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The undersigned counsel, on behalf of Melvin Bailey, Jr., defendant-appellant, for his opening brief states:

STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Oklahoma had jurisdiction over this matter pursuant to 18 U.S.C. § 3231. Mr. Bailey was convicted after trial of possession of cocaine base with intent to distribute, possession of cocaine with intent to distribute and maintaining a drug involved premises.

After sentencing, the judgment and commitment order was entered on the docket on October 29, 2008. (v. 1, doc. 74). The notice of appeal was timely filed in accordance with Rule 4(b)(1), F.R.A.P., on November 3, 2008. (v. 1, doc. 75). This appellate court's jurisdiction derives from 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

THE DISTRICT COURT IMPROPERLY ADMITTED EVIDENCE AT TRIAL THAT WAS SEIZED FROM 2304 NORTH BOSTON PLACE, IN TULSA, OKLAHOMA, THROUGH THE USE OF AN INVALID SEARCH WARRANT.

THE DISTRICT COURT IMPROPERLY ADMITTED VOICE IDENTIFICATION TESTIMONY BY OFFICER JEFF HENDERSON

STATEMENT OF THE CASE

The government obtained an indictment against Mr. Bailey, charging him with possession of cocaine base with intent to distribute (Count I) in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(iii); possession of cocaine with intent to distribute (Count II) in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C); and maintaining a drug involved premises (Count III), in violation of 21 U.S.C. § 856. (v. 1, doc. 2).

Prior to trial, Mr. Bailey filed numerous motions requesting the suppression of evidence seized pursuant to a search warrant obtained by the Tulsa Police Department, arguing the evidence was seized in violation of Mr. Bailey's constitutional and statutory rights. (v. 1, docs. 15, 28). A hearing was held on the matter, (*Attachment 5*), and Magistrate Judge Paul Cleary filed a Report and Recommendation denying the motion to suppress with regard to the search warrant, but finding evidence unlawfully seized by an affiant officer on a previous encounter with Mr. Bailey should not be used to support an alleged "corroboration" of an informant's information. (*Attachment 2*). Magistrate Cleary further noted the recklessness of various acts by the police officers involved. (*Attachment 2*). Judge James H. Payne, in his order and opinion, adopted Magistrate Cleary's recommendations, except as to the prior "corroborating" encounter with Mr. Bailey. Judge Payne permitted some, but not all of the evidence obtained in that prior encounter to be utilized at trial. (*Attachment 3*).

Also prior to trial, Mr. Bailey filed a motion in limine, requesting the exclusion of evidence in the form of a telephone call made by Officer Jeff Henderson to Mr. Bailey with the assistance of an informant. (v. 1, doc. 57). Judge Payne permitted the testimony, and at trial, Officer Henderson was permitted to testify that he recognized Mr. Bailey's voice over the speakerphone of a cellular telephone, even though he had not personally spoken with Mr. Bailey in at least 6 years. (v. 2, doc. 85 at 278-305).

At trial, the government presented its case largely through the testimony of Tulsa Police Department Officers who were involved in obtaining and/or carrying out the search warrant in question. At the conclusion of trial, the jury found Mr. Bailey guilty of

all three counts against him. (v. 2, doc. 88 at 473-474). The Court imposed a term of 360 months imprisonment. (v. 2, doc. 87 at 11-15).

STATEMENT OF THE FACTS

This case began with a violation of Defendant Melvin Bailey, Jr.'s constitutional rights. As a reformed former gang member, Mr. Bailey actively worked in his community to steer children away from the dangers of gang violence. He was trying to change his once troubled life. However, although Mr. Bailey had not been involved in gang activity for many years, the Tulsa Police Department would never allow him to escape his troubled past. The search conducted at 2304 North Boston Place, in Tulsa, Oklahoma, during which Mr. Bailey's Fourth Amendment rights were violated, is simply the latest example of Mr. Bailey's inability to escape his past in the eyes of Tulsa law enforcement.

The Story of Melvin Bailey, Jr.

In his youth, Melvin Bailey, Jr., did not lead an upstanding life. He was involved in a gang, and he has prior criminal convictions as a result of his involvement in that gang. (v. 1, doc. 20; *Attachment 4*). Upon leaving prison in 2001, however, Mr. Bailey vowed to clean up his life. He obtained his GED while in prison (*Attachment 4*), and he was dedicated to making a positive difference in his community. He attempted to steer youth in his community away from the gang lifestyle which he himself had survived. (v. 2, doc. 85 at 240-241). In fact, as testified by Officer Sean Hickey, who is with the organized gang unit of the special investigations division of the Tulsa police department,

Mr. Bailey had not even identified himself with a gang since 1992 - approximately 16 years prior to this trial. (v. 2, doc. 85 at 240).

While Mr. Bailey relinquished his gang activity, the police simply could not disassociate him from his sordid past. Officer Hickey could point to no current evidence whatsoever that Mr. Bailey was involved in a gang during the three years immediately preceding his trial. (v. 2, doc. 85 at 244-245). Under the guidelines utilized by the Tulsa Police Department for maintaining a master "list" of gang members, if a person fails to meet the criteria for gang involvement for 12 months, his name is placed in an inactive file, and if he fails to meet the criteria for 24 months, his name is completely purged from the "list". (v. 2, doc. 85 at 242). Under these guidelines, Mr. Bailey's name should definitely have been removed from the "list" - but it was not.

In the years since his release from prison in 2001, Mr. Bailey actually *assisted* the police in steering the city's youth away from gangs, (v. 2, doc. 85 at 223-224; 240-241), yet not even this was enough to convince law enforcement that he was a changed man. This mindset is evident, and is clearly demonstrated by the testimony of Officer Hickey, who examined a Tulsa World newspaper article depicting Mr. Bailey's efforts in the community to help youth, but chose only to see the orange shoelaces he was wearing in the photograph as a "gang symbol." (v. 2, doc. 85 at 223-224).

Mr. Bailey also cleaned up his personal life. He started his own construction business - Bailey Construction (*Attachment 5* at 14-25) - and he worked in and received proceeds from a night club - Club Fahrenheit. (v. 1, doc. 72; *Attachment 5* at 112-113). He entered into a committed relationship with a girlfriend - Tiara Crawford - for a period

of about two years, and he stayed with her most nights. (*Attachment 5* at 118-119; doc. 86 at 398-400). In all, Mr. Bailey's life was heading in the right direction.

Perhaps it was because his name was never purged from the master "list" of gang members, or perhaps it was because Tulsa police officers simply could not forget the bad acts previously committed by Mr. Bailey, but the police simply would not allow Mr. Bailey to continue on a positive road. They were determined that, due to his past behavior, he did not deserve a second chance to do good things in this world. This was evident in the attitude of Prosecutor Litchfield himself, when he made the off-handed comment at Mr. Bailey's trial, in response to testimony regarding Mr. Bailey's positive efforts to help the city's youth, "Not a real good citizen then, is he?" (v. 2, doc. 85 at 249).

The Story of this Investigation

Mr. Bailey's past provides the backdrop for an investigation filled with lies, reckless statements and omissions. In a prior and unrelated encounter, the Tulsa police, with conflicting stories, claim that Mr. Bailey corroborated the testimony of an informant, whose reliability was otherwise questionable. Furthermore, the warrant upon which the search of 2304 North Boston Place occurred was itself flawed. Additionally, at trial, when exculpatory testimony was available, both the government and Mr. Bailey's own attorney failed to properly investigate whether someone else actually committed the crimes for which Mr. Bailey is currently imprisoned.

A Prior Encounter

Depending upon whose story we believe, either "a couple of months," or "a few weeks" prior to the execution of the search warrant on 2304 North Boston

Place,¹(*Attachment 2; Attachment 5* at 76-85, 91-100, 135-142), Mr. Bailey was with his friend, Tommy Mahan, at or near 205 Mohawk Blvd., in Tulsa, Oklahoma, taking the measurements of a house. Mr. Mahan was doing some work on the house, and he wished to subcontract out some of that work to Mr. Bailey's construction business. (*Attachment 2; Attachment 5* at 14-28). Also present nearby was either a "large group" of individuals, or four to five people² - again, depending upon which police testimony we believe. (*Attachment 2; Attachment 5* at 76-85, 91-100, 135-142). Some of these people were assisting Mr. Mahan and Mr. Bailey, but most were just milling around the convenience store located next door. (*Attachment 5* at 14-28).

The police approached, either with lights on or lights off,³ and requested that everyone who was present sit on a nearby retaining wall and remove their shoes and socks. (*Attachment 2; Attachment 5* at 14-28, 76-85, 91-100, 135-142). Mr. Bailey spoke with Officer Jason Muse, and questioned why these people were being forced to sit on a wall. (*Attachment 5* at 14-28, 76-85, 91-100, 135-142). Officer Muse asked if Mr. Bailey had any weapons, and conducted a pat-down search, restraining Mr. Bailey's hands above his head during the process. (*Attachment 2; Attachment 5* at 76-85, 91-100, 135-142). Mr. Bailey told Officer Muse that he could search his vehicle, and Officer Matt Snow conducted the vehicle search. (*Attachment 2; Attachment 5* at 76-85, 91-100, 135-142).

¹ Officer Jason Muse testified the events occurred a "couple of months" prior to the execution of the warrant, while Officer Matt Snow testified they occurred a "few weeks" prior to the execution of the warrant.

² Officer Muse testified there was a "large group" of people present, while Officer Snow testified there were 4 to 5 people.

³ Officer Matt Snow testified the police officers approached with their lights on, while Officer Jason Muse testified he and three other officers in police vehicles approached with their lights off.

During this encounter at 205 Mohawk Blvd., Officer Muse claims to have discovered money in Mr. Bailey's wallet during a pat-down. (*Attachment 2; Attachment 5* at 76-85, 91-100). Officer Snow, who searched Mr. Bailey's car, claims to have discovered a diagram depicting a "secret compartment" in a vehicle. (*Attachment 2; Attachment 5* at 76-85, 91-100, 135-142). Officer Muse claims that Mr. Bailey told him that he lived at 2304 North Boston Place, and that he, "lived there alone." (*Attachment 2; Attachment 5* at 76-85, 91-100). Mr. Bailey was not arrested as a result of the activities which transpired at 205 Mohawk Blvd., and nothing was seized as a result of the encounter. (*Attachment 2; Attachment 3, Attachment 5* at 76-85, 91-100, 135-142).

Prior to trial, Mr. Bailey sought to exclude evidence of this prior encounter. (v. 1, doc. 15). After a hearing on the matter, (*Attachment 5*), Magistrate Judge Paul J. Cleary, found that, "...a reasonable person would not believe that he was free to leave and that the encounter was an investigative detention and not a consensual encounter."(*Attachment 2*). He further found that Officer Muse, "...exceeded the scope of his pat-down search of Bailey." (*Attachment 2* at 15). As a result, he excluded the money found on Mr. Bailey's person during the pat-down, and further excluded the diagram found within Mr. Bailey's vehicle because there was, "...no lapse between the illegal detention and Bailey's alleged consent to search his vehicle and no intervening circumstances." (*Attachment 2* at 17-18). Because the Magistrate found that Mr. Bailey's Fourth Amendment rights were violated during the encounter, he did not consider the references to that encounter in determining whether Officer Muse's affidavit established probable cause for the search of 2304 North Boston Place. (*Attachment 2* at 18-19).

In adopting the Magistrate's Report and Recommendation, however, Judge James Payne independently found that Mr. Bailey's encounter with police was consensual, even though he still found that Officer Muse, "exceeded the scope of consent when - after verifying the wallet was indeed a wallet - he opened the wallet to examine its contents." (*Attachment 3* at 10). The money found on Mr. Bailey at 205 Mohawk Blvd. was therefore still excluded by Judge Payne, but the diagram found in Mr. Bailey's car was permitted, because it was not, "causally connected to, or in any way an exploitation of, the prior illegal search of Bailey's wallet." (*Attachment 3* at 12).

Magistrate Cleary purged any reference to 205 Mohawk Blvd. from the affidavit upon which the search warrant was based (*Attachment 2*), but it is unclear to what extent Judge Payne considered the alleged statement by Mr. Bailey that he resided at 2304 North Boston Place, and that he "lived alone." This is a critical corroborating fact, considering the reliability issues surrounding the informant in this case.

The Informant

Either on November 24th or November 25th 2007, again depending upon which story we believe,⁴ Officers Muse and Snow allegedly encountered Felicia Witherspoon⁵ - a known drug offender with a substance abuse problem - standing on the corner of Virgin and Cincinnati, in Tulsa Oklahoma. (*Attachment 1*; *Attachment 5* at 25-34, 44-50, 133-135, 143-155). Neither Officer Muse nor Officer Snow articulated any reason for Ms.

⁴ The affidavit for search warrant recounts a conversation wherein Ms. Witherspoon stated she purchased drugs from Mr. Bailey at 6 p.m. on November 24th, but Officer Muse initially testified that he actually encountered Ms. Witherspoon on November 24th. (*Attachment 1*; *Attachment 5* at 30-31)

⁵ It is unclear whether Officers Muse and Snow were riding in the same patrol car when this encounter occurred. The officers' testimony conflicted again on this subject.

Witherspoon's stop other than "a pedestrian violation." (*Attachment 5* at 25-34, 44-50, 133-135, 143-155). While both officers testified that Ms. Witherspoon was carrying a crack pipe, and had a misdemeanor warrant for her arrest, neither of these facts became apparent until *after* the officers had stopped Ms. Witherspoon. (*Attachment 5* at 25-34, 44-50, 133-135, 143-155). The officers did not collect the crack pipe that she was allegedly carrying. They also did not collect a small baggie containing what they claim appeared to be drug residue. In fact, Ms. Witherspoon was not even arrested for the outstanding warrant she was facing.⁶ (*Attachment 5* at 25-34, 44-50, 133-135, 143-155).

The officers testified, and Officer Muse declared in his affidavit, that Ms. Witherspoon told them of a drug purchase she witnessed at 2304 Boston Place, and that Mr. Bailey was the person who sold those drugs. (*Attachment 1*; *Attachment 5* at 25-34, 44-50, 133-135, 143-155). Ms. Witherspoon herself testified, however, that she never even encountered the police officers, and that she certainly did not direct them to a house where drugs were purchased. (*Attachment 5* at 29-52).

The Warrant

The warrant pursuant to which 2304 North Boston Place was searched was obtained with an affidavit which: (1) improperly described the premises to be searched,⁷ (2) largely relied information provided by an informant - Felicia Witherspoon - with 11 prior drug arrests, who was likely high on drugs at the time, and denies ever speaking

⁶ It was later learned that Ms. Witherspoon's outstanding warrant was for a felony - not a misdemeanor as the police testified. (*Attachment 5* at 33-34).

⁷ The affidavit describes a brick house which was painted tan and a brown composition shingle roof, with a glass storm door. (*Attachment 1*). In fact, as testified by the owner of the house - Genevieve Bailey - the house is stucco with a brown roof, and there are bars on the storm door. (*Attachment 5* at 20-21).

with police officers or directing them to 2304 North Boston Place,⁸ (3) provided an incorrect physical description of Mr. Bailey,⁹ (4) utilized information from a prior encounter at 205 Mohawk Blvd. which should have been purged,¹⁰ (5) described surveillance activity which could not possibly have occurred given the time constraints of the investigation and the conflicting testimony of the officers involved,¹¹ (6) described an act of watching Mr. Bailey open the door to let in pedestrians when in fact the affiant never physically saw Mr. Bailey,¹² (7) contained the incorrect year on its face,¹³ and (8) was largely based upon Mr. Bailey's past - namely information provided by Officer Jeff Henderson - who had prior dealings with the Mr. Bailey before he changed his ways.¹⁴

These elements combined lead to the inevitable conclusion that the warrant issued for the search of 2304 North Boston Place was facially invalid. Removing the problematic elements above, we are left only with an officer who occasionally witnessed out-of-state vehicles coming and going from a residence over the Thanksgiving weekend.

⁸ The affidavit describes Ms. Witherspoon "driving" the officers to the house. (*Attachment 1*). Ms. Witherspoon herself testified that she never encountered the police officers during the time frame involved. (*Attachment 5* at 29-52).

⁹ The affidavit describes Mr. Bailey as around 160 to 180 pounds. (*Attachment 1*). In fact, Mr. Bailey's presentence investigation report indicates that he weighs approximately 220 pounds. (*Attachment 4*).

¹⁰ The affidavit contains information regarding the money discovered on Mr. Bailey at 205 Mohawk Blvd. (*Attachment 1*). Judge Payne subsequently ruled that such evidence should not be taken into consideration. (*Attachment 3*).

¹¹ The affidavit describes surveillance activity taking place over a period of 72 hours prior to the affidavit preparation. (*Attachment 1*). The testimony of Officers Muse and Snow conflicts with regard to how much surveillance activity actually took place, (*Attachment 5* at 37-42, 108-109, 151-155), and given the time constraints between meeting Ms. Witherspoon sometime after November 24th at 6:00 p.m. and preparing the affidavit on November 26, 2007, at 3:05 p.m., 72 hours of specific surveillance is implausible.

¹² The affidavit describes pedestrian traffic approaching 2304 North Boston Place and, "being let inside by Melvin Bailey Junior." (*Attachment 1*). In fact, under oath at the suppression hearing, Officer Muse testified that he never actually saw Mr. Bailey letting people into his house. (*Attachment 5* at 42-44).

¹³ The affidavit is dated 2006, when in fact the year was 2007. (*Attachment 1*).

¹⁴ Officer Muse spoke with Officer Henderson, who had no specific knowledge regarding these actual events, and obtained information regarding Mr. Bailey's past dealings, when he was involved in gang activity. (*Attachment 5* at 34-37). In fact, Officer Muse included information provided by Officer Henderson in the affidavit itself. (*Attachment 1*).

Exculpatory Testimony Swept Under the Rug

The Tulsa Police Department was consumed with "catching" Mr. Bailey doing something wrong. At the same time, the government, in this case, had no problem turning a blind eye to a man who wanted to do the right thing, and tell the truth.

As discussed above, Mr. Bailey had a girlfriend - Tiara Crawford - and he stayed with her most nights during the timeframe involved herein. (*Attachment 1* at 118-119; doc. 86 at 398-400). Because Mr. Bailey no longer stayed the night at 2304 North Boston Place, he was a kind neighbor, and he permitted Fred Chapelle - a gentleman who lived across the street, who he had known for 20 years, who was enduring a messy divorce - to stay at his place. (v. 2, doc. 86 at 420-425).

At trial, despite no requirement to do so, counsel for Mr. Bailey announced to the government and the Court that he would be introducing the testimony of Fred Chapelle, who would testify that he was the one residing at the house, and he was the one who owned the drugs. (v. 2, doc. 86 at 382-387). The government immediately threatened to prosecute Mr. Chapelle (v. 2, doc. 86 at 385), and the Court saw to it that a public defender was appointed.¹⁵ (v. 2, doc. 86 at 386-394). Even after speaking with the public defender - Ms. McMurray - Mr. Chapelle was undecided about whether or not he wished to come forward. (v. 2, doc. 86 at 389).

Fed. R. Crim. Pro. 2 admonishes that the rules are, "to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay." By

¹⁵ It should be noted that counsel for Mr. Bailey advised Mr. Chapelle to consult an attorney, but he refused.

informing the Court and the government of his intentions to introduce exculpatory testimony, Mr. Bailey's attorney failed to fulfill the spirit of Fed. R. Crim. Pro. 2, and further failed to provide justice for his client.

SUMMARY OF THE ARGUMENTS

Mr. Bailey was improperly convicted of Counts I, II and III against him because the evidence seized from 2304 North Boston Place, in Tulsa, Oklahoma, should have been excluded as a product of an unconstitutional search. Furthermore, the testimony of Officer Jeff Henderson regarding the identification of Mr. Bailey's voice should have been excluded as unreliable and prejudicial.

THE DISTRICT COURT IMPROPERLY ADMITTED EVIDENCE AT TRIAL THAT WAS SEIZED FROM 2304 NORTH BOSTON PLACE, IN TULSA, OKLAHOMA, THROUGH THE USE OF AN INVALID SEARCH WARRANT

Several problems existed with the affidavit and search warrant pursuant to which the search of 2304 North Boston Place was conducted. The Fourth Amendment provides for the right of people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures. The law provides for the suppression of evidence secured as a result of a Fourth Amendment violation. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341 (U.S.1914).

Under the Fourth Amendment, Federal courts and officers are under such limitations and restraints in the exercise of their power and authority as to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizure under the guise of law.

The protection of the Fourth Amendment reaches all alike, whether accused of crime or not and the duty of giving it force and effects obligatory on all entrusted with the enforcement of Federal laws.

The tendency of those executing Federal criminal laws to obtain conviction by means of unlawful seizures and enforced confessions in violation of Federal rights is not to be sanctioned by the courts, which are charged with the support of constitutional rights.

While the efforts of the courts and their officials to bring the guilty to punishment are praiseworthy, they are not to be aided by sacrificing the great fundamental rights secured by the Constitution.

Id at 390.

The evidence in this case should have been suppressed because it was seized in violation of Mr. Bailey's Fourth Amendment rights. The search warrant pursuant to which the search was conducted failed to specify with sufficient particularity the property to be searched. The evidence unlawfully seized by the affiant officer - Officer Muse - on a previous encounter also should not have been used to support an alleged "corroboration" of an informant's information. Finally, the affiant who obtained the search warrant for the premises either falsified information provided to him by a named informant, or acted with reckless disregard for the truth under the standard outlined in Franks v. Delaware, 438 U.S. 154 (1978). See U.S. v. Cortina, 630 F.2d 1207 (7th Cir. 1980); U.S. v. Davis, 714 F.2d 896 (9th Cir. 1983); U.S. v. Leon, 468 U.S. 897 (1984).

The Legal Standard

When reviewing an order granting or denying a motion to suppress, the appellate court accepts the district court's factual findings unless they are clearly erroneous, and it views the evidence in the light most favorable to the district court's determination. See United States v. Doyle, 129 F.3d 1372, 1375 (10th Cir.1997). However, the ultimate determination of reasonableness under the Fourth Amendment is a question of law which

the appellate court reviews *de novo*. United States v. Hunnicutt, 135 F.3d 1345, 1348 (10th Cir.1998). See U.S. v. Caro, 248 F.3d 1240, 1243-1244 (C.A.10 (Utah) 2001).

The Warrant Failed to Specify with Particularity the Property to be Searched

Both the affidavit and the warrant upon which this search was conducted failed to state with particularity the place to be searched. The house located at 2304 North Boston Place is constructed of brown stucco - not tan painted brick. The roof on the house is light-colored - not brown. The search warrant describes a glass storm door, when in fact, the door on the house located at 2304 North Boston Place has heavy bars. There is no mention of security cameras on the house, when they are clearly visible from the street. If the affiant had conducted surveillance on the property, as he stated in his affidavit and testified at the suppression hearing, he would have clearly noticed these differences.

The sufficiency of the description contained in the warrant is determined by asking whether executing officers would be able to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that other premises might be mistakenly searched. U.S. v. Lora-Solano, 330 F.3d 1288 (10th Cir. 2003); Steele v. U.S., 267 U.S. 498 (1925); Anderson v. Maryland, 427 U.S. 463 (1976). When the description in the warrant is so ambiguous, however, that it allows officers to speculate about whether they are reasonably certain that the place is correctly described, a violation of the Fourth Amendment may arise.

...depending on the circumstances of the particular case, a warrant may be so facially deficient - *i.e.*, in failing to particularize the place to be searched or the things to be seized - that the executing officers cannot reasonably presume it to be valid.

U.S. v. Leon, 468 U.S. 897, 899 (1984).

In Groh v. Ramirez, 540 U.S. 551 (2004), a case in which the warrant described the dwelling to be searched as simply a “single dwelling residence ... blue in color,” and failed to specify the items to be seized, the Supreme Court held that the particularity requirement had not been met. The Sixth Circuit also stated, in United States v. Lemmens, 527 F.2d 662, 666 (6th Cir. 1976), that, "...the Fourth Amendment ‘safeguard is designed to require a description which particularly points to a definitely ascertainable place so as to exclude all others.’(Citation omitted)."

The District Court erroneously decided that these descriptive differences were insignificant. Considering that no numbers were on the house itself (v. 1, doc. 18 (attachment B)), the Court's conclusion that a correct address with physically absent markers (i.e., no display of numbers) and *partially* correct descriptors cured deficiencies in particularity was improper.

Evidence from a Previous Encounter with the Defendant Should be Excluded

Evidence unlawfully seized by the affiant officer on a previous encounter with Mr. Bailey at 205 Mohawk Blvd. was improperly used to corroborate the otherwise conflicting information provided by the affidavit informant, Felicia Witherspoon. Statements acquired through the 205 Mohawk Blvd. encounter between Officer Muse and Mr. Bailey were used to bolster the strength of the affidavit itself, since Officer Muse admitted at the suppression hearing that he did not actually see Mr. Bailey open the door of 2304 North Boston Place so that pedestrian traffic could enter and allegedly purchase drugs. Without the statement given at 205 Mohawk Blvd. that Mr. Bailey "lived at 2304

North Boston Place," and that he "lived alone," there would be no basis for the warrant or the charges against Mr. Bailey aside from the reliance upon the uncorroborated testimony of an informant with 11 prior drug convictions.

Magistrate Cleary and Judge Payne differed in their opinions regarding what actually transpired at 205 Mohawk Blvd., and as a result, what evidence should be admitted and what should be purged from the Affidavit for Search Warrant.¹⁶ Through the examination of Magistrate Cleary's Report and Recommendation and Judge Payne's Opinion and Order, however, it appears that any statement made by Mr. Bailey that he "lived alone" at 2304 North Boston Place was suppressed by the Court's ruling. Magistrate Cleary purged any reference to, or evidence obtained from the encounter at 205 Mohawk Blvd., and declined to consider it in making a probable cause determination. (*Attachment 2* at 6-19). Judge Payne determined that evidence of money contained within Mr. Bailey's wallet should be suppressed, but a diagram found in Mr. Bailey's car was admissible. (*Attachment 3* at 7-12). Judge Payne's order mentioned nothing about the statement by Mr. Bailey that he "lived alone," however and the order otherwise adopted the Report and Recommendation of Magistrate Cleary. (*Attachment 3* at 13). Judge Payne noted that, like Magistrate Cleary, he declined to consider the 205 Mohawk encounter or Officer Muse's statement that he witnessed Mr. Bailey opening the door to 2304 North Boston Place in making his probable cause determination.

The consideration of 205 Mohawk Blvd. for purposes of affiant reliance in obtaining the warrant itself is discussed in further detail below. Any reference to the 205

¹⁶ These facts are more fully outlined in the Statement of Facts section, above.

Mohawk Blvd. encounter (including the diagram) should have been purged from consideration at trial, however. Admission of testimony surrounding the events occurring at 205 Mohawk Blvd. and admission of the diagram was clearly erroneous and prejudicial to Mr. Bailey. This is so because under the principles of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the reasonableness of a search or seizure depends on "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Id at 20. *See U.S. v. Holt*, 264 F.3d 1215, 1220 (C.A. 10 (Okla.) 2001).

The conflicting testimony of two officers who were present during the 205 Mohawk Blvd. encounter demonstrates the lack of reasonable relation in scope to the circumstances.¹⁷ Mr. Bailey was not even arrested as a result of this remote encounter. As such, even reference to the diagram should have been excluded, and inclusion of any reference to the 205 Mohawk encounter at Mr. Bailey's trial constituted prejudicial error.

***The Search of 2304 North Boston Place was Improper under
the Franks Standard***

Under the standard articulated in Franks v. Delaware, 438 U.S. 154 (1978), Officer Muse, who obtained the search warrant for the 2304 North Boston Place, either falsified information provided to him by a named informant, or acted with reckless disregard for the truth. The affidavit is fraught with inconsistencies, inaccurate information and omissions such that it cannot reasonably be relied upon under the totality of the circumstances.

¹⁷ As outlined in the Statement of Facts, above, the officers' testimony conflicted in every area - from how many people were present, to whether their lights were turned on, to even when the actual encounter occurred.

Pursuant to Franks, where a defendant makes a substantial preliminary showing that a false statement "knowingly and intentionally," or "with reckless disregard for the truth," was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. Franks at 155-156. If, at that hearing, the allegation of false statements or reckless disregard "is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Franks at 156.

Mr. Bailey was not afforded the proper protection under Franks. At the suppression hearing, it was clearly established by a preponderance of the evidence that information obtained from the encounter at 205 Mohawk Blvd. that Mr. Bailey "lived alone" at 2304 North Boston Place, and a statement in the affidavit by Officer Muse that he physically saw Mr. Bailey open the door to 2304 North Boston Place while conducting surveillance were either false or made with a reckless disregard for the truth. Magistrate Cleary and Judge Payne declined to consider these items in making their probable cause determinations. The remaining affidavit, after purging these items, is woefully inadequate, however, and the District Court erred in determining that it was sufficient to establish probable cause.

After removing the statement obtained from 205 Mohawk Blvd., and the affidavit statement by Officer Muse that he physically saw Mr. Bailey open the door to 2304 North

Boston Place, which he admitted under oath was false, the remaining affidavit stands upon a telephone conversation between Officer Muse and Officer Jeff Henderson regarding things Mr. Bailey had done in the remote past, officers viewing out-of-state license plates at a residence over the Thanksgiving weekend, and the uncorroborated testimony of an informant with a substance abuse problem and eleven prior convictions.

Because the affidavit omitted critical information with regard to the encounter with Ms. Witherspoon, the affidavit lacks probable cause. In the alternative, even if the officers did not commit an "omission" by failing to relay critical information with regard to their encounter with Ms. Witherspoon, the officers made false statements and or showed a reckless disregard for the truth both in dealing with Ms. Witherspoon and in executing the affidavit.

Omissions by Officer Muse with Regard to Informant

Officers Muse and Snow allegedly encountered Felicia Witherspoon on November 24th or 25th, 2007, as more fully discussed in the Statement of Facts, above. They eventually determined she had an outstanding warrant against her, and was carrying a crack pipe and a baggie containing drug residue. Officers Muse and Snow both assert that the outstanding warrant against Ms. Witherspoon was for a misdemeanor, but it was later learned that it was an outstanding felony warrant.

In Oklahoma, pursuant to 22 Okl.St. Ann. § 172, "...a warrant of arrest is an order in writing, in the name of the state, signed by a magistrate, ***commanding the arrest*** of the defendant." (*emphasis added*). Warrants must contain the following language:

...you are therefore *commanded* forthwith to arrest the above named C. D. and bring him before me at (naming the place), or, in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

(*emphasis added*).

When encountering Ms. Witherspoon, therefore, especially since she faced a felony warrant, Officers Muse and Snow had no discretion in whether or not to arrest her. They were *commanded* to arrest her. After discovering the warrant, and further discovering drug paraphernalia on Ms. Witherspoon, however, they chose not to make an arrest. Likely in an effort to avoid arrest, after being forced to sit in a police vehicle for a period of 15-20 minutes, the officers allege that Ms. Witherspoon provided them with information about Mr. Bailey. Even if this were true, Officer Muse conveniently failed to mention the "deal" he had struck with Ms. Witherspoon in his affidavit.

Officer Muse's failure to mention that he offered Ms. Witherspoon a "deal" in exchange for information regarding Mr. Bailey is an "omission." The omission of facts material to a magistrate's determination of probable cause constitutes a misrepresentation or a misstatement because it interferes with the ability of the magistrate to consider the "totality of circumstances," as required by Illinois v. Gates, 462 U.S. 213 (1983). The 10th Circuit described this concept in the case of Stewart v. Donges 915 F.2d 572, 582 - 583 (C.A.10 (N.M.) 1990), as follows:

Prior to the time of plaintiff's arrest in this case, the Tenth Circuit had not addressed whether the standards of *Franks* governed omissions as well as affirmative misstatements. However, several of the other circuits had indicated that the "deliberate falsehood" and "reckless disregard" standards of *Franks* applied to material omissions, as well as affirmative falsehoods. *See, e.g., United States v. Ippolito*, 774 F.2d 1482, 1486-87 n. 1 (9th Cir.1985); *Olson v. Tyler*, 771 F.2d 277, 281 n. 5 (7th Cir.1985) ("The *Franks* rationale applies with equal force where police officers secure a warrant through the intentional or reckless *omission*

of material facts.” (emphasis in original)); *United States v. Ferguson*, 758 F.2d 843, 848 (2d Cir.) (“Omissions from an affidavit that are claimed to be material are governed by [*Franks v. Delaware*], *cert. denied*, 474 U.S. 841, 106 S.Ct. 124, 125, 88 L.Ed.2d 102 (1985); *United States v. Williams*, 737 F.2d 594 (7th Cir.1984) (“[w]e acknowledge that the rationale of *Franks* applies to omissions”) (cases cited), *cert. denied*, 470 U.S. 1003, 105 S.Ct. 1354, 1355, 84 L.Ed.2d 377 (1985); *United States v. Johnson*, 696 F.2d 115, 118 (D.C.Cir.1982) (“the reasoning of *Franks* ‘logically extends ... to material omissions’ ” (quoting 2 W. LaFave, *Search and Seizure* § 4.4 (Supp.1982))); *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 959 (11th Cir.1982); *United States v. Martin*, 615 F.2d 318, 328 (5th Cir.1980) (“allegations of material omissions [are] to be treated essentially similarly to claims of material misstatements”). Therefore, we hold that at the time defendant submitted his affidavit and arrested plaintiff, it was a clearly established violation of plaintiff’s Fourth and Fourteenth Amendment rights to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause.

Federal courts have held that facts undermining an informant’s credibility should be related to the magistrate issuing the search warrant so that he might adequately assess credibility under *Franks*. *See, e.g., U.S. v. Rule*, 594 F.Supp. 1223 (D. Ma. 1984); *U.S. v. Reivich*, 610 F.Supp. 538 (W.D. Mo. 1985) [officer’s omission from affidavit of the “deal” offered to his informants constituted “reckless disregard” for truthfulness]; *State v. Van Pieteron*, 550 So.2d 1162 (Fla. App. 1989) [failure to advise issuing magistrate of “deal” with CI, or inconsistency of his stories implicating the accused].

Under *Franks*, when a statement is held to be made with reckless disregard for the truth, the affidavit’s false material is set to one side, and the remaining content is tested for probable cause. *Id.* at 156. This procedure is unworkable for an omission, however, so instead of setting the material to the side, the omitted truths are inserted, and probable cause is then tested. *Stewart v. Donges*, 915 F.2d 572, 583.

After removing (1) the information gleaned from 205 Mohawk Blvd. that Mr. Bailey “lived alone” at 2304 North Boston Place, and (2) the affidavit testimony of

Officer Muse that he witnessed Mr. Bailey opening the door of 2304 North Boston Place, and inserting (3) a statement that Officer Muse obtained information from Ms. Witherspoon by offering her a "deal" to avoid arrest, it is clear that the affidavit was inadequate. The Magistrate, therefore, was not given the opportunity to assess probable under the "totality of the circumstances."

Other Evidence of Reckless Disregard

Even without the inclusion of information regarding the "deal" struck between Officer Muse and Ms. Witherspoon, so many other false statements, or statements made with reckless disregard for the truth are present in the affidavit that probable cause for a search could not possibly have existed.

The affidavit begins with statements regarding informant Felicia Witherspoon. It states that officers came into contact with her, that she has prior arrests, that she was at 2304 North Boston Place within the past 72 hours with a man named "Pooh", that she watched Mr. Bailey sell a quarter of an ounce of crack cocaine to "Pooh", that she shared the crack cocaine with "Pooh", that she has been going to 2304 North Boston place with "Pooh" for several months to purchase crack, that "Ojo" Bailey is around 5 feet 10 inches tall, with light skin and braided hair, weighing around 160-180 pounds, that "Ojo" lives at the residence where he distributes crack, that the residence is constructed of brick, that after "Pooh" purchases crack from "Ojo", he cuts it into smaller rocks and sells them on the East Side of Tulsa, and that on November 24, 2007, she rode with "Pooh" to the residence and watched him buy a quarter of an ounce of crack cocaine from "Ojo." The

affidavit further states that Ms. Witherspoon then drove the officers to 2304 North Boston Place and pointed to a tan brick house with a brown shingle roof. (*Attachment 1*).

Each and every one of these statements by Officer Muse is either a false statement or a statement made with reckless disregard for the truth. To begin with, Ms. Witherspoon herself has testified that she never came into contact with *any* Tulsa police officers during Thanksgiving weekend of 2007. She is certain of this, because she had a felony warrant outstanding, and any police officer would have arrested her. She testified to this at the suppression hearing, and Larry Edwards, the attorney who represented Mr. Bailey on state court charges, also corroborated her testimony. Even the two officers who allegedly encountered Ms. Witherspoon gave conflicting stories under oath, with Officer Muse stating that she was stopped for a "pedestrian check" and Officer Snow stating that she must have had some sort of pedestrian violation.¹⁸

Furthermore, the timeline during which Officer Muse conceivably could have encountered Ms. Witherspoon while conducting the surveillance he claims to have conducted over the previous 72 hours is impossible. Officer Muse claims that Ms. Witherspoon told him she witnessed a buy at 2304 North Boston Place on November 24, 2007, at 6:00 p.m. He has also testified, however, that he encountered Ms. Witherspoon on his shift, which begins at 4:00 p.m., on either November 24 or November 25, 2007. He further testified, and swore under oath in his affidavit, that he observed the house located at 2304 North Boston Place for 72 hours after speaking with Ms. Witherspoon.

¹⁸ Both officers point to an outstanding warrant and drug paraphernalia on Ms. Witherspoon's person, however neither of these pieces of information would have been know at the time the initial stop was made, since the officers did not know her name yet, and the crack pipe she was allegedly carrying was concealed.

Given that the affidavit was executed on November 26, 2007, at 3:05 p.m., all of these activities could not possibly have occurred during a 72 hour period.

Additionally, the person repeatedly identified only as "Pooh" in this affidavit has never been identified by a proper name or charged, and has never been called to testify in conjunction with this case. Also, while Ms. Witherspoon admittedly knows Mr. Bailey as "Ojo" because he previously worked at a convenience store she frequented, she clearly never identified him on this night, because the description allegedly taken by Officer Muse is wrong. Officer Muse's notes from that night contain a reference only to someone name "Old Joe," who is "40-50 years old" and weighs only 160 to 180 pounds. Mr. Bailey was in his early thirties at this time, and weighed 220 pounds. (*Attachment 4*).

Reports are also clearly lacking with regard to Ms. Witherspoon. There are no police reports, other than Officer Muse's little spiral notebook, from the conversations with her. A TRACIS report was run on Ms. Witherspoon, but it was run by Officer Muse at 5:02 p.m on November 25, 2007, (*Attachment 5* at 64-66). This means that, if Ms. Witherspoon indeed witnessed a drug sale at 6:00 p.m, it would have had to have occurred on November 24, 2007. If the officers did not encounter Ms. Witherspoon, then, until November 25, 2007. It is questionable, therefore, how they were able to conduct surveillance for 72 hours, as Officer Muse asserts in the affidavit.

Additionally, Ms. Witherspoon was a known crack addict with 11 prior convictions. The government wishes to rely upon her as an informant, when she was abusing drugs and would say anything to avoid arrest, yet when she came to court, from a drug rehabilitation program, (*Attachment 5* at 29-53), sober, to testify that she never

witnessed a drug purchase involving Mr. Bailey, they assert her testimony is unbelievable. It cannot cut both ways. Either Ms. Witherspoon is reliable or she is not.

At the time Officer Muse alleges to have encountered Ms. Witherspoon, she had a felony warrant outstanding against her. *If* the officers encountered her on the street, they were *commanded* to arrest her, as discussed above. They had no discretion otherwise. And what happened with the crack pipe Ms. Witherspoon was allegedly carrying, or the baggie which appeared to contain drug residue? It was never collected by the officers, and it was never turned into the evidence room. Again, this scenario is implausible.

Officer Muse goes on to state in his affidavit, and to testify at the suppression hearing, that Ms. Witherspoon directed the officers to a house located at 2304 North Boston Place. Officers Muse and Snow have conflicting stories regarding how this occurred, however. Officer Muse claims to have attempted to intentionally mislead Ms. Witherspoon while she was allegedly directing the officers to the house. Officer Snow, on the other hand, testified that Ms. Witherspoon directed the officers to the house, "the best she could."

Officer Muse's affidavit continues by describing a records check on 2304 North Boston Place which revealed that Mr. Bailey listed it as his address with the Tulsa Police Department. The affidavit describes a TRACIS description of Mr. Bailey and his alias - "Ojo". The affidavit then describes the 205 Mohawk Blvd. encounter. (*Attachment 1*).

These statements are also either false, made with reckless disregard for the truth, or inadmissible and therefore purged from the affidavit. While a records check would likely have revealed 2304 North Boston Place as a former residence of Mr. Bailey, the

physical description, as mentioned above, no longer matches him. In addition, this statement relies heavily on the aforementioned 205 Mohawk Blvd. encounter, which *both* Magistrate Cleary and Judge Payne excluded from their consideration.

The affidavit goes on to describe a utilities check, which allegedly returned Genevieve Bailey - Mr. Bailey's mother - as the person responsible for the bills at the residence. Again making reference to 205 Mohawk Blvd., Officer Muse relays that Mr. Bailey told him that he is the "sole occupant" of the house. (*Attachment 1*).

To begin with, while *some* of the utilities at 2304 North Boston Place may have been in the name of Genevieve Bailey, it was revealed at trial that the electric and gas accounts were in the name of Melvin Bailey, Jr. Also, with regard to the so-called "consensual encounter" with Mr. Bailey at 205 Mohawk Blvd., which is excluded anyway, it is more than unlikely that a person would ever tell the police, "I am the sole occupant of 2304 North Boston Place," especially since it has already been established that Fred Chappelle was residing at 2304 North Boston Place at the time.

The affidavit continues by describing surveillance that was allegedly conducted on the premises during the previous 72 hours and mentioning the presence of out-of-state vehicles parked in the driveway. It states that the affiant *witnessed* Mr. Bailey allowing pedestrian traffic into the house. The affidavit then describes a telephone conversation between Officer Muse and Officer Jeff Henderson during which Officer Henderson told him that he had conducted various narcotics investigations on Mr. Bailey. (*Attachment 1*).

No one even bothered to run the license plates of these many alleged "out-of-state vehicles" frequenting 2304 North Boston Place. Like the encounter at 205 Mohawk

Blvd., there are also no police reports from the surveillance allegedly conducted. This was Thanksgiving weekend 2007, and Mr. Bailey resided, at one time, with his family in Texas. (*Attachment 4*). It is not unexpected, therefore, that there would be Texas license plates on cars in the driveway on this particular weekend. Officer Muse himself testified at the suppression hearing that he actually did not physically see Mr. Bailey open the door of 2304 North Boston Place, (*Attachment 5*), which is likely why there is so much reference in the affidavit about him being the "sole occupant." And ultimately, we return to where this brief began - a statement of Officer Jeff Henderson, who never wanted to allow Mr. Bailey to escape his past in the first place. He had no personal knowledge whatsoever regarding the facts surrounding this particular case, yet put his two cents into the affidavit to bolster an otherwise weak showing of probable cause.

The fact that Ms. Witherspoon acted under duress, allegedly providing information in exchange for freedom is a critical omission which should be inserted into the affidavit. Even without it, however, the affidavit is critically lacking. The affidavit pursuant to which 2304 North Boston Place was searched contains so many false statements and/or statements made with reckless disregard for the truth that no warrant upon probable cause should ever have been issued.

THE DISTRICT COURT IMPROPERLY ADMITTED THE VOICE IDENTIFICATION TESTIMONY OF OFFICER JEFF HENDERSON

At trial, Officer Jeff Henderson was permitted to testify that he had an encounter with an informant, who was under arrest at the time, during which the informant allegedly called Mr. Bailey to arrange a "drug buy." (v. 2, doc. 85 at 304-306). Officer

Henderson testified that he recognized Mr. Bailey's voice on the other end of the telephone line, even though (1) the phone call was heard over the speaker of a cellular telephone, (2) Officer Henderson had not spoken with Mr. Bailey in at least six years, and (3) Mr. Bailey was incarcerated at the time the telephone call was actually made. (*Attachment 4*). This telephone call was never recorded. Furthermore, Officer Henderson is not a voice recognition specialist, and it is utterly implausible that a person could specifically recognize a voice that he had not heard in at least six years. While Officer Henderson relied on the informant's assertion to him that he was indeed placing a call to Mr. Bailey, the number was never cross-referenced and no attempt was made to confirm that Mr. Bailey's telephone number was indeed the one called. While a lay witness need only be minimally familiar with a defendant's voice before offering an identification, U.S. v. Parker, 551 F.3d 1167 (C.A.10 (Kan.) 2008), Officer Henderson's last encounter with Mr. Bailey was so remote in time in comparison with the instant action that his familiarity with Mr. Bailey's voice could not even be described as minimal.

This case is particularly problematic because it involves an investigation which admittedly never culminated in an arrest. Mr. Bailey was never charged as a result of this alleged "buy". In addition, Mr. Bailey was not afforded the opportunity to confront the informant who allegedly placed the call. Pursuant to Fed. Rules of Evid. § 404(b), the evidence must be related to proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evidence of this phone call does not reliably fall within any of these criteria, and therefore it was erroneously admitted at trial. Even if it were found to be relevant, it is too remote in time, and therefore more

prejudicial than probative under the Fed. Rules of Evid. § 403 balancing test. It should have been excluded. The fact that it was not constitutes plain error.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the complex issues presented by this case, counsel believes the Court's decisional process will be aided by oral argument.

CONCLUSION

Mr. Bailey is a reformed man, who was attempting to do good things in his life. He no longer even resided at 2304 North Boston Place on a permanent basis, instead spending the nights with his girlfriend, Tiara Crawford. Because he did not stay there often, he was neighborly, and allowed a friend who was down on his luck and going through a bad divorce to live there. His neighbor, Mr. Chapelle, actually initially wanted to testify at trial that the drugs that were eventually discovered at 2304 North Boston Place were his, not Melvin Bailey's, but thanks to the announcement by Mr. Bailey's counsel that he would be introducing this evidence, the government threatened Mr. Chapelle, and his public defender eventually dissuaded him.

Setting aside any reference to Mr. Chapelle, the affidavit upon which the search warrant in this case was issued failed to meet the Franks standard. It was fraught with false statements, statements made with reckless disregard for the truth, and obvious omissions. Under the totality of the circumstances test, therefore, the affidavit and resulting search warrant fail.

Finally, the reemergence of Officer Henderson as a "player" in this case is regretful. He had no specific involvement in this investigation, yet he was permitted to

inform upon the affidavit upon which the warrant was issued. He was also permitted to insert his "two cents" with regard to the telephone call discussed above. Officer Henderson's testimony should clearly have been excluded.

After making the adjustments to the affidavit which are required by law, as discussed herein, and excluding Officer Henderson's irrelevant and prejudicial testimony, it is clear that the residence located at 2304 North Boston Place was searched without probable cause, and Mr. Bailey has been wrongfully convicted.

Mr. Bailey's sentence should be reversed, and his case remanded to the district court for proceedings consistent with the exclusion of previously admitted evidence.

Respectfully submitted,

KEVIN ADAMS
DORIE CHRISTIAN
Attorneys for Defendant-Appellant

By: KEVIN ADAMS

By: DORIE CHRISTIAN

By: /S/ Kevin Adams
Attorney for Defendant-Appellant
Melvin Bailey, Jr.
406 S. Boulder, Suite 400
Tulsa, Oklahoma 74103
(918)582-1313
kadams@lawyer.com

By: /S/ Dorie Christian
Attorney for Defendant-Appellant
Melvin Bailey, Jr.
19906 E. 45th Street
Broken Arrow, Oklahoma 74014
(918)260-9837
DorieC25@aol.com

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Dorie Christian
Attorney for Defendant-Appellant
Melvin Bailey, Jr.

By: /S/ Dorie Christian
Attorney for Defendant-Appellant
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Dorie Christian
Attorney for Defendant-Appellant
Melvin Bailey, Jr.

By: /S/ Dorie Christian _____
Attorney for Defendant-Appellant
(Digital)

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I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF** was furnished by U.S. Mail to the following on this the _____ day of April, 2009:

Leena Alam
Assistant United States Attorney
110 West Seventh Street, Suite 300, Tulsa, OK 74119-1013
leena.alam@usdoj.gov

Additionally, on the same date, a copy of the digital submission in electronic form was emailed to Assistant United States Attorney Leena Alam at: leena.alam@usdoj.gov.

By: _____
Dorie Christian
Attorney for Defendant-Appellant
Melvin Bailey, Jr.

By: /S/ Dorie Christian
Attorney for Defendant-Appellant
(Digital)