS R. BRETT

\_\_\_\_\_  
THOMAS R. BRETT  
CHIEF UNITED STATES  
DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DEVIN L. HARP aka Devin Lee Harp; )  
 MICHELLE ELLEN HARP; BANK )  
 UNITED OF TEXAS, FSB formerly )  
 United Savings Assn. of the Southwest, )  
 fsb; MERRILL LYNCH; COUNTY )  
 TREASURER, Tulsa County, Oklahoma; )  
 BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma, )  
 )  
 Defendants. )

**FILED**

DEC 14 1995

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

ENTERED ON DOCKET  
DATE DEC 15 1995

Civil Case No. 95-C 579B

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 14 day of Dec.,  
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, BANK UNITED OF TEXAS,  
FSB formerly United Savings Assn of Southwest, fsb, appears not having previously filed a  
Disclaimer; and the Defendants, DEVIN L. HARP aka Devin Lee Harp, MICHELLE  
ELLEN HARP and MERRILL LYNCH, appear not, but make default.

The Court further finds that the Defendants, DEVIN L. HARP aka Devin Lee  
Harp, MICHELLE ELLEN HARP and MERRILL LYNCH, 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 September 21, 1995, and continuing through October 26, 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, DEVIN L. HARP aka Devin Lee Harp, MICHELLE ELLEN HARP and MERRILL LYNCH, 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, DEVIN L. HARP aka Devin Lee Harp, MICHELLE ELLEN HARP and MERRILL LYNCH. 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 Answers on July 11, 1995; that the Defendants, BANK UNITED OF TEXAS, FSB formerly United Savings Assn of Southwest, fsb, filed its Disclaimer on August 3, 1995; and that the Defendants, DEVIN L. HARP aka Devin Lee Harp, MICHELLE ELLEN HARP and MERRILL LYNCH, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, DEVIN L. HARP, is one and the same person as Devin Lee Harp, and will hereinafter be referred to as "DEVIN L. HARP." The Defendants, DEVIN L. HARP and MICHELLE ELLEN HARP, are husband and wife.

The Court further finds that on December 7, 1993, Devin Lee Harp and Michelle Ellen Harp, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-03936-W. On March 31, 1994, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on June 7, 1994.

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

**THE WEST 60 FEET OF THE EAST 80 FEET OF LOT TWO (2), BLOCK FORTY-SEVEN (47), TOWN OF RED FORK, NOW AN ADDITION IN THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.**

The Court further finds that on July 31, 1991, the Defendant, DEVIN L. HARP, executed and delivered to UNITED SAVINGS ASSN OF THE SOUTHWEST FSB, his mortgage note in the amount of \$48,059.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, DEVIN L. HARP, A SINGLE PERSON, executed and delivered to UNITED SAVINGS ASSN OF THE SOUTHWEST FSB, a mortgage dated July 31, 1991, covering the above-described property. Said mortgage was recorded on August 5, 1991, in Book 5340, Page 0632, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 22, 1991, UNITED SAVINGS ASSN OF THE SOUTHWEST FSB, assigned the above-described mortgage note and mortgage to MERRILL LYNCH. This Assignment of Mortgage was recorded on April 14, 1992, in Book 5396, Page 2039, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 11, 1993, BANK UNITED OF TEXAS FSB, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on April 5, 1993, in Book 5490, Page 1300, in the records of Tulsa County, Oklahoma. A second Assignment of Mortgage dated February 1, 1993, was recorded on April 5, 1993, in Book 5490, Page 1302, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 1, 1993, the Defendants, DEVIN L. HARP and MICHELLE ELLEN HARP, 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 October 1, 1993.

The Court further finds that the Defendant, DEVIN L. HARP, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due

thereon, which default has continued, and that by reason thereof the Defendant, DEVIN L. HARP, is indebted to the Plaintiff in the principal sum of \$63,877.90, plus interest at the rate of 10 percent per annum from March 22, 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, DEVIN L. HARP, MICHELLE ELLEN HARP and MERRILL LYNCH, are in default, and have no right, title or interest in the subject real property.

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

The Court further finds that the Defendant, BANK UNITED OF TEXAS, FSB formerly United Savings Assn of Southwest, fsb, 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 In Rem against the Defendant, DEVIN L. HARP, in the principal sum of \$63,877.90, plus interest at the rate of 10 percent per annum from March 22, 1995 until judgment, plus interest thereafter at the current legal rate of 5.45 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, Tulsa County, Oklahoma, DEVIN L. HARP, MICHELLE ELLEN HARP, MERRILL LYNCH and BANK UNITED OF TEXAS, FSB formerly United Savings Assn of Southwest, fsb, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, DEVIN L. HARP, 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.

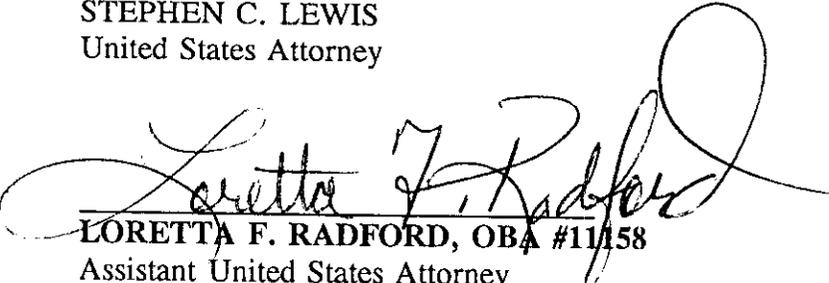
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed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

S/ THOMAS R. BRETT

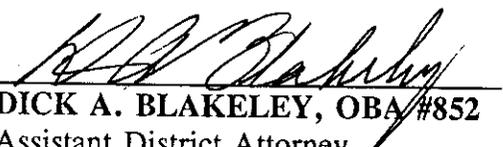
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
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 579B

LFR:flv

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
on behalf of the Secretary of )  
Housing and Urban Development, )  
 )  
Plaintiff, )

v. )

GARY L. GRAHAM )  
aka Gary Lee Graham; )  
S. DENISE GRAHAM )  
aka Sondra Denise Graham )  
aka Sondra D. Graham; )  
STATE OF OKLAHOMA ex rel. )  
Oklahoma Tax Commission; )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma, )  
 )  
Defendants. )

ENTERED ON DOCKET  
DATE DEC 15 1995

CIVIL ACTION NO. 95-C-387-B

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 14 day of Dec.,  
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; and the  
Defendants, Gary L. Graham aka Gary Lee Graham and S. Denise Graham aka Sondra  
Denise Graham aka Sondra D. Graham, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Gary L. Graham aka Gary Lee Graham**, was served with Summons and Complaint on June 27, 1995; that the Defendant, **S. Denise Graham aka Sondra Denise Graham aka Sondra D. Graham**, was served with Summons and Complaint on June 27, 1995; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, entered its appearance through Kim D. Ashley, Assistant General Counsel, on May 12, 1995.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on May 11, 1995; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, filed its Answer on May 12, 1995; and that the Defendants, **Gary L. Graham aka Gary Lee Graham and S. Denise Graham aka Sondra Denise Graham aka Sondra D. Graham**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on August 21, 1995, Gary Lee Graham and Sondra Denise Graham filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 95-02564-C. The real property described below was shown on Schedule A of the bankruptcy schedules and therefore was a part of the estate. On October 19, 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 this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**LOT FOUR (4), BLOCK SEVEN (7), BRIARDALE ADDITION TO THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.**

The Court further finds that on May 4, 1990, Gary L. Graham and S. Denise Graham executed and delivered to Inland Mortgage Corporation their mortgage note in the amount of \$36,226.00, payable in monthly installments, with interest thereon at the rate of 8.435 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Gary L. Graham and S. Denise Graham, husband and wife, executed and delivered to Inland Mortgage Corporation, a real estate mortgage dated May 4, 1990, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on May 7, 1990, in Book 5251, Page 1283, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 4, 1990, Inland Mortgage Corporation assigned the above-described mortgage note and mortgage to BancOklahoma Mortgage Corp. This Assignment of Mortgage was recorded on May 14, 1990, in Book 5252, Page 2274, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 15, 1991, BancOklahoma Mortgage Corp. assigned the above-described mortgage note and mortgage to the Secretary of Housing

and Urban Development. This Assignment was recorded on March 20, 1991, in Book 5310, Page 423, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, **Gary L. Graham aka Gary Lee Graham and S. Denise Graham aka Sondra Denise Graham aka Sondra D. Graham**, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Gary L. Graham aka Gary Lee Graham and S. Denise Graham aka Sondra Denise Graham aka Sondra D. Graham**, are indebted to the Plaintiff in the principal sum of \$36,087.01, plus penalty charges in the amount of \$104.96, plus accrued interest in the amount of \$11,929.43 as of January 1, 1995, plus interest accruing thereafter at the rate of 8.435 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$10.00 for recording Notice of Lis Pendens.

The Court further finds that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, has liens on the subject property which is the subject matter of this action in the total amount of \$375.99, together with interest and penalty according to law, by virtue of Tax Warrant No. ITI9400504500, dated February 24, 1994, and recorded on March 2, 1994, in the records of Tulsa County, Oklahoma; and by virtue of Tax Warrant No. ITI9402330100, dated December 8, 1994, and recorded on December 12, 1994, in the records of Tulsa County, Oklahoma. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has liens on the property which is the subject matter of this action by virtue of personal property taxes in the total amount of \$82.00, plus penalties and interest, which became liens on the property as of 1991 (\$32.00), 1992 (\$26.00), and 1993 (\$24.00). Said liens are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that 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 Defendants, **Gary L. Graham aka Gary Lee Graham and S. Denise Graham aka Sondra Denise Graham aka Sondra D. Graham**, in the principal sum of \$36,087.01, plus penalty charges in the amount of \$104.96, plus accrued interest in the amount of \$11,929.43 as of January 1, 1995, plus interest accruing thereafter at the rate of 8.435 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.45 percent per annum until paid, plus the costs of this action in the amount of \$10.00 for recording Notice of Lis Pendens, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, have and recover judgment in rem in the total amount of \$375.99, together with interest and penalty according to law, by virtue of Tax Warrant No. ITI9400504500, dated February 24, 1994, and recorded on March 2, 1994, in the records of Tulsa County, Oklahoma; and by virtue of Tax Warrant No. ITI9402330100, dated December 8, 1994, and recorded on December 12, 1994, in the records of Tulsa County, Oklahoma.

**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 penalties and interest, for personal property taxes for the years 1991 (\$32.00), 1992 (\$26.00), and 1993 (\$24.00), plus the costs of this action.

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

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, **Gary L. Graham aka Gary Lee Graham and S. Denise Graham aka Sondra Denise Graham aka Sondra D. Graham**, 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 the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma;

**Fourth:**

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission.

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.

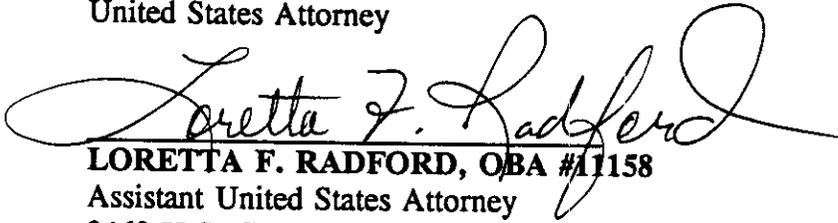
S/ THOMAS R. BRETT

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UNITED STATES DISTRICT JUDGE

APPROVED:

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

Judgment of Foreclosure  
USA v. Gary L. Graham, et al.  
Civil Action No. 95-C-387-B



**DICK A. BLAKELEY, QBA #852**

Assistant District Attorney

406 Tulsa County Courthouse

Tulsa, Oklahoma 74103

(918) 596-4841

Attorney for Defendants,

County Treasurer and

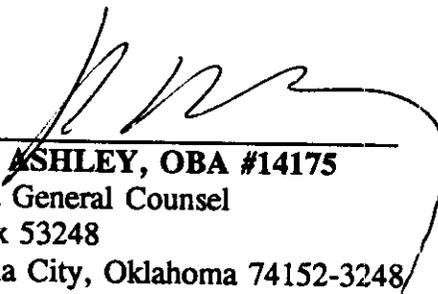
Board of County Commissioners,

Tulsa County, Oklahoma

**Judgment of Foreclosure**

**USA v. Gary L. Graham, et al.**

**Civil Action No. 95-C-387-B**

  
**KIM D. ASHLEY, OBA #14175**

Assistant General Counsel

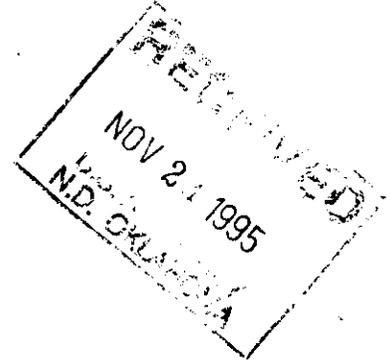
P.O. Box 53248

Oklahoma City, Oklahoma 74152-3248

(405) 521-3141

Attorney for Defendant,

State of Oklahoma ex rel. Oklahoma Tax Commission



Judgment of Foreclosure

USA v. Gary L. Graham, et al.

Civil Action No. 95-C-387-B

LFR:css

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

JEAN F. TRIGALET and MYRA J. TRIGALET, )  
personal representative of the Estate of )  
of Constance Trigalet, )

Plaintiffs, )

v. )

CITY OF TULSA, OKLAHOMA, a municipal )  
corporation, et al., )

Defendants. )

JEAN F. TRIGALET, personal )  
representative of the Estate of )  
Martha Annette Trigalet, )

Plaintiff, )

v. )

CITY OF TULSA, OKLAHOMA, a municipal )  
corporation, et al., )

Defendants. )

LEONARD L. MUNSON, personal )  
representative of the Estate of )  
Steven Lewis Munson, )

Plaintiff, )

v. )

CITY OF TULSA, OKLAHOMA, a municipal )  
corporation, et al., )

Defendants. )

ENTERED ON DOCKET

DATE 12-14-95

Case No. 92-C-368-H ✓

**FILED**

DEC 13 1995

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

Case No. 92-C-369-H  
(Consolidated for  
trial with Case No.  
92-C-368-H)

Case No. 92-C-370-H  
(Consolidated for  
trial with Case No.  
92-C-368-H)

ORDER

This matter comes before the Court on Plaintiffs' Motion to  
Revise Order filed on December 3, 1993. The Court has reviewed  
Plaintiffs' submission regarding Cross Appeal as well as  
Plaintiffs' Case Review, Status Report, and Proposals upon return

85

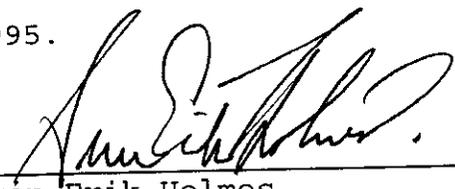
of case from Tenth Circuit and Defendant City of Tulsa's Brief on the Cross-Appeal Issue.

First, as a result of the Order and Judgment entered on May 2, 1995 by the Tenth Circuit Court of Appeals, the order of this Court, which order denied the police officers' motion for summary judgment in their individual capacities on grounds of qualified immunity, has been reversed. Therefore, pursuant to the Tenth Circuit Order, dismissal of those officers in their individual capacities from this lawsuit is now appropriate. The claims against Officers Warrick, Stege, and Pierce in their individual capacities are hereby dismissed.

Second, the Court has concluded that Plaintiffs' claims against Officers Warrick, Stege, and Pierce in their official capacity and against the City of Tulsa for deprivations of Fourteenth Amendment substantive due process remain. As a result, the Court now has pending before it Plaintiffs' Motion to Revise Order filed December 3, 1993. Defendants have never responded to Plaintiffs' Motion. The Court allows Defendants until January 5, 1996 to respond to Plaintiffs' Motion. Plaintiffs then have until January 19, 1996 to reply to Defendants' response.

IT IS SO ORDERED.

This 12<sup>TH</sup> day of DECEMBER, 1995.

  
Sven Erik Holmes  
United States District Judge

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

FILED

DEC 13 1995

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

BANCOKLAHOMA TRUST )  
COMPANY, as Trustee of the Branam )  
Trust, )  
Plaintiff, )

Case No. 95CV 941E

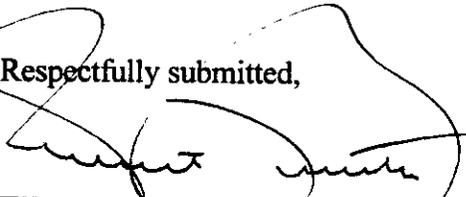
v. )  
APACHE CORPORATION, )  
Defendant. )

ENTERED ON DOCKET ✓  
DATE DEC 14 1995

**DISMISSAL WITH PREJUDICE**

COMES NOW, the Plaintiff, BancOklahoma Trust Company as Trustee for the Branam Trust, hereby dismisses the above stated action with prejudice, each side to bear their own attorney's fees and costs associated with said action.

Respectfully submitted,



---

R. Thomas Seymour, Esq., OBA #  
C. Robert Burton, IV, Esq., OBA #  
550 ONEOK Plaza  
100 West Fifth Street  
Tulsa, OK 74103-4288  
(918) 583-5791  
(918) 583-9251 (Telecopier)

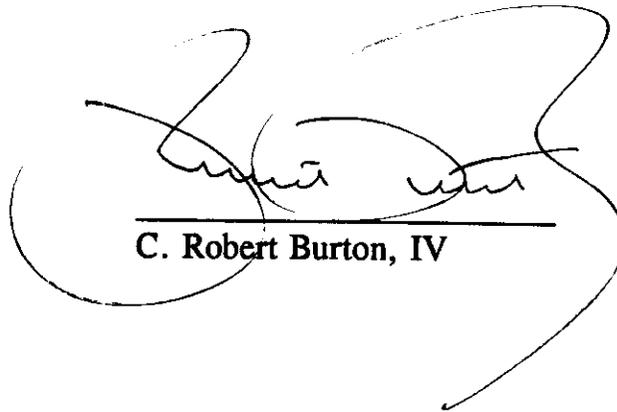
**ATTORNEYS FOR PLAINTIFF  
BANCOKLAHOMA TRUST COMPANY  
as Trustee of the Branam Trust**

**CERTIFICATE OF MAILING**

The undersigned hereby certifies that on this 15 day of December, 1995, a true and correct copy of the above and foregoing document was mailed with proper postage thereon fully prepaid to:

R. Casey Cooper, Esq.  
R. Kevin Layton, Esq.  
Boesche, McDermott & Eskridge  
800 Oneok Plaza  
100 W. 5th St.  
Tulsa, OK 74103-4216

Richard D. Black, Esq.  
Apache Corporation  
2000 Pot Oak, Suite 100  
Houston, TX 77057-4400



A large, stylized handwritten signature in black ink, appearing to read "C. Robert Burton, IV", is written over a horizontal line. The signature is highly cursive and loops around the line.

C. Robert Burton, IV

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

**FILED**

DEC 13 1995

SOMETIMES YOU WIN MUSIC, )  
SEVENTH SON MUSIC, MATTIE )  
RUTH MUSICK, HOWLIN' HITS )  
MUSIC, INC., SQUARE WEST )  
MUSIC, INC., MORGANACTIVE )  
SONGS, INC., POOKIE BEAR )  
MUSIC and SOUTHERN GALLERY, )

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

Plaintiffs, )

No. 95-C-704 C

v. )

JESSE THARP, d/b/a )  
JESSE'S DISTRIBUTING, )

ENTERED ON DOCKET ✓

Defendant. )

DATE DEC 14 1995

JOURNAL ENTRY OF JUDGMENT BY DEFAULT

The above styled and numbered cause comes before the Court pursuant to the Plaintiffs' Application and Brief for Entry of Judgment by Default. The files and records in this case show that the plaintiffs' Complaint was filed on July 27, 1995; that the Complaint was personally served upon the defendant, Jesse Tharp, on August 12, 1995, as shown by the Return of Service now on file with the court clerk; that no answer or other responsive pleading or appearance has ever been filed by the defendant; that the time for filing an answer has elapsed and has not been further extended; that the defendant is not an infant or incompetent person; that the defendant has not been in the military since the filing of this action nor for the six months prior to the filing of this action, and; the clerk of this court entered default against the defendant on October 25, 1995.

THE CLERK OF COURT  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA  
MUSKOGEE, OKLAHOMA

Based upon the foregoing record, from review of the plaintiffs' Application and Brief for Default, noting the defendant has filed no response thereto, and being otherwise fully advised in the premises, the Court hereby finds that the plaintiffs' are entitled to judgment by default against the defendant, Jesse Tharp.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

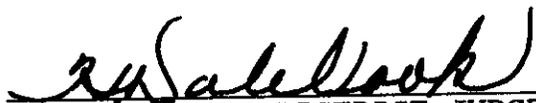
1. Judgment is hereby entered in favor of the plaintiffs, Sometimes You Win Music, et al., and against the defendant, Jesse Tharp; and

2. The defendant, and all persons, companies, corporations acting under his direction, control, permission or license, are hereby permanently enjoined from publicly performing any and all of the plaintiffs' copyrighted musical compositions and all such copyrighted music in the repertory of the American Society of Composers, Authors and Publishers (ASCAP) and from causing or permitting any such composition to be publicly performed without prior authorization from plaintiffs and ASCAP by means of any jukebox owned or leased by defendant to any other person and in any restaurant, bar or other establishment of any kind or by any other means, mechanical or otherwise, and from aiding or abetting the public performance of any such composition from any location and by any method; and

3. The defendant shall pay to plaintiffs statutory damages of \$ 2,000.<sup>00</sup> for each of the six (6) causes of action herein, for a total principal money judgment of \$ 12,000.<sup>00</sup>; and

4. Pursuant to 17 U.S.C. §505, the Court further finds that the plaintiffs are entitled to recover their costs from the defendant, including a reasonable attorney's fee, in addition to those amounts set forth above. Plaintiffs' counsel are directed to submit a Bill of Costs and an Application to Determine Amount of Attorney's Fee within fourteen (14) days from the date of this Judgment in compliance with Local Court Rules 54.1 and 54.2.

IT IS SO ORDERED this 12<sup>th</sup> day of December, 1995.

  
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

DATE 12-14-95

JOHN LAWMASTER, )  
)  
Plaintiff, )  
)  
v. )  
)  
P. BLAIR WARD AND UNKNOWN )  
AGENTS OF THE UNITED STATES )  
TREASURY DEPARTMENT BUREAU )  
OF ALCOHOL, TOBACCO AND )  
FIREARMS and the UNITED STATES, )  
)  
Defendants. )

Case No. 93-C-1115-H ✓

**FILED**

DEC 13 1995

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

O R D E R

This matter comes before the Court on a Motion to Dismiss Complaint or Alternatively for Summary Judgment by Defendant P. Blair Ward and Defendant Unknown Agents (Docket #30) and a Motion to Dismiss by Defendant United States of America (Docket #37).

I.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Widon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

[t]he 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 322.

H/2

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [citation omitted]. If the evidence is merely colorable, [citation omitted], or is not significantly probative, summary judgment may be granted.").

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury

or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250.

If, as in this case, a court looks outside the pleadings, the motion to dismiss should be converted to a motion for summary judgment, in which case a court views the evidence submitted in the light most favorable to the nonmoving party. Celotex, 477 U.S. at 324; Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991). Nonetheless, the moving party "has no burden to disprove unsupported claims of his opponent." Pueblo Neighborhood Health Ctrs. v. Losavio, 847 F.2d 642, 649 (10th Cir. 1988) (citing Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 247-50). The Tenth Circuit has noted that "[a]pplication of this rule is even more important 'when, as in the area of concern in this case, the reasons for swiftly terminating insubstantial lawsuits are particularly strong.'" Pueblo Neighborhood, 847 F.2d at 649 (quoting Martin v. District of Columbia Police Dep't, 812 F.2d 1425, 1434 (D.C. Cir. 1987)).

In the instant case, Defendant P. Blair Ward and Defendant Unknown Agents move for summary judgment on the basis of qualified immunity. The Supreme Court and the Tenth Circuit have recognized the competing interests implicated by a qualified immunity defense, stating in applicable part as follows:

In an attempt to balance the need to preserve an avenue for vindication of constitutional rights with the desire to shield public officials from undue interference in the performance of their duties as a result of baseless claims, the Court [has] adopted an objective test to determine whether the doctrine of qualified immunity applies.

Pueblo Neighborhood, 847 F.2d at 645 (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)). Thus, government officials performing discretionary functions will not be held liable for their conduct unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818.

Qualified immunity shields government officials from liability for mistakes insofar as the mistakes are reasonable. Hunter v. Bryant, 112 S.Ct. 534, 536 (1987). Thus, execution of an unconstitutional search on the mistaken belief that the search is valid is not "objectively legally unreasonable." Anderson v. Creighton, 483 U.S. 635, 641 (1987). The Supreme Court has recognized that

it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials -- like other officials who act in ways they reasonably believe to be lawful -- should not be held personally liable.

Id. (citing Malley v. Briggs, 475 U.S. 335, 334-35 (1986)).

Once a defendant raises the affirmative defense of qualified immunity, the plaintiff must "come forward with facts or allegations sufficient to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred." Pueblo Neighborhood, 847 F.2d at 646. If the court concludes that the law was not clearly established at the time of the defendant's action, the defendant is entitled to qualified immunity. Harlow, 457 U.S. at 818.

If the plaintiff sufficiently identifies both a clearly established right and the defendant's conduct that violated that right, then the defendant assumes the normal burden of a movant for summary judgment of establishing that no material facts remain in dispute that would defeat her or his claim of qualified immunity. Pueblo Neighborhood, 847 F.2d at 646. Thus, unless the plaintiff is able to make the required showing that the defendant's conduct violated a clearly established right, the government official is properly spared the burden and expense of defending the litigation.

Moreover, the "plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant has violated it." Pueblo Neighborhood, 847 F.2d at 645 (citing Creighton, 483 U.S. at 640 n.2). The Supreme Court has cautioned that allowing a plaintiff to overcome a qualified immunity defense by asserting a violation of a broad constitutional right would render the qualified immunity defense unavailable as a practical matter. Therefore, "the contours of the right [that has allegedly been violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Creighton, 483 U.S. at 640.

In the instant case, Plaintiff alleges that Defendants violated his constitutional rights under the Fourth and Fifth Amendments while executing a search of his home pursuant to a valid search warrant. Accepting as true the allegations set forth in Plaintiff's Amended Complaint, the Court concludes that Plaintiff simply has failed to "set forth sufficient facts to show that the

actions of Defendants violated clearly established law." See Lawmaster v. Ward, No. 93-C-1115, slip op. at 2 (N.D. Okl. Dec. 13, 1994). Furthermore, the authorities cited by Plaintiff in support of his claim, Tarpley v. Greene, 684 F.2d 1 (D.C. Cir. 1982) and Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980), do nothing to improve the sufficiency of his pleadings.

Finally, Plaintiff's "Statement of Controverted Facts" does not controvert material facts and therefore cannot affect the Court's ruling on this motion. Indeed, Plaintiff's "Statement of Controverted Facts" by and large consists of a series of bare assertions based on no actual knowledge of Plaintiff and, in many cases, constitutes mere assumptions and opinions. For this reason, the Court concludes that Plaintiff's claim that material facts are in controversy is without merit.

For the reasons set forth herein, the Motion for Summary Judgment by Defendants P. Blair Ward and Unknown Agents is hereby granted.

## II.

Because the Court has looked outside the pleadings, the motion to dismiss by Defendant United States is hereby converted to a motion for summary judgment, in which case the Court views the evidence submitted in the light most favorable to the nonmoving party. See Celotex, 477 U.S. at 324; Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991). Nonetheless, the moving party "has no burden to disprove unsupported claims of his opponent." Pueblo Neighborhood Health Ctrs. v. Losavio, 847 F.2d

642, 649 (10th Cir. 1988) (citing Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 247-50).

Plaintiff's Amended Complaint sets forth tort claims against Defendant United States for trespass, conversion, and intentional infliction of emotional distress. The Court has reviewed the Amended Complaint and holds that, as a matter of law, the Amended Complaint does not support any tort action against the United States.

Plaintiff alleges that agents of Defendant committed a trespass upon his property. Under Oklahoma law, a trespass is an entry upon the property of another without the owner's permission. See Fairlawn Cemetary Ass'n v. First Presbyterian Church, 496 P.2d 1185, 1187 (Okla. 1972) (emphasis added). Because its agents entered Plaintiff's property pursuant to a valid search warrant, Defendant United States cannot be held liable for trespass under the facts of this case.

Plaintiff's conversion claim is based upon his contention that the actions of Defendant's agents constituted a "substantial interference" with his personal property rights. See Amended Complaint ¶ 28. Oklahoma law defines conversion as "an act of dominion and control wrongfully exerted over another's personal property in denial of or inconsistent with his rights." Barrett v. Tallon, 30 F.3d 1296, 1300 (10th Cir. 1994) (applying Oklahoma law). Plaintiff's conclusory allegation of "substantial interference" fails to rise to the level of asserting "dominion and control" required in pleading conversion. In addition, the Court

notes that acts which would otherwise constitute a conversion are not considered a conversion when done by authority of law or by order of the court. See Restatement of Torts (Second), §§ 265, 266 (1977). Therefore, the Court holds that the actions of Defendant United States did not constitute a conversion under applicable law.

Finally, Plaintiff asserts a claim of intentional infliction of emotional distress against Defendant United States. To prevail upon such a claim, Plaintiff must be able to establish that the agents' actions were so extreme and outrageous as to go beyond all possible bounds of decency. See Haynes v. South Community Hospital Management, Inc., 793 P.2d 303 (Okla. 1990). The Court accepts the recommendation of the Magistrate Judge which concluded that any damage allegedly caused by Defendant's agents was not unreasonable. The Court concludes that the execution of a lawful search warrant by Defendant with respect to Plaintiff's residence, under the facts of this case, is not so outrageous as to go beyond "the bounds of decency." Therefore, the Court holds that the action of Defendant United States cannot form the basis of a claim for intentional infliction of emotional distress.

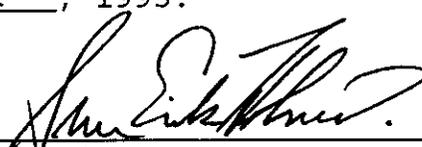
For the reasons set forth above, the Motion to Dismiss as converted into a Motion for Summary Judgment by Defendant United States is hereby granted.

In conclusion, the Motion for Summary Judgment by Defendant P. Blair Ward and Defendant Unknown Agents (Docket #30) is hereby granted, and the Motion to Dismiss by Defendant United States as

converted into a Motion for Summary Judgment (Docket #37) is hereby granted.

IT IS SO ORDERED.

This 12<sup>th</sup> day of DECEMBER, 1995.

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

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

ENTERED ON DOCKET  
DATE 12-14-95

SAM KIERSEY and KAY ORNDORFF, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 DREW DIAMOND, BOBBY BUSBY, )  
 CAROLYN KUSLER, CHARLES )  
 JACKSON, and CITY OF TULSA, )  
 a municipal corporation, )  
 )  
 Defendants. )

Case No. 92-C-345-H ✓

**FILED**

DEC 13 1995

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

O R D E R

This matter comes before the Court on Defendants' Motion for Summary Judgment (Docket #109). A hearing on this matter was held before the Court on November 22, 1995.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

[t]he 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 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue

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of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment") (emphasis in original). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.") (citations omitted).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250.

If, as in the instant case, a court looks outside the

pleadings, the motion to dismiss should be converted to a motion for summary judgment, in which case a court views the evidence submitted in the light most favorable to the nonmoving party. Celotex, 477 U.S. at 324; Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

I.

Defendants Drew Diamond, Bobby Busby, Carolyn Kusler, and Charles Jackson move for summary judgment on the basis of qualified immunity. The Tenth Circuit has noted that, in the qualified immunity context, "the reasons for swiftly terminating insubstantial lawsuits are particularly strong." Pueblo Neighborhood Health Ctrs. v. Losavio, 847 F.2d 642, 649 (10th Cir. 1988) (quoting Martin v. District of Columbia Police Dep't, 812 F.2d 1425, 1434 (D.C. Cir. 1987)). Therefore, the moving party "has no burden to disprove unsupported claims of his opponent." Id. (citing Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 247-50). "[P]laintiffs cannot rely on conclusory allegations; they must produce some specific factual support for their claim of unconstitutional motive." Id.

The Supreme Court and the Tenth Circuit have recognized the competing interests implicated by a qualified immunity defense, stating in applicable part as follows:

In an attempt to balance the need to preserve an avenue for vindication of constitutional rights with the desire to shield public officials from undue interference in the performance of their duties as a result of baseless claims, the Court [has] adopted an objective test to determine whether the doctrine of qualified immunity applies.

Pueblo Neighborhood, 847 F.2d at 645 (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)). Thus, government officials performing discretionary functions will not be held liable for their conduct unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. Qualified immunity therefore shields government officials from liability for mistakes insofar as the mistakes are reasonable. Hunter v. Bryant, 112 S.Ct. 534, 536 (1987).

Once a defendant raises the affirmative defense of qualified immunity, the plaintiff must "come forward with facts or allegations sufficient to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred." Pueblo Neighborhood, 847 F.2d at 646. If the court concludes that the law was not clearly established at the time of the defendant's action, the defendant is entitled to qualified immunity. Harlow, 457 U.S. at 818.

If the plaintiff sufficiently identifies both a clearly established right and the defendant's conduct that violated that right, then the defendant assumes the normal burden of a movant for summary judgment of establishing that no material facts remain in dispute that would defeat her or his claim of qualified immunity. Pueblo Neighborhood, 847 F.2d at 646. Thus, unless the plaintiff is able to make the required showing that the defendant's conduct violated a clearly established right, the government official is properly spared the burden and expense of defending the litigation.

The "plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant has violated it." Pueblo Neighborhood, 847 F.2d at 645 (citing Creighton, 483 U.S. at 640 n.2). The Supreme Court has cautioned that allowing a plaintiff to overcome a qualified immunity defense by asserting a violation of a broad constitutional right would render the qualified immunity defense unavailable as a practical matter. Therefore, "the contours of the right [that has allegedly been violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Creighton, 483 U.S. at 640.

In Pueblo Neighborhood, the Tenth Circuit held that where, as in the instant case, an official's state of mind is an essential element of the plaintiff's claims, the plaintiff cannot succeed unless he produces "specific factual support for [his] claim of unconstitutional motive." 847 F.2d at 649. Recognizing the Supreme Court's "strong condemnation of insubstantial suits against government officials," the Tenth Circuit resolved to hold plaintiffs to a higher standard when public officials move for summary judgment on the basis of qualified immunity. Id. The court held that

[w]here the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated. . . . [Moreover], plaintiffs should not be allowed to overcome a properly submitted motion for summary judgment based on qualified immunity grounds without more than conclusory and nonspecific allegations.

Id. at 649-650 (emphasis added).

In the present case, Plaintiffs contend that Defendants took adverse employment actions against them in retaliation for Plaintiffs' roles in investigating alleged improper activities within the Tulsa Police Department. Thus, Defendants' subjective intent is an essential element of Plaintiffs' claim.

Based upon a review of the record and arguments of counsel, the Court finds that Plaintiffs' allegations of retaliatory adverse employment actions are conclusory and nonspecific, and thus insufficient to preclude Defendants' properly submitted summary judgment motion. The individual defendants are therefore entitled to qualified immunity and their motion for summary judgment is hereby granted.

## II.

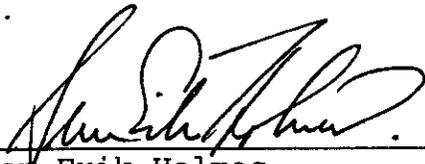
Defendant City of Tulsa also moves for summary judgment. However, the authorities cited in the defendants' joint brief do not obtain as to the city. As municipalities are ineligible for qualified immunity, see Owen v. City of Independence, 445 U.S. 622 (1980), Defendant City of Tulsa must articulate a sufficient alternative legal basis for granting summary judgment in its favor. Because Defendant has failed to do so, the Court denies its present motion for summary judgment. The Court, however, grants Defendant City of Tulsa leave to file a new motion for summary judgment, if such motion is filed by January 16, 1996.

In conclusion, the Motion for Summary Judgment by Defendant City of Tulsa is hereby denied (Docket #109). The Motion for

Summary Judgment by Defendants Diamond, Busby, Kusler, and Jackson  
is hereby granted (Docket #109).

IT IS SO ORDERED.

This 12<sup>TH</sup> day of December, 1995.

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEC 13 1995

*sa*

WILMA J. SMITH,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,<sup>1/</sup>

Defendant.

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

No. 94-C-<sup>912</sup>~~826~~-J ✓

ENTERED ON DOCKET  
DATE 12-14-95

ORDER<sup>2/</sup>

Now before the Court is Plaintiff's appeal of the Secretary's decision denying her Disability Insurance and Supplemental Security Income benefits. The Administrative Law Judge ("ALJ") found that Plaintiff was not disabled because (1) she retained the Residual Functional Capacity ("RFC") to perform at least sedentary work, and (2) significant jobs existed in the national economy that Plaintiff could perform.

Plaintiff argues that the ALJ's conclusions are not supported by substantial evidence. The Court finds that there is substantial evidence to support the ALJ's conclusion that Plaintiff could perform at least sedentary work. The Court finds, however, that the Secretary did not adequately carry her burden of proof to show that

<sup>1/</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296, the Social Security Independence and Program Improvements Act of 1994. 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.

<sup>2/</sup> This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge, filed April 6, 1995.

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significant jobs exist in the national economy that Plaintiff can perform. Consequently, the Secretary's denial of benefits is **REVERSED** and this case is remanded for further action consistent with the following opinion.

### **I. PLAINTIFF'S BACKGROUND**

At the time of the hearing below, Plaintiff was a 44 year old female with a high school diploma. From 1972 to 1985 (i.e., 13 years), Plaintiff worked as a nurse's aide at Saint John Medical Center. *R. at 63.* On February 12, 1985, Plaintiff was injured on the job while trying to help a patient from a chair into bed. As Plaintiff began to lift the patient, she felt something pull in her neck. Pain radiated from her neck down into her low back. Plaintiff worked for another week and during that time, the pain began to work itself into her left arm. *R. at 256-57.* Plaintiff quit work on February 18, 1985 and has not worked since.

From February to October 1985, Plaintiff saw a chiropractor for the pain in her neck, low back and left arm. When she did not get relief from her chiropractor, she went to see Gary Davis, M.D. Dr. Davis found that Plaintiff was suffering from cervical strain and a bulging disk at C4-5 that was causing distortion of Plaintiff's spinal cord. *R. at 255-57.* On November 19, 1985, Kenyon Kugler, M.D. and John Josephson, M.D., performed surgery on Plaintiff to (1) remove the bulging disk at C4-5, and (2) fuse the C4 and C5 vertebra. *R. at 255.*

In April of 1990, Plaintiff also injured her left knee. Nothing in the record indicates how this injury occurred. Plaintiff went to Hillcrest Medical Center's emergency room and the records from that visit indicate that Plaintiff dislocated her

knee. *R. at 270-71.* At some point during her youth, Plaintiff also fractured her right ankle, and the joint in her right ankle has been partially fused.

After her 1985 surgery, Plaintiff had some complaints of pain in her neck, low back and left arm. However, Plaintiff's pain seemed to intensify in early 1992. On May 20, 1992, Plaintiff was admitted to Hillcrest Medical Center. At that time, a microdiskectomy was performed by Dr. Frank Letcher, M.D., on the disk at the C3-4 level and the C3 and C4 vertebra were fused. *R. at 280-304.*

## II. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . .

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Secretary has established a five-step sequential evaluation process.<sup>3/</sup>

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<sup>3/</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from

The standard of review to be applied by this Court to the Secretary's disability determination is set forth in 42 U.S.C. § 405(g), which provides that "the finding of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ALJ's ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Secretary's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Secretary. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Secretary's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

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performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

The Court will typically defer to the ALJ's determinations of witness credibility. Hamilton v. Secretary of H.H.S., 961 F.2d 1495, 1498 (10th Cir. 1992). While evaluating medical evidence, however, more weight will be given to evidence from a treating physician than will be given to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the Plaintiff. Williams, 844 F.2d at 757-58; Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). A treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If the ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984).

In addition to determining whether the Secretary's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Secretary applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Secretary's decision will be reversed when he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

### **III. THE ALJ'S DETERMINATION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

Plaintiff alleges that she is unable to work due to disabling pain in her neck, low back, left arm, left knee, and right ankle. As mentioned above, the ALJ found that Plaintiff is not disabled because (1) she has the RFC to perform at least sedentary work, and (2) significant jobs exist in the national economy that Plaintiff can perform.

The first of these findings is supported by the record. The second is not.

Initially, it must be recognized that Plaintiff is seeking both disability insurance benefits under Title II of the Social Security Act and Supplemental Security Income under Title XVI of the Act. Under Title II, Plaintiff's date of last insurance was December 31, 1990. In order to receive disability insurance benefits, Plaintiff must establish that she was actually disabled prior to December 31, 1990. Potter v. HHS, 905 F.2d 1346, 1348-49 (10th Cir. 1990). Thus, only pre 1991 records will be considered to evaluate Plaintiff's disability insurance claim under Title II. Id.

A person may obtain SSI benefits (1) if her financial resources are below a certain level, and (2) if she is aged, blind or disabled. 42 U.S.C. § 1382. The Secretary uses essentially the same five-step procedure to determine whether an adult is disabled for SSI purposes as is used for disability insurance purposes. See 42 U.S.C. § 1382c(a)(3); and 20 C.F.R. § 416.920. There is, however, no set time period within which the claimant must become disabled. Thus, all of Plaintiff's medical records will be considered to evaluate Plaintiff's SSI claim under Title XVI.

#### A. Disability Insurance Claims Under Title II

The issue here is whether there is substantial evidence in the record to support the ALJ's determination that as of December 31, 1990, Plaintiff was capable of engaging in at least sedentary work. The Court believes that there is.

The hospital notes regarding Plaintiff's first surgery indicate that Plaintiff's postoperative recovery was normal and without complication. Right after the February 1985 surgery, Plaintiff could move her left arm without any difficulty and

with no pain. *R. at 255.* Plaintiff saw Dr. Kugler on August 1, 1986 -- about nine months after the first surgery. At that time, Plaintiff was reporting that she was having the same amount of pain as before the surgery, but not in her left arm. Plaintiff also reported that she was not having a serious problem with weakness in her left hand. *R. at 265-268 (Dr. Kugler's Progress Notes).* Dr. Kugler noted that Plaintiff's pain and numbness had an underlying psychological element and referred Plaintiff to Dr. Fermo. It appears, however, that Plaintiff never went to see Dr. Fermo, as there are no records from Dr. Fermo.

Plaintiff filled out a Disability Report on May 4, 1990. At that time, she indicated that she cooked all meals, washed dishes, did laundry, and cleaned the house (i.e., dusting and sweeping). Plaintiff also shopped for groceries twice a month at this time. Plaintiff indicated that she was capable of lifting not more than 25 pounds. *R. at 170-77.*

Gary Davis, M.D., Plaintiff's treating physician, completed an examination of Plaintiff on July 7, 1990. Dr. Davis found that (1) the range of motion in Plaintiff's head and neck was good; (2) Plaintiff's left knee was tender, but not swollen or hot; (3) Plaintiff's motor, sensory and coordinating functions were normal; (5) Plaintiff's gross and fine manipulation skills were good; and (6) Plaintiff's grip strength was good, but her left grip was somewhat diminished compared to her right grip. *R. at 272-78.* Dr. Davis concluded that Plaintiff "will not be able to perform any manual labor of any type and should be considered for disability only if unable to be retrained in some other type of work that does not require extraordinary physical activity." *R.*

at 273.

On September 11, 1990, Villis Anthony, M.D., performed an RFC assessment of Plaintiff. Dr. Anthony determined that Plaintiff could (1) occasionally lift 50 pounds, (2) frequently lift 25 pounds, and (3) stand, sit or walk for about six hours in an eight hour workday. Dr. Anthony also determined that Plaintiff had no limitation of her ability to push and/or pull with her hands or feet. Dr. Anthony noted that (1) Plaintiff's dexterity and grip were good, although her left side was not as good as her right; (2) Plaintiff's motor and sensory functions were intact; (3) the range of motion in Plaintiff's neck was good. Dr. Anthony concluded that Plaintiff would occasionally have some problem climbing, stooping or crouching. *R. at 91-99.* Dr. Anthony also found that Plaintiff's pain did not further limit her RFC. Dr. Anthony's findings are consistent with a conclusion that Plaintiff could perform the full range of medium work, with some restriction of her ability to climb, stoop or crouch. See 20 C.F.R. § 404.1567(c).

Dr. Davis saw Plaintiff on December 3 and December 6, 1990. At that time, Plaintiff was complaining of chest pain, shoulder pain and arm pain. However, on the progress note sheets completed by Dr. Davis, Dr. Davis checked as negative (1) decreased range of motion, (2) general pain, (3) joint pain, (4) swelling, (5) low back pain, (6) radiation of pain down leg, (7) weakness, (8) numbness, and (8) depression. *R. at 215-16.* In other words, Dr. Davis found nothing abnormal in these areas.

At the hearing, Plaintiff testified that due to her pain, she could only lift a gallon of milk, stand for 30 minutes, sit for 15-30 minutes, and walk about 20-30 yards before having to stop for a rest. *R. at 65-71*. It is not clear from Plaintiff's testimony, however, how long these alleged limitations have existed. In particular, it is not clear whether they existed prior to January 1, 1991.

Plaintiff alleges that the ALJ failed to adequately evaluate Plaintiff's complaints of pain in accordance with Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). The familiar nexus test in Luna was developed as a guide to explain when an ALJ must consider subjective complaints of pain. If the nexus between pain-producing impairment and alleged pain can be established, Luna requires that an ALJ consider the claimant's subjective complaints of pain.

When the ALJ reaches the last step of Luna and considers subjective complaints of pain, he is still entitled to judge the credibility of the claimant in light of all other evidence. Luna, 834 F.2d at 161-63. The ALJ's credibility determinations are entitled to great deference by this Court. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). Even if the ALJ finds the claimant to be credible, the mere existence of pain is insufficient to support a finding of disability. Claimant's pain must be "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988). "Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment." *Id.*

The ALJ did reach the last stage of Luna because he actually considered Plaintiff's subjective complaints of pain. The ALJ concluded, however, that Plaintiff's allegations of disabling pain were not credible in light of the medical evidence. This he is entitled to do so long as his conclusion is supported by substantial evidence. The evidence discussed above is sufficient to support the ALJ's rejection of Plaintiff's subjective complaints of completely disabling pain. The evidence is also sufficient to support the ALJ's conclusion that as of December 31, 1990, Plaintiff was capable of performing either light or sedentary work. See 20 C.F.R. § 404.1567 (defining light and sedentary work).

#### B. SSI Claims Under Title XVI

Plaintiff's post-1990 medical evidence also supports the ALJ's conclusion that even after her insured status ran out and even after her second surgery, Plaintiff could still perform at least sedentary work. One month after filing her SSI application and two months after her second surgery, Plaintiff saw Dr. Letcher. At that time, Dr. Letcher told Plaintiff to "resume a fully normal level of activity . . . without any restrictions whatsoever." *R. at 306.* Dr. Davis' progress notes indicate, however, that from January 1992 to January 1993 Plaintiff (1) complained of neck and back pain, and (2) had a decreased range of motion in her neck.

Thurma Fiegel, M.D., performed an RFC assessment on Plaintiff on August 4, 1992. Dr. Fiegel determined that Plaintiff could (1) occasionally lift 20 pounds, (2) frequently lift 15 pounds, and (3) sit for about six hours in an eight hour workday. Dr. Fiegel also determined that Plaintiff had no limitation of her ability to push and/or

pull with her hands or feet. Dr. Fiegel noted no limitation of Plaintiff's dexterity or grip strength. Finally, Dr. Fiegel found that Plaintiff's pain did not further limit her RFC. In essence, Dr. Fiegel findings are consistent with a conclusion that Plaintiff could perform the full range of light work. See 20 C.F.R. § 404.1567.

The Court finds that the above evidence is sufficient to support the ALJ's conclusion that even after December 1990, Plaintiff could perform sedentary work. Even after 1990, however, the entire record still supports the fact that Plaintiff has a limitation on her ability to climb, stoop or crouch, and a limitation of her left grip strength.

**C. THE ALJ DID NOT PRESENT PROPER HYPOTHETICAL QUESTIONS TO THE VOCATIONAL EXPERT.**

The medical evidence establishes that Plaintiff can perform the full range of sedentary work, with the following two limitations: (1) Plaintiff has problems climbing, stooping or crouching, and (2) the grip strength in Plaintiff's left hand is diminished, despite the fact that her manual dexterity in the left hand is good.<sup>4/</sup>

The Vocational Expert ("VE") did identify a number of semi-skilled or unskilled sedentary jobs Plaintiff could perform. *R. at 81*. The ALJ, however, never presented to the VE the limitation on Plaintiff's ability to climb, stoop or crouch. Thus, the Court has no way of knowing how that limitation would affect the VE's opinion.

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<sup>4/</sup> Because Plaintiff's limitations are virtually the same pre-1991 and post-1990, it was proper for the ALJ to present one set of hypotheticals to the VE.

The ALJ did present to the VE a 50% limitation on Plaintiff's ability to grip with her left hand. With this limitation, the VE concluded that Plaintiff would not be able to do any sedentary work because "[s]he has no transferable skills to sedentary work and most of the jobs would be barely semi-skilled or unskilled and they'd require the good use of both hands; both grip strength and manual dexterity to perform." *R. at 83*. This statement alone would seem to require an award of benefits in this case. However, due to the way in which the ALJ presented various hypotheticals to the VE, the Court cannot determine what weight to give this statement. The VE made this conclusion after being presented with a limitation on Plaintiff's ability to sit and stand for only 45 minutes to an hour. This sit/stand limitation does not appear to be one supported by the record and, therefore, not one required to be submitted to the VE. Thus, the Court cannot determine if the VE's opinion regarding the limitation on Plaintiff's ability to grip would be the same absent the sit/stand limitation.

Reliance on a vocational expert can constitute substantial evidence that an individual is capable of performing work in the national economy. See, e.g., Kelley v. Chater, 62 F.3d 337-38 (10th Cir. 1995). However, the opinion of a VE can be substantial evidence only when the ALJ properly submits to the VE all of those impairments supported by the record. In this case, the hypothetical questions posed by the ALJ did not adequately present Plaintiff's limitations to the VE.

The Secretary's decision is **REVERSED** and this case is **REMANDED** so that the ALJ may properly present to the VE Plaintiff's impairments as described above. Only then can the Court determine whether the Secretary has met her burden at Step Five

of the sequential evaluation process.

IT IS SO ORDERED.

Dated this 13 day of December 1995.

A handwritten signature in cursive script, appearing to read "Sam A. Joyner", written over a horizontal line.

Sam A. Joyner  
United States Magistrate Judge

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

DEC 13 1995 *ja*

WILMA J. SMITH,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of  
Social Security,<sup>1/</sup>

Defendant.

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

No. 94-C-<sup>912</sup>~~826~~J ✓

ENTERED ON DOCKET  
DATE 12-14-95

JUDGMENT

This action has come before the Court for consideration and an Order reversing the Secretary's decision and remanding the case has been entered. Consequently, judgment for the Plaintiff and against the Defendant is hereby entered.

It is so ordered this 13 day of December 1995.

  
Sam A. Joyner  
United States Magistrate Judge

<sup>1/</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296, the Social Security Independence and Program Improvements Act of 1994. 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.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

DEC 13 1995

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

GARY W. THOMPSON,  
Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of  
Social Security,<sup>1</sup>

Defendant.

No. 94-C-1041-J ✓

ENTERED ON DOCKET

DATE 12-14-95

ORDER<sup>2</sup>

Plaintiff, Gary W. Thompson, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary denying Social Security benefits.<sup>3</sup> Plaintiff asserts error because (1) the ALJ's findings were not supported by substantial evidence, and (2) the ALJ denied benefits without fully developing a medical history

<sup>1</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") 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.

<sup>2</sup> This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

<sup>3</sup> Plaintiff filed an application for disability and supplemental security insurance benefits on February 2, 1993. *R. at 66*. The application was denied initially and upon reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held April 19, 1994. *R. at 40*. By order dated June 20, 1994, the ALJ determined that Plaintiff was not disabled. *R. at 13-28*. The Plaintiff appealed the ALJ's decision to the Appeals Council. On October 14, 1994, the Appeals Council denied Plaintiff's request for review. *R. at 3*.

for the twelve months preceding the decision. For the reasons discussed below, the Court reverses the Secretary's decision.

### I. PLAINTIFF'S BACKGROUND

Plaintiff was born October 19, 1959, and has either a ninth or tenth grade education. *R. at 45, 66, 104.* Plaintiff's past relevant work was as a chrome polisher. *R. at 45, 49-50.*

Plaintiff was treated by a chiropractor from June 15, 1984 until July 3, 1984 for chronic dorsal lumbar sprain with spondylosis. *R. at 258-261.* Plaintiff's final bill on July 3, 1984 states that "affected bones are now realigned and patient is pain free." *R. at 261.* Plaintiff additionally saw a chiropractor on November 3, 1987. *R. at 257.*

Plaintiff's medical records from February 26, 1991 indicate that Plaintiff slipped, fell, and fractured his left foot. *R. at 244.* X-rays indicated a "minimally displaced fracture." *R. at 248.* By April 22, 1991, Plaintiff was "doing well and has no complaints." *R. at 249.* Plaintiff's doctor released Plaintiff from treatment and noted that he could return to work. *R. at 249.*

On December 19, 1992, Plaintiff was injured in a motorcycle accident. *R. at 117.* Plaintiff's injuries included (1) an extensively comminuted left ankle fracture,<sup>41</sup> (2) a fracture of the left femur,<sup>51</sup> (3) a severely displaced left shoulder and fracture

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<sup>41</sup> *Taber's Cyclopedic Medical Dictionary* 424 (17th ed. 1993), defines "comminuted fracture" as "a fracture in which the bone is splintered or crushed."

<sup>51</sup> The femur is the thigh bone. *Taber's Cyclopedic Medical Dictionary* 718 (17th ed. 1993).

at the base of the glenoid<sup>61</sup> shoulder, and (4) fractures of the toes of the left foot. *R. at 117, 146.* Randall Hendricks, M.D., performed surgery on Plaintiff on December 19, 1992. Plaintiff's left femur. *R. at 136.* On December 20, 1992, Dr. Hendricks operated on Plaintiff's left ankle and foot. *R. at 131.* Dr. Hendricks noted that Plaintiff had several loose fragments of bone and it was difficult to piece the ankle together. *R. at 131.* Dr. Hendricks additionally observed that Plaintiff tolerated the procedure well. *R. at 131.* On December 20, 1995, John R. Rame, M.D., repaired Plaintiff's facial lacerations. *R. at 129.*

On December 22, 1992, Plaintiff reported the pain in his foot and ankle rated a "five." *R. at 185.* On December 26, 1992, Plaintiff was out of bed without his arm sling which was contrary to orders. *R. at 177.* On December 29, 1992, one of Plaintiff's toes was amputated. The doctor noted that he was concerned that another toe could require amputation. *R. at 121.* Plaintiff was discharged on December 31, 1992. *R. at 117, 167.*

On January 11, 1993, Plaintiff was seen for a follow-up to his various injuries. The doctor notes that although Plaintiff's fourth toe looks a bit dark, he believes it will live. *R. at 245.* The doctor removed the pins from Plaintiff's toes and the sutures from his foot. The doctor requested that Plaintiff's wife continue to clean the sutures, noting that "I do not think she has cleaned them at all." *R. at 245.*

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<sup>61</sup> Glenoid cavity is "the socket that receives the head of the humerus below the acromion at the junction of the superior and axillary borders." *Taber's Cyclopedic Medical Dictionary* 806 (17th ed. 1993).

On February 22, 1993, Plaintiff's doctor notes that Plaintiff "surprisingly has a better range of motion" in his left shoulder "than I would have ever anticipated." *R. at 245.* The doctor additionally notes that X-rays indicate Plaintiff's left ankle and femur are healing nicely. *R. at 245.* The doctor recommended that Plaintiff remain non-weightbearing, work on his range of motion, and obtain support hose for his leg. *R. at 245.*

On April 21, 1993, the doctor notes that Plaintiff's left shoulder is doing very well and his toes are healing reasonably well. *R. at 244.* The doctor notes that Plaintiff's biggest problem is his left ankle, and that Plaintiff will probably require an ankle arthrodesis<sup>71</sup> in the future. *R. at 244.* The doctor additionally notes that he requested that Plaintiff try to use only one crutch or a cane. *R. at 244.* The medical records indicate that Plaintiff complained that he was unable to lie on his left shoulder or pull his left arm behind him. *R. at 244.*

On July 12, 1993, Plaintiff's doctor noted that the femur had healed very nicely, but Plaintiff's ankle concerned him. *R. at 244.* The doctor noted that he believed Plaintiff would develop arthritis in the ankle. "I think that essentially it has healed, but it is just so comminuted that it is going to continue to deteriorate with time." *R. at 244.* The doctor notes that he has informed Plaintiff of this and would be happy to see Plaintiff back as necessary but "basically he has plateaued." *R. at 244.* Plaintiff's records do not indicate any additional visits to his doctor.

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<sup>71</sup> Arthrodesis is the surgical immobilization of a joint. *Taber's Cyclopedic Medical Dictionary* 155 (17th ed. 1993).

Plaintiff stated that he believed he was disabled because he suffered from continuous pain. Plaintiff noted that his ankle felt like it was being hit with a hammer. *R. at 46, 51.* According to Plaintiff, his doctors have talked about wanting to fuse his ankle, but Plaintiff continues to hope that it will get better. *R. at 46.* Plaintiff testified that he can no longer afford to go to a doctor. *R. at 47.* Plaintiff also stated that he has pain in his right heel, left femur, and left shoulder. *R. at 51.*

Plaintiff testified that he can only stand or sit for thirty minutes. *R. at 51.* Plaintiff stated he can walk for about twenty to thirty minutes, but requires a cane. *R. at 53.* Plaintiff believes he can lift only about five to fifteen pounds, and cannot carry any weight. *R. at 53-54.* Plaintiff usually tries to keep his leg elevated. *R. at 55-56.* According to Plaintiff, every few days, when his foot really starts throbbing, he has to put a heating pad on it. *R. at 56.*

On an average day, Plaintiff spends time sitting in front of the television. Plaintiff eats a few times during the day; his wife cooks dinner for him; and he goes to bed at about 10:00 p.m. *R. at 57.* Plaintiff stated that he does very little cooking. *R. at 58.* Plaintiff takes two to three naps each day. *R. at 58.* Plaintiff testified that although he can drive, he cannot go on long journeys, and the farthest he has driven is approximately eighteen to twenty miles. *R. at 48, 58.* According to Plaintiff, he goes fishing approximately one time per month. *R. at 48.*

Plaintiff testified that he would be unable to work while sitting and putting parts together because he has a large knot on his shoulder, his shoulder is bad, and he has limited shoulder movement. *R. at 59.* Plaintiff testified that two surgeons told him

his shoulder was torn up so badly that there was nothing that they could do. *R. at 60.* Plaintiff also testified that he could not work where he would have to alternate between sitting and standing because of his pain. *R. at 60.*

## II. STANDARD OF REVIEW

Disability under the Social Security Act is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). The Secretary has established a five-step process for the evaluation of social security claims.<sup>81</sup> See 20 C.F.R. § 404.1520.

The Secretary's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

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<sup>81</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Secretary is supported by substantial evidence, does not reweigh the evidence or examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will, however, meticulously examine the entire record. Williams, 844 F.2d at 750.

"The finding of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

### III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff could not perform his past work as a chrome polisher. *R. at 19*. The ALJ found that Plaintiff should not lift and carry more than twenty pounds, frequently lift or carry more than ten pounds, and should not stand or walk for prolonged periods of time. *R. at 18*. The ALJ noted that Plaintiff had no limitations on his ability to sit or to use both of his upper arms while in a seated position. *R. at 18*. Based on these limitations and the testimony of a

vocational expert, the ALJ concluded that a significant number of jobs in the national economy existed which Plaintiff could perform. *R. at 20*. The ALJ noted that Plaintiff's complaints of disabling pain were not credible. *R. at 21-26*.

#### IV. REVIEW

##### **Substantial Evidence**

The ALJ concluded that although Plaintiff could not perform his past relevant work, Plaintiff was not disabled. Plaintiff argues that the record does not contain substantial evidence to support the ALJ's conclusion.

Initially, the ALJ determined that Plaintiff's allegations of disabling pain were not credible. *R. at 21-26*. The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. *Id.* at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." *Id.* Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

[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.

*Id.* at 164.

The ALJ summarized Luna and its requirements, and examined Plaintiff's medical records in great detail, and Plaintiff's testimony. *R. at 40-45*. The ALJ noted that Plaintiff's records do not reveal complaints of pain after Plaintiff's release from the hospital on December 31, 1992, and that following surgery Plaintiff stated that the pain in his ankle was a "5." *R. at 21-22*. Plaintiff was uncooperative at the hospital and disobeyed instructions to wear a sling on his arm. *R. at 22*. Although Plaintiff alleged he would soon lose another toe and would be unable to ever lift his arm, the doctor's reports are contrary to his statements. *R. at 23*. Plaintiff testified that he went fishing at least once per month and was able to drive. *R. at 24*. The ALJ additionally noted that although observation of a claimant is not determinative, Plaintiff did not elevate his leg during the hearing, was articulate, used his hands frequently to gesture, showed no signs of difficulty or discomfort, and easily rose from a seated position. *R. at 25*.

The mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988). "Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment." Id. Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). The finding of the ALJ that Plaintiff's pain was not disabling is supported by substantial evidence and well-developed by the ALJ in his Opinion.

The ALJ also determined that Plaintiff was able to lift and carry more than twenty pounds occasionally and ten pounds frequently, was unable to stand or walk for prolonged periods of time, and had a mild limitation of range of motion of the left shoulder. *R. at 20, 27.* The ALJ found that Plaintiff could perform the full range of sedentary work. *R. at 27.*

Plaintiff was hospitalized on December 19, 1992 following his injury in a motorcycle accident. The record indicates that Plaintiff's ankle was severely fractured, his left femur was fractured, his shoulder was severely displaced and fractured, the toes on his left foot were fractured, and one toe was amputated. *R. at 117, 131.* Following surgery, Plaintiff's doctor noted that Plaintiff should remain non-weightbearing, and that Plaintiff may require arthrodesis of his left ankle. *R. at 244-45.*

Plaintiff's last visit to his doctor was on July 12, 1993. Plaintiff's doctor observed that Plaintiff's femur had healed nicely, but that he was concerned about Plaintiff's ankle. *R. at 244.* The doctor noted that Plaintiff's ankle would continue to deteriorate over time. *R. at 244.* His doctor concluded that Plaintiff's condition had hit a plateau, but that he would be happy to see Plaintiff in the future if necessary. *R. at 244.* Plaintiff's doctor reported that Plaintiff's range of motion in his left shoulder was better than the doctor had anticipated. *R. at 245.* On April 21, 1993, Plaintiff's doctor noted that Plaintiff's shoulder was doing very well. *R. at 245.*

While the ALJ may be correct in his determination of Plaintiff's Residual Functional Capacity ("RFC"), the medical records do not contain sufficient support for the ALJ's findings. Nothing in the medical records indicate an appropriate weight that Plaintiff can lift or carry, the amount of time that Plaintiff can sit or stand, the range of motion of Plaintiff's left shoulder, or Plaintiff's reaching, grasping, or pulling capability. The medical records contain no consultative examinations, RFC assessments, or indications of an RFC by Plaintiff's treating doctor. Absent some support in the medical records, the Court must hold that the ALJ's findings were not supported by substantial evidence. On remand, the Secretary should order a consultative exam to determine Plaintiff's exertional limitations, if any. See e.g. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993).

Depending on the outcome of the consultative exam, the ALJ may determine that vocational testimony is necessary. The ALJ, during the April 19, 1994 hearing, obtained testimony from a vocational expert. However, the hypothetical posed by the ALJ included no restrictions or limitations for Plaintiff's shoulder although the ALJ found that Plaintiff did had a minimal range-of-motion restriction to his left shoulder. On remand, the Secretary should make certain that, if testimony from a vocational expert is required, any hypothetical question presented to the vocational expert includes the limitations which the ALJ determines that Plaintiff has. See Hargis v. Sullivan, 945 F.2d 1482, 1491-92 (10th Cir. 1991) ("Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments

cannot constitute substantial evidence to support the Secretary's decision.") quoting Ekeland v. Bowen, 899 F.2d 719, 724 (8th Cir. 1990).

### Sufficiency of the Medical Record

Plaintiff argues that the ALJ erred because the ALJ denied benefits without fully developing the medical record for the twelve months preceding the decision. Plaintiff points to 42 U.S.C. § 423(d)(5)(B) and its requirement that a decision to deny Social Security benefits must be based on "a complete medical history of at least the preceding twelve months. . . ." Id. This language is ambiguous because it does not specify what date or event the twelve month period must precede. The time period referred to by § 423(d)(5)(B) could be either the twelve month period prior to the date an application for benefits is filed or the twelve month period prior to the date a decision to deny benefits is rendered. The difference in the time periods produced by either of these options is significant because there is often a long delay between an application for benefits and a decision to deny benefits.

The Secretary has adopted a regulation that resolves the ambiguity in § 423(d)(5)(B). The pertinent regulation provides as follows:

Before we make a determination that you are not disabled, we will develop your complete medical history for at least the 12 months preceding the month in which you file your application. . . .

20 C.F.R. § 404.1512(d) (emphasis added).

Congress has delegated to the Secretary broad power to adopt regulations "which are necessary or appropriate" to carry out the disability determination provisions of the Social Security Act. 42 U.S.C. §§ 405(a) & 1383(d)(1). Thus, this

Court must accord deference to the Secretary's interpretation of the Social Security Act. The Court's review of a regulation "is limited to determining whether the regulations are arbitrary and capricious or are inconsistent with the statute." Everhart v. Bowen, 853 F.2d 1532, 1535 (10th Cir. 1988), rev'd on other grounds, 494 U.S. 83 (1990); Sullivan v. Zebley, 493 U.S. 521, 528 (1990). Under the circumstances presented by this case, the Court finds no evidence that § 404.1512(d) or § 416.912(d) are arbitrary, capricious, or inconsistent with 42 U.S.C. § 423(d)(5)(B). Given the fact that a determination of disability is to be made as of the time an application for benefits is filed, measuring the twelve month period described in § 423(d)(5)(B) from the date of application is reasonable. The Court finds absolutely no requirement that the ALJ update the medical record to the time of hearing, as Plaintiff seems to argue. See Luna v. Shalala, 22 F.3d 687, 692-93 (7th Cir. 1994).

Plaintiff's application for benefits was filed on February 2, 1993. The medical records relied on by the ALJ span from June 1984 to July 12, 1993. Thus, the record for the twelve month period preceding the date Plaintiff filed his application was adequately developed.

Accordingly, the Secretary's decision is **REVERSED** and this case is **REMANDED** for proceedings consistent with this opinion.

Dated this 13 day of December 1995.

  
Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

DEC 13 1995

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

GARY W. THOMPSON,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of  
Social Security,<sup>1/</sup>

Defendant.

No. 94-C-1041-J ✓

ENTERED ON DOCKET

DATE 12-14-95

**JUDGMENT**

This action has come before the Court for consideration and an Order remanding the case to the Secretary has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 13 day of December 1995.



Sam A. Joyner  
United States Magistrate Judge

<sup>1/</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") 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.

11

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

DEC 13 1995

*sa*

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

CHRISTY I. JOHNSON,  
  
Plaintiff,  
  
v.  
  
SHIRLEY S. CHATER, Commissioner of  
Social Security,  
  
Defendant.

No. 95-C-158-J ✓

ENTERED ON DOCKET  
DATE 12-14-95

ORDER<sup>11</sup>

Plaintiff, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary denying Social Security benefits.<sup>21</sup> Plaintiff asserts that (1) the ALJ improperly evaluated Plaintiff's pain, (2) the ALJ's finding that Plaintiff could perform light work is not based on substantial evidence, (3) the ALJ's decision is not based on a "current" medical record, and (4) the ALJ failed to consult a vocational expert. For the reasons discussed below, the Court affirms the Secretary's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff has a tenth grade education and was born on April 15, 1973. *R. at 93, 163.* Plaintiff has worked at various jobs, and has been a grocery checker, a

<sup>11</sup> This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

<sup>21</sup> Plaintiff filed an application for disability and supplemental security insurance benefits on June 1, 1992. *R. at 36.* The application was denied initially and upon reconsideration. *R. at 44, 47.* A hearing before an Administrative Law Judge ("ALJ") was held September 13, 1993. *R. at 157.* By order dated August 9, 1994, the ALJ determined that Plaintiff was not disabled. *R. at 19-25.* The Plaintiff appealed the ALJ's decision to the Appeals Council. On December 15, 1994, the Appeals Council denied Plaintiff's request for review. *R. at 4.*

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secretary, and a counter-person at a laundry. *R. at 165-171*. Plaintiff claims disability beginning January 15, 1992 due to her back injury. *R. at 36*.

In 1986 Plaintiff had surgery for spondylolisthesis.<sup>31</sup> Plaintiff was treated at the Shriner's Hospital until she was 18. *R. at 172*. Plaintiff's more recent hospital admissions have been for pyelonephritis.<sup>41</sup> *R. at 120, 122, 123*. Plaintiff was also in a car accident in December 1990. *R. at 115*.

## II. STANDARD OF REVIEW

The Secretary has established a five-step process for the evaluation of social security claims.<sup>51</sup> See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

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<sup>31</sup> *Taber's Cyclopedic Medical Dictionary* 1954 (17th ed. 1993), defines spondylolisthesis as "[a]ny forward slipping of one vertebrae on the one below it."

<sup>41</sup> *Taber's Cyclopedic Medical Dictionary* 1954 (17th ed. 1993), defines pyelonephritis as "[i]nflammation of kidney substance and pelvis."

<sup>51</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987); *Williams v. Bowen*, 844 F.2d 748, 750-51 (10th Cir. 1988).

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Secretary's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Secretary is supported by substantial evidence, does not reweigh the evidence or examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will, however, meticulously examine the entire record. Williams, 844 F.2d at 750.

"The finding of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401.

Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

### **III. THE ALJ'S DECISION**

In this case, the ALJ determined that Plaintiff was not disabled at step five. The ALJ concluded that Plaintiff's complaints of disabling pain were inconsistent with the medical evidence and the record. *R. at 24*. The ALJ determined that although Plaintiff may experience some pain, Plaintiff retained the Residual Functional Capacity ("RFC") to perform a full range of light work. The ALJ observed that Plaintiff had no past relevant work, but that Plaintiff's ability to perform a full range of light work, her age, and her educational factors, dictated a finding of not disabled based on the Grids.<sup>61</sup> *R. at 24-25*.

### **IV. REVIEW**

#### **Pain Evaluation**

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision

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<sup>61</sup> The Medical-Vocational Guidelines, commonly referred to as the "Grids," are located at 20 C.F.R. Pt. 404, Supbt. P, App. 2.

maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

[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.

Id. at 164. In assessing a claimant's complaints of pain, the following factors may be considered.

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.

Id. at 165.

Initially, the ALJ summarized Luna and its requirements, Plaintiff's medical record, Plaintiff's testimony, and analyzed Plaintiff's complaints based on Luna. *R. at 22-24.* The ALJ noted that Plaintiff's record establishes a loose nexus for complaints of pain due to Plaintiff's back surgery for spondylolisthesis in 1986. *R. at 21.* However, the ALJ found, based on the testimony and the medical evidence, that Plaintiff did not have a degree of pain sufficient to preclude Plaintiff from engaging in all forms of light work. *R. at 21, 24.*

Plaintiff asserts that the ALJ erred by not finding that Plaintiff was disabled due to pain, and by discounting Plaintiff's complaints of pain. However, the mere existence of pain is insufficient to support a finding of disability. The pain must be

considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988). "Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment." Id. at 807. Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

A RFC Assessment, on October 30, 1992 indicated that Plaintiff could occasionally lift twenty pounds, frequently lift ten pounds, sit for six hours (eight hour day), stand for six hours (eight hour day), and push/pull an unlimited amount. *R. at 54.*

On her disability report, dated July 1, 1992, Plaintiff noted that her daily activities included cooking for approximately forty-five minutes and cleaning for approximately one hour. *R. at 92.* In addition, Plaintiff had picnics at the lake about two times each month, maintained social contacts at the rate of two per week, and drove once or twice per day (for approximately thirty minutes). *R. at 92.* Plaintiff testified that she does load the dishwasher and occasionally wipes off counters, but does not make her bed. *R. at 180.* Plaintiff additionally testified that she can sit comfortably for forty-five minutes, stand for approximately twenty to thirty minutes, drive (every day or every few days), and lays down each day (sometimes two or three times per day). *R. at 164, 177.*

Plaintiff was admitted to Broken Arrow Medical Center on February 12, 1991 for acute pyelonephritis, dehydration, and abdominal pain. Plaintiff was discharged

on February 18, 1991. *R. at 120-21.* On April 13, 1991 Plaintiff was admitted for pyelonephritis, and discharged on April 16, 1991. *R. at 123-24.*

Plaintiff testified that she was being treated by Dr. Postelwait. *R. at 172.* Dr. Postelwait treated Plaintiff for dehydration, pyelonephritis, nausea and vomiting, but not back pain. *R. at 122-127.* After being discharged from the Shriner's hospital, the records do not reveal that Plaintiff sought treatment for pain, although Plaintiff visited a chiropractor for treatment of neck and back pain, following a car accident, in early 1991. *R. at 111.* The last record of Plaintiff's visit to the chiropractor is March 12, 1991. *R. at 105.*

Plaintiff's August 23, 1993 medications list indicates that Plaintiff occasionally takes aspirin for aches and pains. *R. at 137.* Plaintiff testified that she was also prescribed Flexeril. *R. at 180.* Plaintiff's record indicates the prescription for Flexeril, in 1990 or 1991 (the date is unclear from the record) was "to be taken only when she is having severe muscle spasm." *R. at 146.* Plaintiff testified that she did not continue taking Flexeril because it made her go to sleep. *R. at 180-82.*

Plaintiff had back surgery when she was thirteen. *R. at 142.* Plaintiff had rods inserted in her back and remained in a body cast for six or seven months following surgery. *R. at 149.* Plaintiff continued to see her doctor following the surgery on a regular basis. *R. at 139-153.* By February 22, 1988, Plaintiff's doctors indicated that the fusion appeared solid. *R. at 147.* On March 18, 1991, Plaintiff's doctor indicated that Plaintiff was "doing well at this time" and that Plaintiff's "X-rays look solid." *R. at 146.*

The ALJ, in accordance with the factors suggested by the Court in Luna, evaluated Plaintiff's pain and found that Plaintiff does not suffer from disabling pain. The ALJ's determination is supported by substantial evidence.

#### **Light Work: Substantial Evidence**

Plaintiff asserts that the ALJ erred by finding that Plaintiff had the Residual Functional Capacity ("RFC")<sup>71</sup> to perform light work.<sup>81</sup> Plaintiff relies on Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993) as supporting Plaintiff's contention that the ALJ improperly relied on a "lack of evidence" in the record. The Court in Thompson did conclude that an "absence of evidence is not evidence." Id. at 1490. However, the Thompson court noted that "the ALJ, finding no evidence upon which to make a finding as to RFC, should have exercised his discretionary power to order a consultative examination of Ms. Thompson to determine her capabilities."<sup>91</sup> Id.

Unlike Thompson, sufficient evidence exists in this record for the ALJ to determine Plaintiff's capabilities. An RFC Assessment (October 30, 1992), which was "approved as written" by a second doctor on January 14, 1993, indicates Plaintiff

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<sup>71</sup> Residual Functional Capacity is "the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirement of jobs." 20 C.F.R. Pt. 404, Subpt. P, App. 2 § 200.00(c).

<sup>81</sup> The regulations define "light work" as "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. . . ." 20 C.F.R. § 404.1567(b).

<sup>91</sup> Plaintiff asserts that the ALJ erred by failing to order a consultative exam. However, the record does contain a RFC assessment which indicates Plaintiff has the ability to perform activities consistent with light work. *R. at 53-60.*

does have the RFC to perform light work. *R. at 53.* Nothing in Plaintiff's medical records indicate any restrictions which are inconsistent with the conclusion in the RFC that Plaintiff is capable of light work. Contrary to the assertions of Plaintiff, the ALJ's decision is supported by substantial evidence.

#### **Sufficiency of the Medical Record**

Plaintiff argues that the ALJ erred because the ALJ denied benefits without fully developing the medical record for the twelve months preceding the decision. Plaintiff points to 42 U.S.C. § 423(d)(5)(B) and its requirement that a decision to deny Social Security benefits must be based on "a complete medical history of at least the preceding twelve months. . . ." *Id.* This language is ambiguous because it does not specify what date or event the twelve month period must precede. The time period referred to by § 423(d)(5)(B) could be either the twelve month period prior to the date an application for benefits is filed or the twelve month period prior to the date a decision to deny benefits is rendered. The difference in the time periods produced by either of these options is significant because there is often a long delay between an application for benefits and a decision to deny benefits.

The Secretary has adopted a regulation that resolves the ambiguity in § 423(d)(5)(B). The pertinent regulation provides as follows:

Before we make a determination that you are not disabled, we will develop your complete medical history for at least the 12 months preceding the month in which you file your application. . . .

20 C.F.R. § 404.1512(d) (emphasis added).

Congress has delegated to the Secretary broad power to adopt regulations "which are necessary or appropriate" to carry out the disability determination provisions of the Social Security Act. 42 U.S.C. §§ 405(a) & 1383(d)(1). Thus, this Court must accord deference to the Secretary's interpretation of the Social Security Act. The Court's review of a regulation "is limited to determining whether the regulations are arbitrary and capricious or are inconsistent with the statute." Everhart v. Bowen, 853 F.2d 1532, 1535 (10th Cir. 1988), rev'd on other grounds, 494 U.S. 83 (1990); Sullivan v. Zebley, 493 U.S. 521, 528 (1990). Under the circumstances presented by this case, the Court finds no evidence that § 404.1512(d) or § 416.912(d) are arbitrary, capricious, or inconsistent with 42 U.S.C. § 423(d)(5)(B). Given the fact that a determination of disability is to be made as of the time an application for benefits is filed, measuring the twelve month period described in § 423(d)(5)(B) from the date of application is reasonable. The Court finds absolutely no requirement that the ALJ update the medical record to the time of hearing, as Plaintiff seems to argue. See Luna v. Shalala, 22 F.3d 687, 692-93 (7th Cir. 1994).

Regardless, the record indicates that the ALJ adequately developed the record. Plaintiff's application for benefits was filed on June 1, 1992. The medical records relied on by the ALJ span from May 1986 to October 1992. *R. at 60*. Thus, the record for the twelve month period preceding the date Plaintiff filed her application was adequately developed.

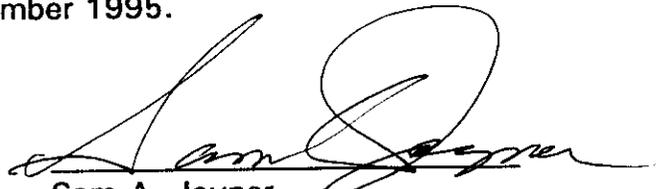
### Grids/Vocational Expert

Plaintiff additionally argues that because the Plaintiff had nonexertional impairments, the ALJ erred by applying the Grids rather than relying upon the testimony of a vocational expert to assess Plaintiff's ability to perform work in the national economy. However, "the mere presence of a nonexertional impairment does not automatically preclude reliance on the grids. The presence of nonexertional impairments precludes reliance on the grids only to the extent that such impairments limit the range of jobs available to the claimant." Gossett v. Bowen, 862 F.2d 802, 807-08 (10th Cir. 1988). See also Ray v. Bowen, 865 F.2d 222 (10th Cir. 1989) ("[T]he ALJ's finding that Miss Ray suffered from no nonexertional impairment severe enough to limit the range of jobs available to her, and his consequent reliance on the grids, was supported by substantial evidence.").

The ALJ found that although Plaintiff may have some pain, Plaintiff's pain did not interfere with Plaintiff's ability to perform a full range of light work. This finding is supported by substantial evidence. Consequently, the ALJ's reliance on the Grids was not error.

Accordingly, the Secretary's decision is **AFFIRMED**.

Dated this 13<sup>th</sup> day of December 1995.

  
Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

DEC 13 1995

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

CHRISTY I. JOHNSON,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of  
Social Security,

Defendant.

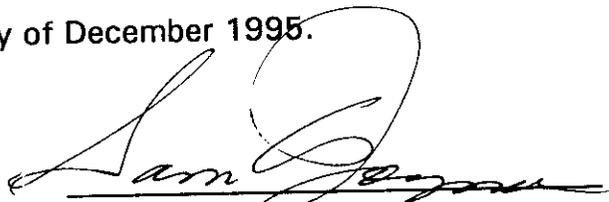
No. 95-C-158-J ✓

ENTERED ON DOCKET  
DATE 12-14-95

JUDGMENT

This action has come before the Court for consideration and an Order affirming the decision of the Secretary has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 13<sup>th</sup> day of December 1995.

  
Sam A. Joyner  
United States Magistrate Judge

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

**FILED**

DEC 13 1995

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

MARGARET RENTIE, an )  
individual, )

Plaintiff, )

vs. )

THE F & M BANK & TRUST COMPANY, )

Defendant. )

Case No. 95-C-536B

ENTERED ON DOCKET

DEC 14 1995

DATE \_\_\_\_\_

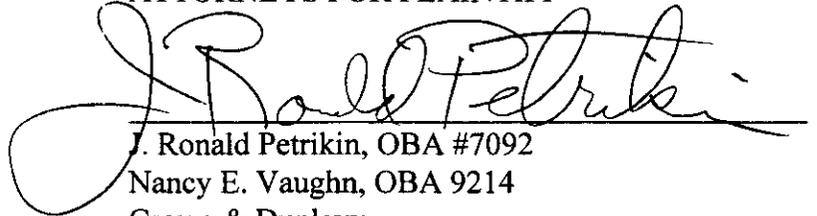
**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, Margaret Rentie, and the Defendant, The F&M Bank & Trust Company, jointly stipulate and agree that this action should be and is hereby dismissed with prejudice, each side to bear his or its own costs, attorneys' fees and expenses.



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ATTORNEYS FOR DEFENDANT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE DEC 14 1995

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
GARY WAYNE HUMPHREY aka Gary W. )  
Humphrey aka Gary Humphrey; MELANIE )  
KAY HUMPHREY aka Melanie K. Humphrey; )  
ROBERTA ANN THOMPSON fka Roberta )  
Ann McMurray fka Ann McMurray; STATE OF )  
OKLAHOMA, ex rel. OKLAHOMA TAX )  
COMMISSION; TULSA ADJUSTMENT )  
BUREAU, INC; COUNTY )  
TREASURER, Tulsa County, Oklahoma; )  
BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
Oklahoma, )  
)  
Defendants. )

**FILED**

DEC 13 1995

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

Civil Case No. 95-C 368K

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 11 day of Dec, 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, TULSA ADJUSTMENT BUREAU, INC., appears not having previously filed a Disclaimer; and the Defendants, GARY WAYNE HUMPHREY aka Gary W. Humphrey aka Gary Humphrey, MELANIE KAY HUMPHREY aka Melanie K. Humphrey and

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

ROBERTA ANN THOMPSON fka Roberta Ann McMurray fka Ann McMurray, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on April 28, 1995, by Certified Mail; that the Defendant, TULSA ADJUSTMENT BUREAU, INC., signed a Waiver of Summons on April 28, 1995

The Court further finds that the Defendants, GARY WAYNE HUMPHREY aka Gary W. Humphrey aka Gary Humphrey, MELANIE KAY HUMPHREY aka Melanie K. Humphrey and ROBERTA ANN THOMPSON fka Roberta Ann McMurray fka Ann McMurray, 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 September 1, 1995, and continuing through October 6, 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, GARY WAYNE HUMPHREY aka Gary W. Humphrey aka Gary Humphrey, MELANIE KAY HUMPHREY aka Melanie K. Humphrey and ROBERTA ANN THOMPSON fka Roberta Ann McMurray fka Ann McMurray, 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, GARY WAYNE HUMPHREY aka Gary W. Humphrey aka Gary Humphrey, MELANIE KAY

HUMPHREY aka Melanie K. Humphrey and ROBERTA ANN THOMPSON fka Roberta Ann McMurray fka Ann McMurray. 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 May 11, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on May 8, 1995; the Defendant, TULSA ADJUSTMENT BUREAU, INC., filed its Disclaimer on April 28, 1995; and that the Defendants, GARY WAYNE HUMPHREY aka Gary W. Humphrey aka Gary Humphrey, MELANIE KAY HUMPHREY aka Melanie K. Humphrey and ROBERTA ANN THOMPSON fka Roberta Ann McMurray fka Ann McMurray, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, GARY WAYNE HUMPHREY, is on and the same person as Gary W. Humphrey and Gary Humphrey, and will hereinafter be referred to as "GARY WAYNE HUMPHREY." The Defendant, MELANIE KAY

HUMPHREY, is one and the same person as Melanie K. Humphrey, and will hereinafter be referred to as "MELANIE KAY HUMPHREY." The Defendants, GARY WAYNE HUMPHREY and MELANIE KAY HUMPHREY, are husband and wife. The Defendant, ROBERTA ANN THOMPSON, is one and the same person formerly referred to as Roberta Ann McMurray and Ann McMurray, and will hereinafter be referred to as "ROBERTA ANN THOMPSON." The Defendant, ROBERTA ANN THOMPSON, is a single unmarried person.

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 Twelve (12), Block Fourteen (14), VAL-CHARLES ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.*

The Court further finds that on September 28, 1979, the Defendant, ANN McMURRAY and Dennis R. McMurray, now deceased, executed and delivered to MAGER MORTGAGE COMPANY their mortgage note in the amount of \$26,550.00, 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 Defendant, ANN McMURRAY and Dennis R. McMurray, now deceased, then Husband and Wife, executed and delivered to MAGER MORTGAGE COMPANY, a mortgage dated September 28, 1979, covering the above-described property. Said mortgage was recorded on October 2, 1979, in Book 4431, Page 725, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 28, 1979, MAGER MORTGAGE COMPANY, assigned the above-described mortgage note and mortgage to THE RICHARD GILL COMPANY. This Assignment of Mortgage was recorded on October 29, 1979, in Book 4436, Page 2651, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 23, 1983, THE RICHARD GILL COMPANY, transferred the above-described mortgage note and mortgage to STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION. This Assignment of Mortgage was recorded on February 1, 1984, in Book 4763, Page 1295, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 12, 1988, Standard Federal Savings Bank formerly known as Standard Federal Savings & Loan Association, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on January 6, 1989, in Book 5159, Page 2533, in the records of Tulsa County, Oklahoma. A Transfer of Lien, dated January 10, 1989, was recorded on February 3, 1989, in Book 5165, Page 227, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 22, 1986, ANN MCMURRAY now Thompson and Michael Elbert Thompson, then husband and wife, granted a general warranty deed to Gary Wayne Humphrey and Melanie Kay Humphrey, Husband and Wife. This deed was recorded with the Tulsa County Clerk on July 23, 1986, in Book 4957 at Page 1266 and the Defendants, GARY WAYNE HUMPHREY and MELANIE KAY HUMPHREY, assumed thereafter payment of the amount due pursuant to the note and mortgage described above, and are the current assumptors of the subject indebtedness.

The Court further finds that on November 14, 1988, the Defendants, GARY WAYNE HUMPHREY and MELANIE KAY HUMPHREY, 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 December 20, 1989, and November 8, 1991.

The Court further finds that the Defendants, GARY WAYNE HUMPHREY and MELANIE KAY HUMPHREY, 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, GARY WAYNE HUMPHREY and MELANIE KAY HUMPHREY, are indebted to the Plaintiff in the principal sum of \$42,127.96, plus interest at the rate of 10½ percent per annum from March 23, 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 \$20.00, plus accruing costs and interest 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 \$593.80, plus accrued and accruing interest which became a lien on the property as of June 20, 1991, and a lien in the amount of \$325.54, plus accrued and accruing interest, which became a lien on the property

as of November 1, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, GARY WAYNE HUMPHREY , MELANIE KAY HUMPHREY and ROBERTA ANN THOMPSON, 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, TULSA ADJUSTMENT BUREAU, INC., 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 In Rem against the Defendants, GARY WAYNE HUMPHREY and MELANIE KAY HUMPHREY, in the principal sum of \$42,127.96, plus interest at the rate of 10½ percent per annum from March 23, 1995 until judgment, plus interest thereafter at the current legal rate of 5.45 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 \$20.00, plus accruing 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 \$919.34, plus accrued and accruing interest, for state income taxes, plus the costs.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, TULSA ADJUSTMENT BUREAU, INC, GARY WAYNE HUMPHREY , MELANIE KAY HUMPHREY and ROBERTA ANN THOMPSON, 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, GARY WAYNE HUMPHREY and MELANIE KAY HUMPHREY, 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 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, STATE OF OKLAHOMA, ex rel.  
OKLAHOMA TAX COMMISSION, in the amount of \$593.80,  
plus accrued and accruing interest, for state income taxes.

**Fourth:**

In payment of Defendant, COUNTY TREASURER, Tulsa  
County, Oklahoma, in the amount of \$20.00, 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 \$325.54,  
plus accrued and accruing interest, for state income taxes.

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

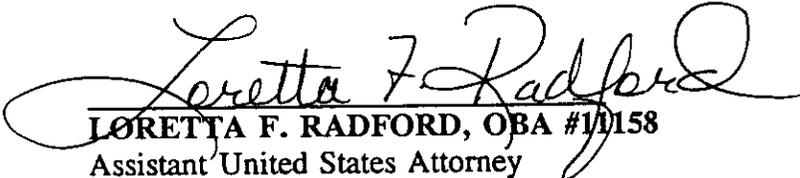
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

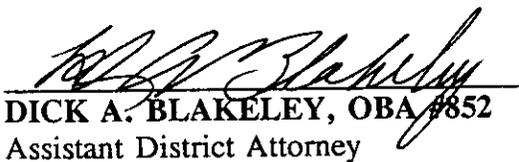
UNITED STATES DISTRICT JUDGE

APPROVED:

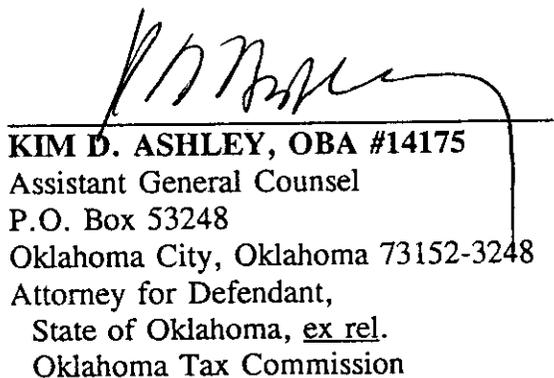
STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #10158**  
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  
Attorney for Defendant,  
State of Oklahoma, *ex rel.*  
Oklahoma Tax Commission

Judgment of Foreclosure  
Civil Action No. 95-C 368K

LFR:flv

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE DEC 14 1995

MICHAEL LEWIS AND DEBBIE LEWIS, )  
husband and wife; STAN FRANKLIN )  
and NICOLE FRANKLIN, husband )  
and wife; and RUTH E. BANKS, )  
an individual )

Plaintiffs, )

v. )

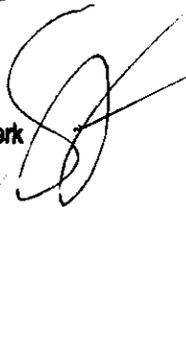
ARMELLINI ENGINEERING, INC., an )  
Oklahoma Corporation; TOBY J. )  
ARMELLINI, individually and in his )  
capacity as President of Armellini )  
Engineering, Inc.; GENERAL AMERICAN )  
LIFE INSURANCE, an Oklahoma corporation )  
doing business in Tulsa County, )  
State of Oklahoma )

Defendants. )

**FILED**

DEC 13 1995

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



No. 94-C-805-K

ORDER GRANTING ATTORNEY FEES

Comes on for hearing Defendant's Application for Attorney Fees Awarded as Sanctions, Doc. No. 41, filed Nov. 14, 1995, with Plaintiff's response filed Nov. 20, 1995. The court having reviewed the briefs, being fully advised in the premises hereby finds as follows:

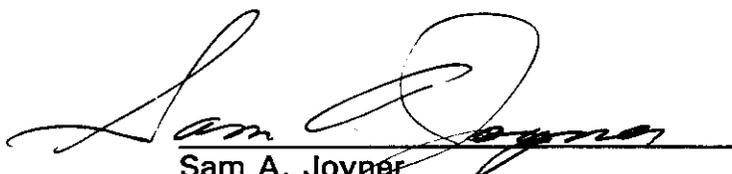
1. By order dated November 6, 1995, the court awarded Defendant its costs and attorney fees in presenting and prosecuting its Motion to Compel and its Motion for Discovery Sanctions.

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2. Fed. R. Civ. P. 37 (4)(A) provides that if the motion is granted the court shall require the party whose conduct necessitated the motion to pay the moving party the reasonable expenses incurred, in making the motion. Since the award is limited to the expenses in making the motion the court has reviewed Defendant's itemized time sheet and finds \$949.00 incurred in making the motion.

3. It is THEREFORE ORDERED, ADJUDGED AND DECREED that General American is awarded attorneys fees and costs in the amount of \$949.00 to be paid by attorneys for the Plaintiffs.

Dated this 13 day of December 1995.

  
Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

UNITED STATES OF AMERICA, )  
on behalf of the Secretary of Housing )  
and Urban Development, )

DATE ~~DEC 14 1995~~

Plaintiff, )

**FILED**

v. )

DEC 13 1995

KANDY LEIMOMI EVERETT )  
aka Kandy Leimomi Kane aka Kandy Leimoni Kane )  
fka Kandy Leimomi Escobar fka Kandy L. Escobar; )  
GREG EVERETT; )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma, )

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

Defendants. )

CIVIL ACTION NO. 95-C-216-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 13 day of December,

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, Kandy Leimomi Everett aka Kandy Leimomi Kane aka Kandy Leimoni Kane fka Kandy Leimomi Escobar fka Kandy L. Escobar and Greg Everett, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, Kandy Leimomi Everett aka Kandy Leimomi Kane aka Kandy Leimoni Kane fka Kandy Leimomi Escobar fka Kandy L. Escobar and Greg Everett, were served

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

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 August 3, 1995, and continuing through September 7, 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, **Kandy Leimomi Everett aka Kandy Leimomi Kane aka Kandy Leimomi Kane fka Kandy Leimomi Escobar fka Kandy L. Escobar and Greg Everett**, 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, **Kandy Leimomi Everett aka Kandy Leimomi Kane aka Kandy Leimomi Kane fka Kandy Leimomi Escobar fka Kandy L. Escobar and Greg Everett**. 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 Answers on March 21, 1995; that the Defendants, **Kandy Leimomi Everett aka Kandy Leimomi Kane aka Kandy Leimoni Kane fka Kandy Leimomi Escobar fka Kandy L. Escobar and Greg Everett,** 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 Fourteen (14), Block Six (6), WOODLAND GLEN  
FOURTH, An Addition to the City of Tulsa, Tulsa County,  
State of Oklahoma, according to the recorded Plat thereof.  
aka 9053 East 95th Street, Tulsa, OK 74133**

The Court further finds that on September 30, 1986, Gary R. Grant and Lesley A. Grant executed and delivered to Mortgage Clearing Corporation, their mortgage note in the amount of \$60,878.00, payable in monthly installments, with interest thereon at the rate of 10 percent per annum.

The Court further finds that as security for the payment of the above-described note, Gary R. Grant and Lesley A. Grant executed and delivered to Mortgage Clearing Corporation, a real estate mortgage dated September 30, 1986, covering the above-described

property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on October 2, 1986, in Book 4973, Page 2385, in the records of Tulsa County, Oklahoma.

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

The Court further finds that on November 8, 1990, Triad Bank, N.A. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors or assigns. This Assignment of Mortgage was recorded on November 13, 1990, in Book 5288, Page 648, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendant, Kandy Leimomi Everett aka Kandy Leimomi Kane aka Kandy Leimoni Kane fka Kandy Leimomi Escobar fka Kandy L. Escobar, currently holds the fee simple title to the property via mesne conveyances and is the current assumptor of the subject indebtedness.

The Court further finds that the Defendant, **Kandy Leimomi Everett aka Kandy Leimomi Kane aka Kandy Leimoni Kane fka Kandy Leimomi Escobar fka Kandy L. Escobar**, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Kandy Leimomi Everett aka Kandy Leimomi Kane aka Kandy Leimoni Kane fka Kandy Leimomi Escobar fka Kandy L. Escobar**, is indebted to the Plaintiff in the principal sum of \$59,530.25, plus administrative charges in the amount of \$2,489.47, plus penalty charges in the amount of \$120.45, plus

accrued interest in the amount of \$22,653.74 as of January 1, 1995, plus interest accruing thereafter at the rate of 10 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid and the costs of this action in the amount of \$354.12 (\$346.12 publication fees, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has liens on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$148.00 which became liens on the property as of June 23, 1994 (\$50.00), June 25, 1993 (51.00) and June 26, 1992 (\$47.00). Said liens are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **Kandy Leimomi Everett aka Kandy Leimomi Kane aka Kandy Leimomi Kane fka Kandy Leimomi Escobar fka Kandy L. Escobar and Greg Everett**, are in default and therefore 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 Defendant, **Kandy Leimomi Everett aka Kandy Leimomi Kane aka Kandy Leimomi Kane fka Kandy Leimomi Escobar fka Kandy L. Escobar**, in the principal sum of \$59,530.25, plus administrative

charges in the amount of \$2,489.47, plus penalty charges in the amount of \$120.45, plus accrued interest in the amount of \$22,653.74 as of January 1, 1995, plus interest accruing thereafter at the rate of 10 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.45 percent per annum until paid, plus the costs of this action in the amount of \$354.12 (\$346.12 publication fees, \$8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$148.00 for personal property taxes entered on lien docket June 23, 1994 (\$50.00), June 25, 1993 (51.00) and June 26, 1992, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, **Kandy Leimomi Everett aka Kandy Leimomi Kane aka Kandy Leimomi Kane fka Kandy Leimomi Escobar fka Kandy L. Escobar; Greg Everett; and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, **Kandy Leimomi Everett aka Kandy Leimomi Kane aka Kandy Leimomi Kane fka Kandy Leimomi Escobar fka Kandy L. Escobar**, 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 the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma.

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.

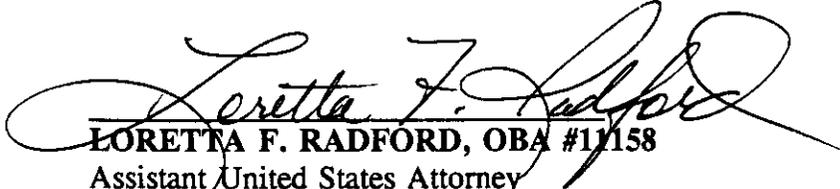
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed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

**8/ TERRY C. KERN**

**UNITED STATES DISTRICT JUDGE**

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463



**DICK A. BLAKELEY, OBA #0852**

Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4841  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95-C-216-K (Everett)

LFR:css

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

ENTERED ON DOCKET  
DATE DEC 14 1995

LEONARD RENAL ROBERTS,  
Petitioner,  
vs.  
RON CHAMPION,  
Respondent.

No. 94-C-690-K

**FILED**

DEC 13 1995

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

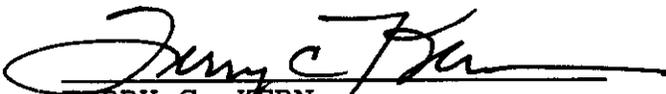


**ORDER**

This matter comes before the Court on Petitioner's motion for reconsideration ("Petition for Rehearing"), Respondent's response to Court's Order, and Petitioner's Motion for Default Judgment and/or Motion for Summary Judgment. Petitioner alleges Respondent submitted a copy of his July 12, 1988 written waiver and not of his October 16, 1992 waiver.

Accordingly, Respondent shall submit, on or before fifteen (15) days from the date of filing of this order, a copy of Petitioner's 1992 written waiver of Executive Parole Revocation hearing. Petitioner's motions for reconsideration, for default judgment, and/or summary judgment (docket #26, #28-1, and #28-2) are DENIED.

SO ORDERED THIS 13 day of December, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

29

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

**FILED**

DEC 12 1995

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

CRAIG A. STEVENS, LOUIE W. )  
STEVENS and LINDA STEVENS, )

Plaintiffs, )

v. )

No. 95-CV-876H ✓

STATE FARM MUTUAL AUTOMOBILE )  
INSURANCE COMPANY, )

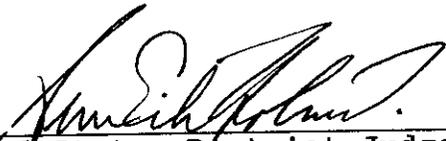
Defendant. )

ENTERED ON DOCKET

DATE 12-13-95

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 11<sup>TH</sup> day of DECEMBER, 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.

  
United States District Judge

6



FRASIER, FRASIER & HICKMAN

By:



Steven R. Hickman OBA#4172

1700 Southwest Blvd., Suite 100

P.O. Box 799

Tulsa, OK 74101-0799

918/584-4724

Attorney for Defendant

CTJ

FILED

SC

OCT 13 1995

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

DOROTHY A. EVANS, CLERK  
U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OKLAHOMA

IN RE: )  
 )  
 BATEY, HERBERT G. and )  
 BATEY, BETTY M. )  
 )  
 Debtor(s), )  
 )  
 STEVEN W. SOULE, TRUSTEE )  
 FOR THE BANKRUPTCY ESTATE OF )  
 HERBERT G. BATEY and BETTY M. )  
 BATEY, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 VIRGINIA KISSINGER )  
 )  
 Defendant. )

Case No. 99-02845-W  
(Chapter 7)

FILED

sa

DEC 11 1995

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

Adv. No. 95-0171-W

95C 606 H ✓  
ENTERED ON DOCKET  
DATE 12-12-95

STIPULATION OF DISMISSAL OF ADVERSARY PROCEEDING

Steven W. Soulé, Trustee for the Bankruptcy Estate of Herbert G. Batey and Betty M. Batey ("Plaintiff"), and Mark Craige as Attorney for Defendant, Virginia Kissinger respectfully stipulate that the Complaint filed herein should be dismissed. In support, the Plaintiff would show the Court as follows:

1. The above styled proceeding was filed on May 19, 1995 and service was obtained on the Defendant on May 24, 1995.
2. In his Complaint, the Plaintiff sought to avoid certain preferential transfers to an insider and to recover the properties transferred or the value thereof pursuant to 11 U.S.C. §550.
3. The Plaintiff hereby advises the Court of his desire to dismiss the above captioned adversary proceeding due to the fact the Defendant has been found to be basically insolvent at this time

and that further prosecution of this Complaint would be of little or no benefit to the estate.

WHEREFORE, premises considered, and pursuant to Fed. R. Civ. P. 41(a)(1), Steven W. Soulé, Trustee and Plaintiff, and Defendant Virginia Kissinger stipulate that the Complaint against the Defendant should be dismissed.

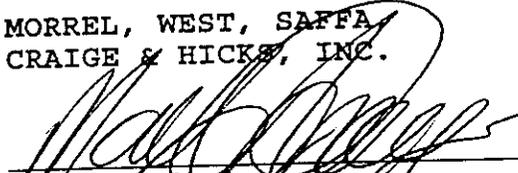
HALL, ESTILL, HARDWICK, GABLE  
GOLDEN & NELSON, P.C.



Steven W. Soulé, OBA #13781  
320 South Boston Avenue  
Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0400

ATTORNEYS FOR PLAINTIFF

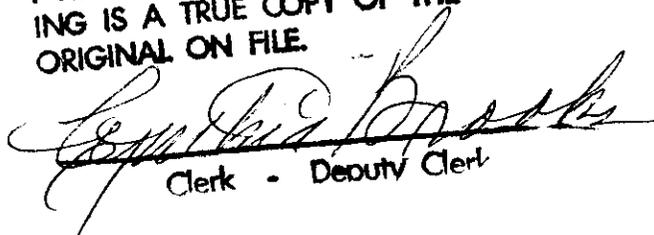
MORREL, WEST, SAFFA  
CRAIGE & HICKEE, INC.



Mark A. Craige  
City Plaza West, 9th Floor  
5310 East 31st Street  
Tulsa, Oklahoma 74135  
(918) 664-0800

ATTORNEYS FOR DEFENDANT

United States Bankruptcy Court |  
Northern District of Oklahoma | ss  
I HEREBY CERTIFY THAT THE FOREGO-  
ING IS A TRUE COPY OF THE  
ORIGINAL ON FILE.



Cynthia Brooks  
Clerk - Deputy Clerk



**CERTIFICATE OF SERVICE**

I certify that the foregoing Dismissal With Prejudice was hand delivered on December 8, 1995, to the following:

Waldo E. Jones, II  
Waldo E. Jones, II & Associates  
110 S. Hartford, Suite 102  
Tulsa, Okla. 74120



---

Ned Dismukes

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

CHARLES JONES, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 SHIRLEY CHATER, Commissioner of the )  
 Social Security Administration, )  
 )  
 Defendant. )

DEC 13 1995

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

ENTERED ON DOCS  
DATE DEC 12 1995

CASE NO. 95-C-827-W

ORDER

Upon the motion of the defendant, Commissioner of Health and Human Services, to which there is no objection, and for good cause shown, IT IS HEREBY ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to Sentence 6, Section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

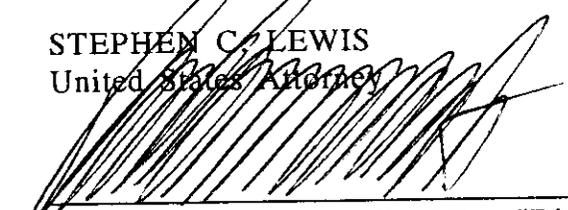
DATED this 8<sup>th</sup> day of December, 1995.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney



PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
333 W. Fourth St., Suite 3460  
Tulsa, OK 74103-3809

8

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

**F I L E D**

DEC 11 1995

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

WILLIAM N. CONN )  
SS# 440-34-6456, )  
Plaintiff, )  
v. )  
SHIRLEY S. CHATER, Commissioner, )  
Social Security Administration, )  
Defendant. )

NO. 94-C-488-M ✓

ENTERED ON DOCKET  
DEC 12 1995

**ORDER**

Plaintiff has applied for an award of attorney's fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). The Defendant, Commissioner of the Social Security Administration, has advised the Court she has no objection to an award of \$2,216.25, as requested by Plaintiff.

The Court finds that a fee enhancement for the cost-of-living is appropriate and the number of hours expended is reasonable. Accordingly, Plaintiff's motion for fees and costs pursuant to 28 U.S.C. § 2412(d) [Dkt. 11] is GRANTED in the amount of \$2,216.25.

SO ORDERED this 9<sup>th</sup> day of December, 1995.

*Frank H. McCarthy*  
FRANK H. MCCARTHY  
UNITED STATES MAGISTRATE JUDGE

**FILED**

DEC 11 1995

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

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

MICHAEL E. MOSHER, )  
SS# 478-58-1663 )

Plaintiff, )

v. )

NO. 94-C-13-M /

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

Defendant. )

ENTERED ON DOCKET  
DATE DEC 12 1995

**ORDER**

Plaintiff has applied for an award of attorney's fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). The Defendant, Commissioner of the Social Security Administration, has advised the Court she has no objection to an award of \$2,816.15, as requested by Plaintiff.

The Court finds that a fee enhancement for the cost-of-living is appropriate and the number of hours expended is reasonable. Accordingly, Plaintiff's motion for fees and costs pursuant to 28 U.S.C. § 2412(d) [Dkt. 15] is GRANTED in the amount of \$2,816.15.

SO ORDERED this 11<sup>th</sup> day of December, 1995.

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

18

12-7

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

DEC 11 1995

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

CHARLES A. JORDAN, )  
)  
Plaintiff, )  
)  
v. )  
)  
SHIRLEY S. CHATER, )  
Commissioner of the Social )  
Security Administration, )  
)  
Defendant. )

Case No. 93-C-865-W

ENTERED ON DOCK. 1  
DATE DEC 12 1995

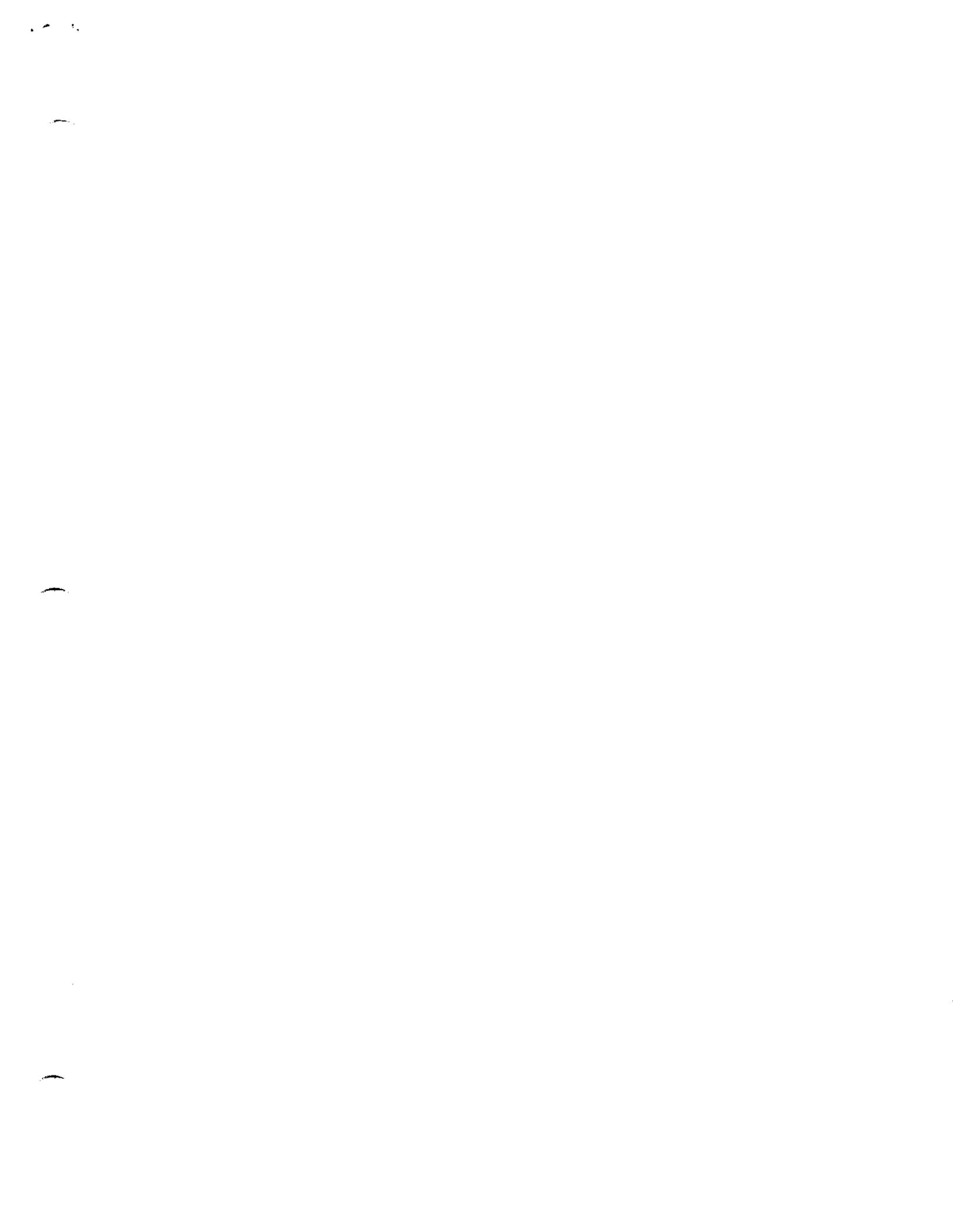
**AGREED ORDER**

On August 21, 1995, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded to the Commissioner for an award of benefits. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on November 20, 1995, the parties have stipulated that an award in the amount of \$4,386.80 for attorney fees and expenses for all work done before the district court is appropriate.

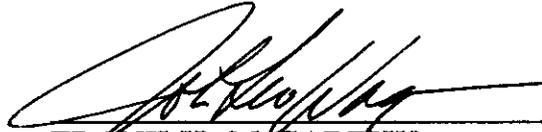
WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees and expenses under the Equal Access To Justice Act in the amount of \$4,386.80. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act,

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plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 8<sup>th</sup> day of December 1995.



FRANK H. MCCARTHY  
United States Magistrate Judge



PHIL PINNELL, OBA #7169  
Assistant United States Attorney



TIMOTHY M. WHITE, OBA #9552

Attorney for Plaintiff  
2526 E. 7<sup>th</sup> St, Suite A  
Tulsa, OK 74136-5576  
(918) 492-9335

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

FILED

DEC 11 1995

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

THOMAS J. GUNN

Plaintiff,

v.

MARY G. FOX,

Defendant.

Case No. 94-C-1114 BU

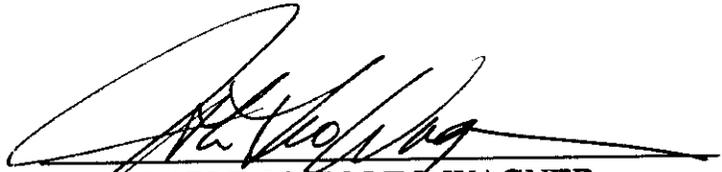
RECORDED ON BOOK

DEC 12 1995

ORDER

Upon Application of the Plaintiff and for good cause shown, the Court does hereby dismiss without prejudice the Plaintiff's cause of action as against American Standard Insurance Company, American Family Mutual Insurance Company and Dairyland Insurance Company.

DATED this 8<sup>th</sup> day of December, 1995.



HONORABLE JOHN LEO WAGNER,  
UNITED STATES MAGISTRATE JUDGE

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

FILED

DEC 11 1995

AMOS MCNAC,

Plaintiff,

v.

AMERADA HESS CORPORATION,

Defendant.

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

Case No. 95-C-0010K

ENTERED ON DOCKET  
DEC 12 1995  
DATE \_\_\_\_\_

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, jointly stipulate that all of Plaintiff's claims herein should be dismissed with prejudice with each side to bear its own costs and attorney fees.

DATED this 11<sup>th</sup> day of December, 1995.

Respectfully submitted,

By: Leslie C. Rinn  
Jeff Nix, Esq.  
Leslie C. Rinn, Esq.  
2121 South Columbia, Suite 710  
Tulsa, OK 74114-3521

ATTORNEYS FOR PLAINTIFFS

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

By: [Signature]  
J. Patrick Cremin OBA #2013  
Steven A. Broussard OBA #12582  
320 South Boston Avenue, Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0594

ATTORNEYS FOR DEFENDANT  
AMERADA HESS CORPORATION

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

ENTERED ON DOCKET

DATE DEC 12 1995

KAREN HARDESTY, )

Plaintiff, )

vs. )

Case No. 95-C-510-K

THE PRUDENTIAL INSURANCE )

COMPANY OF AMERICA, INC., )

a New Jersey )

corporation, )

Defendant. )

**FILED**

DEC 11 1995

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

**ORDER GRANTING JOINT STIPULATION AND APPLICATION FOR AN  
ORDER OF DISMISSAL WITH PREJUDICE**

For good cause having been shown, the parties, Plaintiff, Karen Hardesty, and Defendant, The Prudential Insurance Company of America, by and through their attorneys of record, having stipulated to the entry by this Court of an order of dismissal with prejudice of any and all claims which have been asserted, or which might have been asserted, as a result of the matters described in the Plaintiff's Petition filed March 29, 1995, in the District Court in and for Tulsa County, State of Oklahoma and removed and filed in this Court by Notice of Removal filed June 6, 1995, it is hereby ordered that the above-captioned action be dismissed with prejudice.

DATED this 8 day of Dec., 1995.

s/ TERRY C. KERN

UNITED STATES DISTRICT COURT JUDGE

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

JOHN MICHAEL GRIFFIN, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 RON J. WARD, )  
 )  
 Respondent. )

ENTERED ON DOCKET  
DATE DEC 12 1995

No. 94-C-1025-K

**FILED**

DEC 11 1995

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

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his conviction in Tulsa County District Court, Case No. CRF-80-2276, for Robbery with Firearms.<sup>1</sup> Respondent has filed a Rule 5 response to which Petitioner has replied. Petitioner is represented by retained counsel. As more fully set out below the Court concludes that this petition should be denied.

**I. BACKGROUND**

On December 10, 1980, consistent with a negotiated plea agreement, Petitioner pled nolo contendere to the charge of Robbery with Firearms and received nine to thirty years imprisonment pursuant to the plea agreement. Petitioner did not pursue a direct appeal, but filed a petition for post-conviction relief. He alleged his pleas were involuntarily entered as the trial court

<sup>1</sup> In his reply, Petitioner agrees he is no longer in custody under his convictions in CRF-79-869 and CRF-80-2314 and, thus, he cannot challenge these convictions in the instant action.

failed to follow the minimum requirements of King v. State, 553 P.2d 529 (Okla. Crim. App. 1976). The district court denied relief and the Court of Criminal Appeals affirmed.

In the instant petition for a writ of habeas corpus, Petitioner alleges the trial court failed to determine Petitioner's competency, failed to inform Petitioner of the different ranges of punishment, and failed to determine whether there was a factual basis for his plea.

## II. ANALYSIS

Nolo contendere is a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty. North Carolina v. Alford, 400 U.S. 25, 35 (1970). There is no requirement that there be a factual basis for the plea. Gloria v. Miller, 658 F.Supp. 229, 234 (W.D. Okla. 1987). "Indeed, the purpose of the plea of nolo contendere, to allow a defendant to enter a plea without admitting guilt, is wholly inconsistent with the reason for requiring a factual basis for a guilty plea." Id. This Court's review is generally limited to whether the plea was counseled and voluntary. Id.; see also United States v. Broce, 488 U.S. 563, 569 (1989).

The transcript of the plea proceeding in the instant case supports the conclusion that Petitioner's plea was voluntarily and knowingly made. The trial judge informed Petitioner that by his plea he would waive his right to a jury trial and to present and

confront witnesses. The judge also made sure that Petitioner was satisfied with the representation he received from his attorney, that he understood the charges, and that he was aware his plea of no contest was tantamount to a plea of guilty for sentencing purposes. The judge also asked Petitioner whether he was under the influence of medication or drugs, and the transcript contains no evidence that Petitioner did not fully appreciate the plea proceedings.

Petitioner has not demonstrated that any of the seven exceptions to the presumption of correctness set forth in section 2254(d)(1)-(7) apply to this case, or that the factual determinations made by the Tulsa County District Court and adopted by the Court of Criminal Appeals are not fairly supported by the evidence in the state court record. Thus, the state court's findings of fact are entitled to a presumption of correctness.

### III. CONCLUSION

After carefully reviewing the record in this case, the Court finds that Petitioner is not in custody in violation of the Constitution or laws of the United States. Accordingly, the petition for a writ of habeas corpus is hereby denied.

SO ORDERED THIS 8 day of December, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

blc

OBA #5026

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

RICK CASE and LINDA CASE, )  
 )  
 Plaintiffs, )  
 )  
 -vs- )  
 )  
 NORTH STAR MUTUAL INSURANCE )  
 COMPANY, )  
 )  
 Defendant. )

ENTERED ON DOCKET  
DATE DEC 12 1995

No. 95-C-185 K

**FILED**

DEC 11 1995

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

ORDER OF DISMISSAL WITH PREJUDICE

On this 8 day of Dec., 1995, the  
Joint Application of the parties came on before the Court for an  
Order of Dismissal With Prejudice. The court finds that the  
parties have settled all issues and claims and therefore, said  
Application should be, and is, sustained.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the above  
captioned matter is dismissed with prejudice to refiling.

of TERRY C. KERN

UNITED STATES DISTRICT JUDGE  
FOR NORTHERN DISTRICT OF OKLAHOMA

APPROVED AS TO FORM:

Scott D. Keith  
SCOTT D. KEITH,  
Attorney for Plaintiffs

Dennis King  
DENNIS KING,  
Attorney for Defendant

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

CHARLES ENOCH BROWN,

Petitioner,

vs.

RON CHAMPION, et al.,

Respondents.

No. 93-C-609-K

ENTERED ON DOCKET

DATE ~~DEC 12 1995~~

**FILED**

DEC 11 1995

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

ORDER

This is a proceeding on a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his First Degree Murder conviction in Creek County District Court Case No. CRF-83-288. Respondents have filed a response and Petitioner has moved for appointment of counsel. For the reasons stated below, the Court denies grounds one and two of the petition and reserves ruling on Petitioner's motion for appointment of counsel and ground three of the petition pending completion of the attached affidavit of financial status.

**I. ANALYSIS**

As a preliminary matter, the Court finds that Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982).

**A. Loss of Videotape**

In his first ground, Petitioner alleges he was denied his constitutional right to a fair trial when the copy of the video-

tape, prepared by a news reporter and introduced into evidence at trial was missing at the time that he perfected his appeal. The video-tape showed Petitioner's affirmative answer to the following question by a news reporter: whether "he said he would shoot the next trooper who stopped him on a traffic citation?"

This Court agrees with the Oklahoma Court of Criminal Appeals that it was "the responsibility of the defendant to provide a sufficient record to allow review of alleged errors on appeal," and that the tape was not absolutely essential to rule on the change of venue issue. In any event, since Petitioner cannot establish that his jury was not impartial and fair and that he was entitled to a change of venue (see discussion in section "B" below), the Court finds moot the issue of the missing tape.

#### **B. Change of Venue**

In his second ground for habeas relief, Petitioner contends that he was prejudiced by the trial court's failure to grant his motion for a change of venue due to adverse pretrial publicity. He argues a change of venue was warranted because of the extensive media coverage and the videotape interview mentioned above. The Oklahoma Court of Criminal Appeals recognized that the motion for change of venue was properly accompanied by three affidavits in compliance with state law. It concluded, however, that actual prejudice could not be presumed because the facts of Petitioner's case did not reveal that the trial was totally corrupted by press coverage.

This Court must "review the trial court's decision denying a transfer of venue for an abuse of discretion." Stafford v. Saffle, 34 F.3d 1557, 1565 (10th Cir. 1994), cert. denied, 115 S.Ct. 1830 (1995). "Great deference [is due] to the trial court's exercise of its discretion, and its decision is 'entitled to a presumption of correctness and will not be overturned unless there is manifest error.'" Id. (quoted cases omitted). "Part of the rationale behind the limited nature of federal review of a state trial court's findings is that '[t]he state trial judge had the benefit of observing the general demeanor of the jurors as the basis for his general finding.'" Brecheen v. Reynolds, 41 F.3d 1343, 1350 (10th Cir. 1994), cert. denied, 115 S.Ct. 2564 (1995).

Petitioner claims, and the State concedes, that there was extensive media coverage of the murder and trial in this case. Petitioner also claims that the videotape interview was played before the residents of Creek County and that all the potential jurors in his case had prior knowledge of the defendant. The Court liberally construes the petition, in accordance with Petitioner's pro se status, to allege actual as well as presumed prejudice.<sup>1</sup>

In reviewing whether Petitioner suffered actual prejudice as a result of the pre-trial publicity, this Court must "examin[e] the totality of the circumstances." Stafford, 34 F.3d at 1567. "The trial court 'has broad discretion in gauging the effects of

---

<sup>1</sup> The Court notes Petitioner has pointed to no actual hostility or impartiality by the jurors. Therefore, the Court could limit its discussion to presumed prejudice. See Brecheen, 41 F.3d at 1350-51.

allegedly prejudicial publicity and in taking measures to ensure a fair trial.'" Id. In the instant case, the trial court properly assessed the partiality of the jurors during voir dire. Although the majority of the prospective jurors had heard news reports about Petitioner's case, the jurors that were seated said they could be fair. (Tr. 33, 73, 83-85, 127, 145, 156, 167, 184-85, 200, 206, 235, 239, 256, 259, 263-64, 269-70, 271-72, 285, 286, 293, 302, 311, 321, 329-30, 374, 390, 397, 412-13, 419, 433-34, 441, 446, 471, 476.) Jurors need not be ignorant. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Stafford, 34 F.3d at 1567.

In Petitioner's case, the two potential jurors who candidly admitted they could not sit as fair and impartial jurors were dismissed for cause. (Tr. 81, 85-86.) Another juror was excused by the court because he had served on the previous week's panel during Petitioner's competency hearing. (Tr. 201-04.) The fact that juror Dennis McKee was not excused for cause, as argued by Petitioner on direct appeal, is irrelevant in that he was stricken on the basis of a peremptory challenge. Therefore, Petitioner cannot show any actual hostility or impartiality by the jurors as a result of the pre-trial publicity.

In a presumed prejudice case, Petitioner bears the burden of establishing that "an irrepressibly hostile attitude pervaded the community," Stafford, 34 F.3d at 1566, and rendered Petitioner's trial fundamentally unfair. Brecheen, 41 F.3d at 1351.

This is a difficult standard, even in cases in which there has been extensive media coverage, because [p]retrial publicity in topical criminal cases is inevitable. The publicity impacts defendant's rights only when it dictates the community's opinion as to guilt or innocence.

Stafford, 34 F.3d at 1566. "Fundamentally unfair circumstances may be indicated by an inflammatory atmosphere within the community or courtroom, by specific statements of jurors, or by the difficulty with which an impartial panel was selected." Brecheen, 41 F.3d at 1351. In such circumstances, however, the Court must apply a "manifest error standard." Under that standard the question "is not whether the community remembered the case." Id. (quoted cases omitted). Rather, the relevant question is "whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." Id. (quoted case omitted). In Stafford, 34 F.3d at 1566, the Tenth Circuit noted that only "[i]n rare cases, the community is so predisposed that prejudice can be presumed, and venue must be transferred as a matter of law."

While there was extensive publicity in this case, Petitioner has not met his burden of establishing that an irrepressibly hostile attitude pervaded the community. "The law does not require that jurors be ignorant of the controversy; only that they be impartial." Id. The fact that the potential jurors knew about Petitioner's case and that there was extensive pretrial publicity does not suffice in and of itself to establish an irrepressibly hostile attitude in the community. Moreover, as noted above, the trial court conducted an extensive voir dire and the jurors who clearly stated they could not approach the trial without an opinion

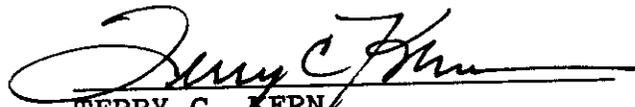
were excused for cause or dismissed on a peremptory challenge.

Accordingly, the Court concludes Petitioner has failed to establish that his jury was not impartial and fair and that he was entitled to a change of venue because of actual or presumed prejudice.

## II. CONCLUSION

Grounds one and two of the petition are DENIED. Petitioner shall COMPLETE the enclosed affidavit (parts 4-9 and the financial affidavit) and SUBMIT it to the Clerk for filing on or before twenty (20) days from the date of filing of this order.

SO ORDERED THIS 11 day of December, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE



on the applicable burden of proof in the punishment stage of the trial. In May 1990, after the Mitchell opinion but before the Court of Criminal Appeals ruled on Petitioner's appeal, the Oklahoma Legislature enacted Title 22 O.S. Supp. 1990, § 929 and directed that it be applied retroactively as it was a procedural change. Section 929 permits the Court of Criminal Appeals to remand a case to the trial court for resentencing in the event it finds a prejudicial error in the sentencing proceeding of a non-capital criminal case.

On October 8, 1991, the Oklahoma Court of Criminal Appeals affirmed Petitioner's judgment, but vacated the sentence for the same fundamental error found in Mitchell--i.e., failure to instruct the jury on the burden of proof in the second stage proceeding. Unlike Mitchell, however, the Court remanded Petitioner's case to the Tulsa County District Court for resentencing pursuant to section 929. On April 29, 1992, Petitioner waived his right to jury trial and was resentenced to serve thirty-five years after having his conviction reduced to Possession of a Controlled Dangerous Substance with Intent to Distribute. The Court of Criminal Appeals affirmed Petitioner's resentencing.

In the present petition for a writ of habeas corpus, Petitioner alleges that equal protection, due process, and fundamental fairness require a modification of his sentence to the appropriate range without enhancement as in Mitchell. He contends that his appeal was filed with the Court of Criminal Appeals before Anthony Mitchell's appeal, that both cases were submitted to the

Court for review on the same date, but that Mitchell's appeal was decided two years prior to Petitioner's appeal. Petitioner alleges he was disadvantaged by the delay and the application of section 929 amounts to a violation of the ex post facto clause.

## II. ANALYSIS

The Supreme Court recently addressed the nature of an ex post facto violation. In Collins v. Youngblood, 497 U.S. 37 (1990), the Court determined that the ex post facto clause's prohibition is triggered only by a statute which:

punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed.

Id. at 42 (quoted case omitted). The Constitution requires more for an ex post facto violation than simply a retrospective law that alters the situation of a defendant to his disadvantage. Id. at 48-51. Nevertheless, a state cannot immunize from scrutiny a retrospective change in the law simply by labeling it as "procedural." Clearly certain procedural changes may deprive a defendant of substantial protections in such a way as to constitute an ex post facto violation. See id. at 45.

The retroactive application of section 929 in Petitioner's direct appeal does not pose an ex post facto problem. Section 929 did not (1) render criminal conduct that was legal when committed, (2) increase the punishment that could be imposed, or (3) render unavailable to Petitioner a defense that was available at the time

he committed the offense. See id. at 52. Section 929 merely enabled the Court of Criminal Appeals to remand Petitioner's case to the trial court for resentencing, instead of sua sponte modifying the sentence. The change was merely procedural and therefore did not amount to an ex post facto violation.

Petitioner's contention that his due process rights and his right to equal protection were violated because of the delay in deciding his appeal should be rejected as well. Even if there had been inordinate delay in the disposition of petitioner's direct appeal, habeas corpus relief based solely on previous inordinate appellate delay is unavailable where the state appellate court has rendered a decision affirming the conviction. See Harris v. Champion, 15 F.3d 1538, 1566 (10th Cir. 1994). "Only when appellate delay 'prejudiced [the petitioner's] due process rights so as to make his confinement constitutionally deficient,' would habeas relief based on appellate delay be appropriate for a petitioner whose conviction has been affirmed." Id.

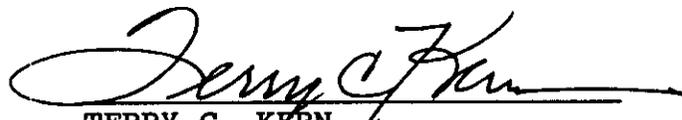
Petitioner has failed to make such a showing. Whether or not section 929 was enacted, Petitioner was going to receive a lesser sentence; it was up to either the Court of Criminal Appeals, the trial court or a jury to determine Petitioner's new sentence. There is no indication Petitioner would have received a lower sentence from one tribunal than from another.

### III. CONCLUSION

As Petitioner is not in custody in violation of the

Constitution or laws of the United States, the petition for a writ of habeas corpus is hereby DENIED.

SO ORDERED THIS 11 day of December, 1995.

A handwritten signature in cursive script, reading "Terry C. Kern", written over a horizontal line.

TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 on behalf of the Secretary of Veterans Affairs, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ELLIS R. HAIKEY aka Ellis Riley Haikey; )  
 GLADYS J. HAIKEY aka Gladys Jeanette Haikey; )  
 STATE OF OKLAHOMA ex rel. )  
 Oklahoma Tax Commission; )  
 GENERAL ELECTRIC CAPITAL CORP.; )  
 GENERAL MOTORS ACCEPTANCE )  
 CORPORATION; )  
 COUNTY TREASURER, Creek County, )  
 Oklahoma; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Creek County, Oklahoma, )  
 )  
 Defendants. )

ENTERED ON DOCKET  
DATE DEC 12 1995

**FILED**

DEC 11 1995

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

) CIVIL ACTION NO. 95-C-493-K

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 8 day of Dec., 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, **County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma**, appear by Michael S. Loeffler, Assistant District Attorney, Creek County, Oklahoma; the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, appears not, having previously filed its Disclaimer; the Defendant, **General Electric Capital Corp.**, appears by its attorney John L. Collinsworth; the Defendant, **General Motors Acceptance Corporation**, appears by its attorney Brian J. Rayment; and

NOTE: ALL DOCUMENTS MUST BE  
 FILED WITH THE CLERK AND  
 PROVIDED TO THE PLAINTIFFS IMMEDIATELY  
 UPON RECEIPT.

the Defendants, **Ellis R. Haikey aka Ellis Riley Haikey and Gladys J. Haikey aka Gladys Jeanette Haikey**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Ellis R. Haikey aka Ellis Riley Haikey**, was served with Summons and Complaint on July 18, 1995; the Defendant, **Gladys J. Haikey aka Gladys Jeanette Haikey**, was served with Summons and Complaint on August 11, 1995; that the Defendant, **General Electric Capital Corp.**, executed a Waiver of Service of Summons on June 1, 1995 which was filed on June 8, 1995; that the Defendant, **General Motors Acceptance Corporation**, executed a Waiver of Service of Summons on June 7, 1995 which was filed on June 14, 1995; that the Defendants, **County Treasurer, Creek County, Oklahoma and Board of County Commissioners, Creek County, Oklahoma**, filed an Entry of Appearance through their attorney Michael S. Loeffler on August 3, 1995.

It appears that the Defendants, **County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma**, filed their Joint Answer on August 16, 1995; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, filed its Disclaimer on August 28, 1995; that the Defendant, **General Electric Capital Corp.**, filed its Answer on June 8, 1995; that the Defendant, **General Motors Acceptance Corporation**, filed its Answer, Counterclaim and Cross-Claim on June 13, 1995; and that the Defendants, **Ellis R. Haikey aka Ellis Riley Haikey and Gladys J. Haikey aka Gladys Jeanette Haikey**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on November 28, 1994, Ellis Riley Haikey and Gladys Jeanette Haikey filed their voluntary petition in bankruptcy in Chapter 7 in the United

States Bankruptcy Court, Northern District of Oklahoma, Case No. 94-03561-C. On May 15, 1995, the United States Bankruptcy Court, 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 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 Creek County, Oklahoma, within the Northern Judicial District of Oklahoma:

**West Half of the South Half of the Southwest Quarter of the Southwest Quarter; and the West Half of the South Half of the North Half of the Southwest Quarter of the Southwest Quarter of Section 8, Township 14 North, Range 9 East, Creek County, State of Oklahoma, according to the United States Government survey thereof.**

The Court further finds that on November 7, 1985, Ellis R. Haikey and Gladys J. Haikey executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$27,500.00, payable in monthly installments, with interest thereon at the rate of 11.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Ellis R. Haikey and Gladys J. Haikey executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated November 7, 1985, covering the above-described property, situated in the State of Oklahoma, Creek County. This mortgage was

recorded on November 8, 1985, in Book 196, Page 1204, in the records of Creek County, Oklahoma.

The Court further finds that on August 3, 1993, Ellis R. Haikey and Gladys J. Haikey executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, a Modification and Reamortization Agreement pursuant to which the entire debt due on that date was made principal and the interest rate became 4.00 percent.

The Court further finds that the Defendants, **Ellis R. Haikey aka Ellis Riley Haikey and Gladys J. Haikey aka Gladys Jeanette Haikey**, made default under the terms of the aforesaid note, mortgage and modification and reamortization agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Ellis R. Haikey aka Ellis Riley Haikey and Gladys J. Haikey aka Gladys Jeanette Haikey**, are indebted to the Plaintiff in the principal sum of \$20,479.50, plus administrative charges in the amount of \$440.50, plus penalty charges in the amount of \$10.32, plus accrued interest in the amount of \$464.98 as of October 18, 1994, plus interest accruing thereafter at the rate of 4.00 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, **County Treasurer, Creek County, Oklahoma and Board of County Commissioners, Creek County, Oklahoma**, have liens on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$46.34 which became liens on the property in 1992, 1993, and 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**, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendant, **General Electric Capital Corp.**, has a lien on the property which is the subject matter of this action in the principal amount of \$1,702.67, plus attorney's fees of \$255.00, and costs \$95.00, and interest accruing at the statutory rate, by virtue of judgment against Defendant, Ellis R. Haikey, which was rendered on December 26, 1993, in the District Court of Creek County, Oklahoma, Case No. C-93-620, and recorded on January 6, 1994, in Book 317, Page 1316 in the records of Creek County, Oklahoma. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **General Motors Acceptance Corporation**, has a lien on the property which is the subject matter of this action in the principal sum of \$3,215.17 with interest thereon at the statutory rate per annum, costs of the action, accrued and accruing, and an attorney's fee, by virtue of a Journal Entry of Judgment entered May 16, 1994, in the District Court in and for Tulsa County, State of Oklahoma, Case No. CS 94 00731, filed of record with the County Clerk of Creek County on May 25, 1994, in Book 323 at Page 2105 and filed of record with the County Clerk of Tulsa County on July 20, 1994, in Book 5643, Page 0222. Said lien is inferior to the interest of the Plaintiff, United States of America.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment **in rem** against the Defendants, **Ellis R. Haikey aka Ellis Riley Haikey and Gladys J. Haikey aka Gladys Jeanette Haikey**, in the principal sum of

\$20,479.50, plus administrative charges in the amount of \$440.50, plus penalty charges in the amount of \$10.32, plus accrued interest in the amount of \$464.98 as of October 18, 1994, plus interest accruing thereafter at the rate of 4.00 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.45 percent per annum until paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma, have and recover judgment in the amount of \$46.34, plus penalties and interest, for personal property taxes for the years 1992, 1993, and 1994, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, General Electric Capital Corp., have and recover judgment in the principal amount of \$1,702.67, plus attorney's fees of \$255.00, and costs \$95.00, and interest accruing at the statutory rate, by virtue of a judgment against Defendant, Ellis R. Haikey, rendered on December 26, 1993, in the District Court of Creek County, Oklahoma, Case No. C-93-620, and recorded on January 6, 1994, in Book 317, Page 1316 in the records of Creek County, Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, General Motors Acceptance Corporation, have and recover judgment in the principal sum of \$3,215.17 with interest thereon at the statutory rate per annum, costs of the

action, accrued and accruing, and an attorney's fee, by virtue of a Journal Entry of Judgment entered May 16, 1994, in the District Court in and for Tulsa County, State of Oklahoma, Case No. CS 94 00731, filed of record with the County Clerk of Creek County on May 25, 1994, in Book 323 at Page 2105 and filed of record with the County Clerk of Tulsa County on July 20, 1994, in Book 5643, Page 0222.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, Ellis R. Haikey aka Ellis Riley Haikey and Gladys J. Haikey aka Gladys Jeanette Haikey, 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 the judgment rendered herein in favor of the Defendant, County Treasurer, Creek County, Oklahoma;

**Fourth:**

In payment of the judgment rendered herein in favor of the Defendant, General Electric Capital Corp.;

**Fifth:**

In payment of the judgment rendered herein in favor of the Defendant, General Motors Acceptance Corporation.

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

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

**s/ TERRY C. KERN**

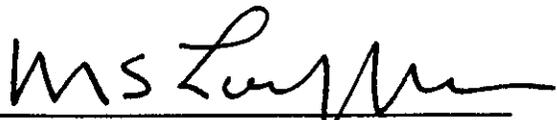
**UNITED STATES DISTRICT JUDGE**

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



**PHIL PINNELL, OBA #7169**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



**MICHAEL S. LOEFFLER, OBA #12753**

Assistant District Attorney

110 West 7th - P.O. Box 567

Bristow, Oklahoma 74010

(918) 367-3331

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Creek County, Oklahoma

**Judgment of Foreclosure**

**Case No. 95-C-493-K**

**PP:css**

  
**JOHN L. COLLINSWORTH, OBA #1818**

1224 North Shartel Avenue  
Oklahoma City, Oklahoma 73103-2433  
(405) 235-3388  
Attorney for Defendant,  
General Electric Capital Corp.

**Judgment of Foreclosure**  
**Case No. 95-C-493-K**

**PP:css**

*Handwritten signature*

**BRIAN J. RAYMENT, OBA #7441**  
7666 East 61st, Suite 240  
Tulsa, Oklahoma 74133  
(918) 254-0623  
Attorney for Defendant,  
General Motors Acceptance Corporation

DEC 9 1995  
N.D.

**Judgment of Foreclosure**  
**Case No. 95-C-493-K**

PP:css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DELBERT F. EPPERSON; MELVA J. )  
 EPPERSON; HAROLD DAVID )  
 SLATTON; CHERYL SLATTON; CHRIS )  
 STEWART; UNKNOWN OCCUPANT )  
 OF 1101 W. 14TH PL, CLAREMORE, )  
 OK. 74017; SERVICE COLLECTION )  
 ASSOCIATION, INC.; COUNTY )  
 TREASURER, Rogers County, Oklahoma; )  
 BOARD OF COUNTY )  
 COMMISSIONERS, Rogers County, )  
 Oklahoma, )  
 )  
 Defendants. )

**FILED**

DEC 8 - 1995

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

Civil Case No. 95-C 389BU

ENTERED ON THE  
DATE DEC 11 1995

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 8<sup>th</sup> day of December, 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, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; the Defendant, SERVICE COLLECTION ASSOCIATION, INC., appears by its Attorney, Fred A. Pottorf; and the Defendants, DELBERT F. EPPERSON, MELVA J. EPPERSON, HAROLD DAVID SLATTON and CHERYL SLATTON, who are the Unknown Occupants of 1101 W. 14th Pl, Claremore, OK. 74017, and CHRIS STEWART, appear not, but make default.

NOTE: THIS JUDGMENT IS NOT VALID UNLESS IT IS FILED WITH THE CLERK OF COURT AND UPON RECEIPT.

The Court being fully advised and having examined the court file finds that the Defendants, HAROLD DAVID SLATTON and CHERYL SLATTON, who are the Unknown Occupants of 1101 W. 14th Pl, Claremore, OK 74017, each signed a Waiver of Summons on May 13, 1995; that the Defendant, CHRIS STEWART, signed a Waiver of Summons on May 29, 1995; that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., signed a Waiver of Summons on May 5, 1995; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on May 5, 1995, by Certified Mail.

The Court further finds that the Defendants, DELBERT F. EPPERSON and MELVA J. EPPERSON, were served by publishing notice of this action in the Claremore Daily Progress, a newspaper of general circulation in Rogers County, Oklahoma, once a week for six (6) consecutive weeks beginning August 22, 1995, and continuing through September 26, 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, DELBERT F. EPPERSON and MELVA J. EPPERSON, 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 abstractor filed herein with respect to the last known addresses of the Defendants, DELBERT F. EPPERSON and MELVA J. EPPERSON. 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, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, filed their Answer on June 12, 1995; that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., filed its Answer on May 10, 1995; and that the Defendants, DELBERT F. EPPERSON, MELVA J. EPPERSON, HAROLD DAVID SLATTON and CHERYL SLATTON, who are the Unknown Occupants of 1101 W. 14th Pl, Claremore, OK. 74017, and CHRIS STEWART, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, DELBERT F. EPPERSON and MELVA J. EPPERSON, are husband and wife. The Defendants, HAROLD DAVID SLATTON and CHERYL SLATTON, are husband and wife, and are the same persons as the Unknown Occupant of 1101 W. 14th Pl, Claremore, OK 74017. The Defendant, CHRIS STEWART, is a single person.

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

**LOT FIFTY-ONE (51), IN BLOCK TWO (2), OF  
MEADOW VIEW ADDITION, AN ADDITION TO THE  
CITY OF CLAREMORE, ROGERS COUNTY,  
OKLAHOMA, ACCORDING TO THE RECORDED PLAT  
THEREOF.**

The Court further finds that on August 14, 1978, Thomas A. Varner and Sherry D. Varner, executed and delivered to FIRST CONTINENTAL MORTGAGE CO., their mortgage note in the amount of \$37,300.00, 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, Thomas A. Varner and Sherry D. Varner, husband and wife, executed and delivered to FIRST CONTINENTAL MORTGAGE CO., a mortgage dated August 14, 1978, covering the above-described property. Said mortgage was recorded on August 16, 1978, in Book 542, Page 530, in the records of Rogers County, Oklahoma.

The Court further finds that on March 11, 1987, COMMONWEALTH SAVINGS ASSOCIATION successor by merger to FIRST CONTINENTAL MORTGAGE CO., assigned the above-described mortgage note and mortgage to COMMONWEALTH MORTGAGE COMPANY OF AMERICA. This Assignment of Mortgage was recorded on July 15, 1987, in Book 764, Page 92, in the records of Rogers County, Oklahoma.

The Court further finds that on August 24, 1991, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., assigned the above-described mortgage note and mortgage to ROUSSEAU MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on September 9, 1991, in Book 862, Page 435, in the records of Rogers County, Oklahoma. A Corrected Assignment of Mortgage Dated May 26, 1993,

recorded on June 18, 1993, in book 919, Page 139, in the records of Rogers County, Oklahoma, was filed to show the proper Assignor of the previously described Assignment of Mortgage.

The Court further finds that on May 10, 1993, ROUSSEAU MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 18, 1993, in Book 919, Page 138, in the records of Rogers County, Oklahoma.

The Court further finds that Defendants, DELBERT F. EPPERSON and MELVA J. EPPERSON, currently hold title to the property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on April 21, 1993, the Defendants, DELBERT F. EPPERSON and MELVA J. EPPERSON, 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, DELBERT F. EPPERSON and MELVA J. EPPERSON, 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, DELBERT F. EPPERSON and MELVA J. EPPERSON, are indebted to the Plaintiff in the principal sum of \$37,226.40, 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, SERVICE COLLECTION ASSOCIATION, INC., has a lien on the property which is the subject matter of this action by virtue of a judgment lien in the amount of \$\$1,871.95 plus court costs, together with interest at the rate of 11.710% per annum, and for attorney's fee in the sum of \$661.00, which became a lien on the property as of December 11, 1991. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, DELBERT F. EPPERSON, MELVA J. EPPERSON, HAROLD DAVID SLATTON and CHERYL SLATTON, who are the Unknown Occupants of 1101 W. 14th Pl, Claremore, OK. 74017, and CHRIS STEWART, 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, Rogers 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, DELBERT F. EPPERSON and MELVA J. EPPERSON, in the principal sum of \$37,226.40, 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 5.45 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, SERVICE COLLECTION ASSOCIATION, INC., have and recover judgment in the amount of \$1,871.95, plus court costs, together with interest at the rate of 11.710% per annum, and attorney's fee in the sum of \$661.00 for its judgment.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, DELBERT F. EPPERSON, MELVA J. EPPERSON, HAROLD DAVID SLATTON and CHERYL SLATTON, who are the Unknown Occupants of 1101 W. 14th Pl, Claremore, OK. 74017, and CHRIS STEWART, 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, DELBERT F. EPPERSON and MELVA J. EPPERSON, 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 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, SERVICE COLLECTION  
ASSOCIATION, INC., in the amount of \$1,871.95, plus court  
costs, together with interest at the rate of 11.710%, and  
attorney's fee in the sum of \$661.00, for its judgment.

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.

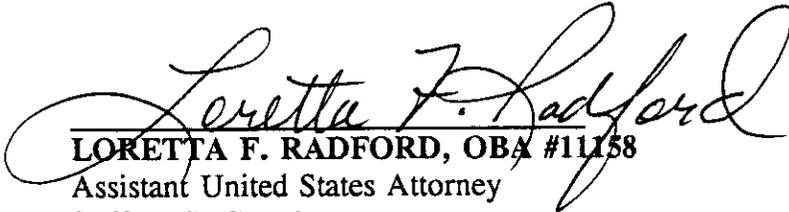
**s/ MICHAEL BURRAGE**

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UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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



**MICHELE L. SCHULTZ, OBA #13771**  
Assistant District Attorney  
219 S. Missouri, Room 1-111  
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Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Rogers County, Oklahoma



**FRED A. POTTORF, OBA #7248**  
1437 South Boulder, Suite 900  
Tulsa, Oklahoma 74119-3609  
(918) 582-3191  
Attorney for Defendant,  
Service Collection  
Association, Inc.,

Judgment of Foreclosure  
Civil Action No. 95 C 389BU

LFR:flv

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
RAYBURN D. ALLEN; JANE E. )  
ALLEN; KUHRTS CONSTRUCTION )  
CO. INC.; COUNTY TREASURER, )  
Rogers County, Oklahoma; BOARD OF )  
COUNTY COMMISSIONERS, Rogers )  
County, Oklahoma, )  
)  
Defendants. )

DEC 8 - 1995

DEC 8 - 1995  
FEDERAL BUREAU OF INVESTIGATION  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED ON DEC 11 1995

Civil Case No. 95-C 548BUNTE DEC 11 1995

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 8<sup>th</sup> day of December

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, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; and the Defendants, RAYBURN D. ALLEN, JANE E. ALLEN and KUHRTS CONSTRUCTION CO., INC., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, RAYBURN D. ALLEN, signed a Waiver of Summons on July 16, 1995; that the Defendant, JANE E. ALLEN, signed a Waiver of Summons on July 16, 1995; that Defendant, COUNTY TREASURER, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on June 19, 1995, by Certified Mail; and that Defendant, BOARD

COPIES OF THIS DOCUMENT SHOULD BE MAILED  
BY THE PARTY RESPONSIBLE FOR MAILING AND  
FILED WITH THE COURT IMMEDIATELY  
UPON RECEIPT.

OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on June 19, 1995, by Certified Mail.

The Court further finds that the Defendant, KUHRTS CONSTRUCTION CO., was served by publishing notice of this action in the Claremore Daily Progress, a newspaper of general circulation in Rogers County, Oklahoma, once a week for six (6) consecutive weeks beginning August 29, 1995, and continuing through October 3, 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 Defendant, KUHRTS CONSTRUCTION CO., INC., and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, KUHRTS CONSTRUCTION CO., INC. 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 party served by publication with respect to its present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by

publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, filed their Answer on June 23, 1995; and that the Defendants, RAYBURN D. ALLEN, JANE E. ALLEN and KUHRTS CONSTRUCTION CO., INC., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, RAYBURN D. ALLEN and JANE E. ALLEN, are the same persons names as grantees (Rayburn D. and Jane E. Allen, Husband and Wife) in a certain warranty deed dated July 26, 1983, and recorded on July 27, 1983, in Book 652, Page 717, in the records of Rogers County, Oklahoma. The Defendants, RAYBURN D. ALLEN and JANE E. ALLEN, 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 Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

**THE EAST 108.6 FEET OF THE NORTH 50 FEET OF  
TRACT SEVEN (7), HOME BUILDERS' SUB-DIVISION,  
AN ADDITION TO THE CITY OF CLAREMORE,  
ROGERS COUNTY, STATE OF OKLAHOMA,  
ACCORDING TO THE RECORDED PLAT THEREOF.**

The Court further finds that on January 26, 1982, Randall Lee Rowland and Julia Ann Rowland, executed and delivered to SHEARSON AMERICAN EXPRESS MORTGAGE CORPORATION, their mortgage note in the amount of \$36,750.00, payable in monthly installments, with interest thereon at the rate of Fourteen and One-Half percent (14.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Randall Lee Rowland and Julia Ann Rowland, husband and wife, executed and delivered to SHEARSON AMERICAN EXPRESS MORTGAGE CORPORATION, a mortgage dated January 26, 1982, covering the above-described property. Said mortgage was recorded on February 3, 1982, in Book 616, Page 837, in the records of Rogers County, Oklahoma.

The Court further finds that on July 31, 1984, SHEARSON AMERICAN EXPRESS MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to THE NEW YORK GUARDIAN MORTGAGEE CORPORATION. This Assignment of Mortgage was recorded on October 9, 1984, in Book 688, Page 176, in the records of Rogers County, Oklahoma.

The Court further finds that on April 18, 1988, The New York Guardian Mortgagee Corp., 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 May 2, 1988, in Book 783, Page 599, in the records of Rogers County, Oklahoma.

The Court further finds that Defendants, RAYBURN D. ALLEN and JANE E. ALLEN, currently hold to the property by virtue of a General Warranty Deed, dated July 26, 1983, recorded on July 27, 1983, in Book 652, Page 717, in the records of Rogers County, Oklahoma. The Defendants, RAYBURN D. ALLEN and JANE E. ALLEN, are the current assumptors of the subject indebtedness.

The Court further finds that on May 1, 1988, the Defendants, RAYBURN D. ALLEN and JANE E. ALLEN, 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 December 1, 1988, June 1, 1989, September 1, 1990, June 1, 1991, June 1, 1992, and July 1, 1993.

The Court further finds that the Defendants, RAYBURN D. ALLEN and JANE E. ALLEN, 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, RAYBURN D. ALLEN and JANE E. ALLEN, are indebted to the Plaintiff in the principal sum of \$61,071.65, plus interest at the rate of 14.5 percent per annum from May 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, RAYBURN D. ALLEN, JANE E. ALLEN and KUHRTS CONSTRUCTION CO., INC., 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, Rogers 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 against the Defendants, RAYBURN D. ALLEN and JANE E. ALLEN, in the principal sum of \$61,071.65, plus interest at the rate

of 14.5 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.45 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, Rogers County, Oklahoma, RAYBURN D. ALLEN, JANE E. ALLEN and KUHRTS CONSTRUCTION CO., INC., 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, RAYBURN D. ALLEN and JANE E. ALLEN, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

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.

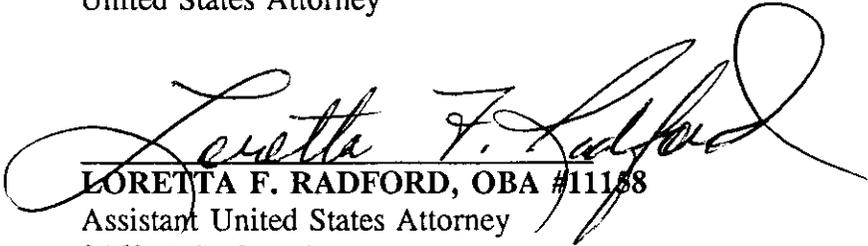
**S/ MICHAEL BURRAGE**

---

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11188**

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463



**MICHELE L. SCHULTZ, OBA #13771**

Assistant District Attorney

219 S. Missouri, Room 1-111

Claremore, Oklahoma 74017

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Rogers County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95 C 548BU

LFR:flv

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

KATHLEEN SCHAUMBURG, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 UNITED SERVICES AUTOMOBILE )  
 ASSOCIATION, a Texas insurance )  
 corporation, USAA FEDERAL )  
 SAVINGS BANK, a federal )  
 banking institution, USAA )  
 CREDIT CARD CENTER, INC., )  
 a Delaware corporation, and )  
 LARRY BUCK, an individual, )  
 )  
 Defendants. )

ENTERED ON DOCKET  
DATE DEC 11 1995

Case No. 95-C-155-BU /

**FILE**

DEC 8 - 1995

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

**ORDER**

On November 17, 1995, this Court entered an Order striking all deadlines and ordering that Plaintiff shall have until December 22, 1995 to obtain new counsel in this matter. The Order stated that if new counsel did not enter his or her appearance by December 22, 1995, the Court shall dismiss this action without prejudice unless Plaintiff informs the Court in writing of her intention to pursue this case on her own behalf.

On December 7, 1995, this Court received a letter from Plaintiff, attached hereto, indicating that she is unable to find an attorney to take her case. In the letter, Plaintiff has requested that her case be dismissed in a manner that would allow her to refile it if she is able to locate counsel. Having reviewed the letter and having considered Plaintiff's request, the Court finds that this case should be dismissed without prejudice to refiling.

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Accordingly, this matter is hereby **DISMISSED WITHOUT PREJUDICE**  
to refiling.

Entered this 8<sup>th</sup> day of December, 1995.

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

December 4, 1995

Michael Burrage  
United States District Judge  
Northern District of Oklahoma  
U.S. Courthouse  
Tulsa, Ok 74103-3819

**RECEIVED**

**DEC 8 1995**

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

Re: Kathleen Schaumburg v. USAA  
Case: 4:95-cv-00155

Dear Judge Burrage:

I have talked to 48 attorneys over the last month and I have been unable to find an attorney to represent me in the above referenced case. The fact that my case is so far along, my previous attorney requested to withdraw and my current financial status has made it very difficult to locate counsel.

I do not believe I will be able to find an attorney willing to take my case. I would like to know how to proceed. My wish would be to dismiss the case but dismiss it in a manner that would allow me to refile if I should be able to locate an attorney at a later date. I have been unable to locate an attorney who would even advise me on this matter. My former attorney has been unwilling to help me.

I understand you are not giving me legal advise on how to proceed with my case but on how to proceed for trial. If it would be best for me to wait until your deadline and let you dismiss the case I will do that. If I need to request the dismissal I will do that. To repeat, I do not know how to proceed. You requested that I keep you informed on my status.

Please advise as soon as possible on what I should do.

Respectfully,

*Kathleen Schaumburg*  
Kathleen Schaumburg  
4900 Medical Dr Apt 1607  
San Antonio, Tx 78229  
210-615-7033

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

ENTERED ON DOCKET

DATE 12-11-95

COMPUTRONICS CONSULTANTS, INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 NeXT COMPUTER, INC., )  
 )  
 Defendant, )  
 )  
 NeXT COMPUTER, INC., )  
 )  
 Counterclaimant, )  
 )  
 v. )  
 )  
 COMPUTRONICS CONSULTANTS, INC., )  
 )  
 Counterclaim Defendant. )

Case No. 95-C-0050-H ✓

**FILED**

DEC 8 1995

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

ORDER

This matter comes before the Court on the Motion for Summary Judgment by Defendant NeXT Computer, Inc. ("NeXT"). Plaintiff Computronics Consultants, Inc. ("CCI") has asserted eleven claims against NeXT: fraudulent misrepresentation, fraudulent concealment, non-disclosure, breach of fiduciary duty, bad faith breach of contract, negligent injury to property (goodwill), negligent interference with contract, tortious interference with contract, tortious interference with prospective economic advantage, breach of Oklahoma antitrust law, and restitution. Additionally, NeXT has asserted four counterclaims against CCI: breach of contract, unjust enrichment, restitution, and conversion. NeXT has moved for summary judgment on each of Plaintiff's claims and on its counterclaims.

I.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

[t]he 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 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment") (emphasis in original). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient;

there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [citation omitted]. If the evidence is merely colorable, [citation omitted], or is not significantly probative, summary judgment may be granted.").

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

## II.

In the first instance, the Court has determined that CCI has not raised "a genuine issue of material fact" sufficient to defeat NeXT's motion. The following facts have been established for purposes of the resolution of NeXT's motion.

In May 1992, pursuant to a written dealer agreement, CCI became an authorized, non-exclusive dealer of NeXT products. On October 21, 1992, the Tulsa Police Department awarded a contract to

CCI to provide it with NeXT computers. To fulfill this contract, CCI ordered and received equipment from NeXT in late 1992 and early 1993. NeXT invoiced CCI over \$156,000 for the equipment, but CCI has never paid the invoices.

In late December of 1992, Steven P. Jobs, Chief Executive Officer and Chairman of the Board of NeXT, and senior managers at NeXT began discussing whether NeXT should discontinue manufacturing computer hardware. Jobs was the only person with the requisite authority to make this decision for NeXT. Over the course of the next few weeks, Jobs, in consultation with senior managers, decided to discontinue hardware manufacture. NeXT publicly announced his decision on February 10, 1993. CCI was notified immediately thereafter.

The contract between the parties provided that:

NeXT reserves the right to change, upgrade and discontinue NeXT Products and NeXT Software from time to time. NeXT shall give Dealer 30 days advance notice prior to discontinuance of any NeXT Product.

It is uncontroverted that NeXT provided the requisite notice to CCI. The agreement also contained an integration clause providing that:

This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and the purchases and sales contemplated hereunder, and supersedes any prior agreements or understandings between the parties, whether written or oral, with respect hereto.

The contract further stated that:

No modification to this Agreement shall be of any force or effect unless incorporated herein by a writing signed by both parties specifically referencing this paragraph.

### III.

CCI has not asserted a breach of contract claim against NeXT, yet CCI's claims are entirely dependent upon the relationship between the two parties, which relationship was established in May of 1992 by way of a written, non-exclusive dealer agreement. The bulk of Plaintiff's claims involve alleged fraudulent misrepresentations, concealments, non-disclosures, and other tortious acts. However, CCI has not presented this Court with evidence of any misrepresentations or other possibly fraudulent acts. Further, CCI has not offered any authority to support the broad proposition that this Court should transform the parties' contractual dealer-distributor relationship into a fiduciary relationship. Finally, CCI has not proffered any defenses--legally cognizable or otherwise--for its refusal to pay NeXT for equipment it admittedly received in late 1992 and early 1993. For these reasons and for the other reasons expressed in this order, the Court grants NeXT's Motion for Summary Judgment on CCI's claims and on its counterclaims in its entirety.

Six of the eleven CCI claims stem from the assertion that CCI was damaged by NeXT's alleged failure to disclose that NeXT was evaluating whether to discontinue hardware production: fraudulent misrepresentation, fraudulent concealment, non-disclosure, breach of fiduciary duty, negligent injury to property--goodwill, and restitution. The only evidence Plaintiff has proffered to substantiate these six claims is three NeXT documents.

The first two documents were generated during the time of NeXT's announcement that it was exiting the hardware manufacturing business. The first states that "[f]or the past year, NeXT has been evolving toward a purely software-driven company, beginning in January 1992 with the announcement of NeXT's plans to port NeXTSTEP to the Intel architecture." This statement does not support Plaintiff's claim that NeXT had been considering leaving the hardware business for some eighteen months prior to the February 1993 announcement. The second is similarly deficient.

The third document is a November 12, 1992 e-mail spreadsheet sent from one NeXT executive to another. The e-mail appears to depict what NeXT's financial picture might look like if it closed hardware manufacturing by mid-1993. On its face, this e-mail demonstrates that a decision to exit hardware manufacturing was not under active consideration at that time. The e-mail states that:

There is still a lot of work to do to validate these assumptions, but knowing the sensitivity of this topic, I wonder if it is worth exploring (on a very quiet basis), the numbers suggest that it is a viable option.

Further, the Supplemental Jobs Declaration demonstrates that Mr. Jobs, the only person with the authority to decide to terminate the hardware line, did not authorize these employees to formulate the spreadsheet. Additionally, Mr. Jobs declares that he has never seen the e-mail prior to the commencement of this litigation. Finally, Mr. Jobs states that he never authorized any financial analysis concerning the possibility of NeXT's exit from the hardware business before late December 1992 or early January 1993.

These three documents do not controvert any of NeXT's evidence demonstrating that NeXT did not take up the decision whether to exit the hardware business before late December 1992 or early January 1993. Under Oklahoma law, which governs Plaintiff's tort claims, CCI must produce some evidence of NeXT's alleged misrepresentations, concealments, or nondisclosures to avoid summary judgment. Because Plaintiff has not produced sufficient evidence with respect to its claims for fraudulent misrepresentation, fraudulent concealment, non-disclosure, negligent injury to property, and restitution, summary judgment on these claims in favor of NeXT is appropriate.

CCI's breach of fiduciary duty claim also asserts that NeXT improperly failed to disclose its alleged consideration of the possibility of the termination of the hardware business. For the reasons discussed above, there is insufficient evidence in the record controverting Defendant's evidence that it was not considering an exit from the hardware line prior to late December 1992 at the earliest.

Further, CCI has not offered any authority supporting its claim that its dealer-distributor relationship with NeXT should be transformed into a fiduciary relationship. Under well-established Oklahoma law, a dealer agreement, such as the contract between CCI and NeXT, does not establish a fiduciary relationship absent "a veritable substitution of the will of the defendant for that of the

plaintiff in material matters involved in the transaction".<sup>1</sup>  
Devery Implement Co. v. J.I. Case Co., 944 F.2d 724, 730-31 (10th Cir. 1991) (applying Oklahoma law) (quoting Sellers v. Sellers, 428 P.2d 230, 236 (Okla. 1967)). Here, no facts suggest that CCI's common commercial dealings with NeXT should be subject to "heightened fiduciary responsibilities." Devery Implement Co., 944 F.2d at 730. Therefore, the Court also grants summary judgment to NeXT on Plaintiff's breach of fiduciary duty claim.

Plaintiff's fifth claim alleges a "bad faith breach of contract". Under either Oklahoma or California law, such a claim is not cognizable. See Devery, 944 F.2d at 728-29 (under Oklahoma law, implied covenant of good faith and fair dealing "cannot trump a bargained-for termination-at-will clause"); Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 679-80 (Cal. 1995). Judgment in favor of NeXT is appropriate on this claim as well.

Plaintiff's seventh claim alleges "negligent interference with contract". However, Oklahoma cases have consistently barred recovery for interference claims based on unintentional, or negligent, conduct. See, e.g., Mac Adjustment, Inc. v. Property Loss Research Bureau, 595 P.2d 427, 428 (Okla. 1979) (trial court should have sustained motion for a directed verdict where evidence

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<sup>1</sup> The Court notes that the agreement itself expressly provided that the parties were not in any special relationship with each other. It states in applicable part as follows:

Dealer is an independent contractor and neither party is a legal representative or agent of the other party for any purpose. . . . [T]his Agreement does not create any agency, employment, partnership, joint venture, franchise or similar relationship between the parties.

failed to establish that defendant maliciously or wrongfully interfered with plaintiff's business); accord Restatement (Second) of Torts § 766C, Comment a (1979) ("Thus far there has been no general recognition of any liability for a negligent interference . . ."). This Court declines to adopt a tort for negligent interference with contract into Oklahoma jurisprudence. For these reasons, the Court grants judgment to NeXT on CCI's seventh claim.

CCI's eighth claim is similarly defective. In CCI's eighth claim, it alleges that NeXT's decision to discontinue production of computer hardware constituted intentional interference with CCI's contract with the Tulsa Police Department. To establish this claim, Plaintiff must allege facts establishing that Defendant's "primary intent" was to interfere with the contract. Morrow Dev. Corp. v. American Bank & Trust Co., 875 P.2d 411, 416-17 (Okla. 1994). Yet CCI has not even claimed that NeXT's primary intent when it decided to discontinue making hardware was to interfere with the CCI-TPD contract. CCI alleges only that NeXT "knew to a substantial certainty" that exiting the hardware business would disrupt the contract. This bare allegation is clearly not sufficient to avoid summary judgment on this claim.

CCI's ninth claim alleges that NeXT kept CCI from selling to two prospective customers by claiming them as NeXT house accounts. CCI claims that, by so doing, NeXT unlawfully interfered with CCI's prospective economic advantage. As in CCI's eighth claim, this claim fails because CCI has neither alleged nor demonstrated that NeXT intended to interfere with CCI's business advantage. See,

e.g., Overbeck v. Quaker Life Ins. Co., 757 P.2d 846, 848-49 (Okla. Ct. App. 1984) (plaintiff failed to state a claim for interference with prospective economic advantage where there was no evidence of "illegal or malicious" conduct). Further, the dealer agreement gives NeXT the absolute right to sell NeXT products directly to any customers. Therefore, the Court grants judgment to NeXT on this claim as well.

Plaintiff's final claim against NeXT attempts to allege an antitrust violation. Plaintiff alleges that NeXT refused to fill CCI's order for a single customer (Wiltel) and, instead, dealt with Wiltel directly as a "house account". CCI claims that this act constitutes a "restraint on competition" and a "monopoliz[ation of] the Wiltel account." However, these allegations do not state a claim under the antitrust laws. The Oklahoma Supreme Court has stated that

[u]ntil a commercial arrangement between parties reaches a stage where commodities needful to the public welfare are restricted commercially to the point where the public is exposed to the evils of monopoly such arrangement is not in restraint of trade within the meaning of the anti-trust laws.

Thomas v. Belcher, 87 P.2d 1084, 1085 (Okla. 1939); e.g., Oakridge Invs., Inc. v. Southern Energy Homes, Inc., 719 P.2d 848, 852 (Okla. Ct. App. 1986) (merely refusing to fill dealer's orders, even if a breach of contract, does not give rise to an antitrust violation). Thus, CCI's "antitrust" claim must also fail.

In conclusion, the manufacturer-distributor relationship between CCI and NeXT must be wholly governed by the non-exclusive agreement between the parties. CCI has alleged no facts

demonstrating that the agreement was not bargained for at arms length by two corporations. Under these circumstances, this Court refuses to invalidate the clear and unambiguous terms of such an agreement. Although Oklahoma law does provide a remedy for tortious acts committed which intentionally interfere with a contract or with another's prospective economic advantage, Plaintiff here has not alleged facts to support such claims. NeXT is therefore entitled to judgment as a matter of law on all of Plaintiff's claims.

#### IV

Finally, NeXT has asserted counterclaims against CCI sounding in breach of contract, unjust enrichment, restitution, and conversion. CCI's failure to pay NeXT for equipment it ordered and received is the allegation underlying all of the counterclaims. CCI admits that it ordered the equipment, received the equipment, and has failed to pay for the equipment. CCI's failure to pay directly contravenes the agreement between the parties, which agreement provides that:

Dealer shall pay each NeXT invoice within 30 days of the date of the invoice. . . . Any overdue amounts shall bear interest at the rate of 2 percentage points over Morgan Guaranty Trust Company's U.S. prime rate on the date such amount becomes overdue, or the highest rate permitted by law, whichever is lower.

CCI has not raised any defenses to NeXT's counterclaims.<sup>2</sup> It is thus clear that CCI is in breach of the parties' agreement and that NeXT is entitled to summary judgment on its counterclaims as a matter of law.

Further, the agreement provides that CCI is liable for the reasonable attorneys fees and costs expended by NeXT to enforce the parties' agreement:

In the event any action is brought with respect to the interpretation or enforcement of this Agreement, the prevailing party in the action shall be entitled to receive from the losing party a reasonable sum for its attorneys fees and costs of litigation.

In sum, the Court grants NeXT's Motion for Summary Judgment (Docket # 31) in its entirety.<sup>3</sup> As a result, NeXT's Motion to Dismiss (Docket # 10) is moot.

IT IS SO ORDERED.

This 8TH day of DECEMBER, 1995.

  
Sven Erik Holmes  
United States District Judge

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<sup>2</sup> Instead, CCI merely asserts that "these claims should be treated as claims of set off for any amount which may be due to NeXT as a result of the relationship between CCI and NeXT."

<sup>3</sup> On November 13, 1995, NeXT moved to amend its counterclaims. At the time of ruling on this summary judgment motion, the motion to amend counterclaims had not yet been fully briefed. At the motion hearing held on December 1, 1995, NeXT withdrew its motion to amend counterclaims (Docket # 58).

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

PATRICIA WORLAND and  
ROBERT WORLAND,

Plaintiffs, )

v. )

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant. )

No. 95-CV-394-K

ENTERED ON BOOKET  
DATE ~~DEC 11 1995~~

**FILED**

DEC 08 1995

ORDER OF DISMISSAL WITH PREJUDICE

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

NOW ON this 7 day of December, 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/ TERRY C. KERN

United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED  
IN OPEN COURT

DEC 11 1995

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

Case No. 94-C-820-K

ENTERED ON COURT  
DATE DEC 11 1995

SUN COMPANY, INC., (R & M), a  
Delaware corporation, and TEXACO INC.,  
a Delaware corporation,

Plaintiffs,

vs.

BROWNING-FERRIS, INC., a Delaware  
corporation, successor in interest to Tulsa  
Container Services, Inc.; et al.

Defendants.

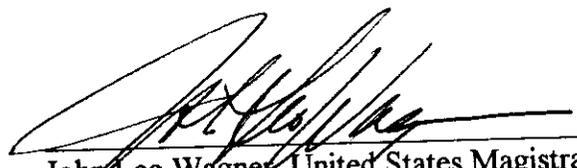
ORDER

NOW on this 8th day of December 1995 comes on for hearing the Application for Attorney Fees for Group II Counsel which was filed by Terence P. Brennan, Liaison Counsel for the Group II Defendants, on November 8, 1995.

No objections have been filed with respect to said Application and no objection is made in open Court.

The Court finds that said Application is in compliance with the rules of this Court; that the fees and charges set forth therein are reasonable and proper in all respects; and that said Application should be approved.

IT IS THEREFORE ORDERED that the above-referenced Application be and the same is hereby approved, and Liaison Counsel is hereby authorized and ordered to pay the same forthwith from the Group II Defendants' Liaison Counsel Trust Account.

  
John Leo Wagner, United States Magistrate Judge

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