IN THE DISTRICT COURT OF BRYAN COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA	§	
	§	
V.	§	Case No. CM-09-941
	§	
PRASHAN SHAKYA	§	

AGREED MOTION TO VACATE PLEA

The parties hereto request the Court vacate the Defendant's guilty pleas entered December 17, 2009 and show the following.[1] While the cases has been dismissed and expunged, the guilty pleas remain. The vagaries of federal immigration law preclude Defendant from obtaining certain immigration status that a vacating of the plea will resolve.

The State of Oklahoma is in agreement with this prayer for relief and has executed a proposed agreed order which accompanies the presentment of this motion for the Court's consideration and entry.

History

Arrested in the same car on October 19, 2009, Southeast Asian students Prashan Shakya [Defendant] and James Subedi were charged in separate two-count informations on October 20, 2009 with misdemeanor possession of marijuana and paraphernalia. **Bates 001-004.** Each was sentenced to concurrent one [1] year deferred adjudications on each count on December 17, 2009. **Bates 005-006**. Defendant's probation was discharged and

[1] Because this case was deferred and expunged, the records may no longer be readily accessible to this Court. Accordingly, they are attached for the Court's convenience.

the Court ordered his case dismissed and expunged December 17, 2010; Mr. Subedi received the same disposition months later. **Bates 007-008.**

Importantly, this Court entered its *Order Vacating Plea* for Mr. Subedi on December 27, 2018. **Bates 009.** This order succeeded in Mr. Subedi obtaining permanent residency. Defendant seeks the same relief from this Court now.

Factual background

This was a simple traffic stop and CDS recovery *via* warrantless search. Subedi was driving a rental car. Defendant was in the front passenger seat. The arresting officer smelled marijuana and effected a warrantless search. Contraband was found in the console between the two front seats. None was recovered from Defendant's person.

Argument and Authority

First, neither man was afforded counsel. **Bates 005-006.** As a result, Defendant was unaware of Oklahoma's deep "mere proximity" jurisprudence that would have been reasonably urged. *Second*, no reporter made a record of the arraignment or the plea and sentencing. **Bates 005-006.** *Finally*, Mr. Shakya seeks equal protection of the law. That is, he seeks merely the outcome Mr. Subedi enjoys: vacation of the guilty pleas. This outcome is consistent with state and federal due process and equal protection law.

An accused has the unconditional and absolute right to counsel in any felony or misdemeanor proceeding. *Mahorney v. State,* 542 P.2d 965, 966 (Okl.Cr. 1975).

> The right to counsel may, however, be waived, but the record must show, or there must be an allegation and evidence which shows, that the accused intelligently and understandingly waived right to counsel. This record is mandatory. Anything less is not a waiver. *Lineberry v. State,* 668 P.2d 1144, 1145 (Okl.Cr. 1983). *Stevenson v. State,* 702 P.2d 371, 374-75 (Okl.Cr. 1985). **The Court of Criminal Appeals cannot and will not presume waiver from a silent record.** *Daffinrud v. State,* 647 P.2d 443, 444 (Okl.Cr. 1982). *Mahorney, supra* at 968. [***4] *Stewart, supra* at

836. *See also Carnley v. Cochran,* 369 U.S. 506, 516, 82 S. Ct. 884, 890, 8 L. Ed. 2d 70 (1962).

[*P6] Before an accused may represent himself or herself, the intention to proceed pro se must be stated unequivocally. The trial court is then required to determine whether the accused has the capacity to make a valid waiver of right to counsel. Next, the court must examine the defendant and determine whether the waiver is voluntary, knowing and intelligent. *Coleman v. State,* 617 P.2d 243, 245-46 (Okl.Cr. 1980).

> The trial judge must clearly explain to the defendant the inherent disadvantages in such a waiver, including a lack of knowledge and skill as to rules of evidence, procedure and criminal law. The record must establish that 'he knows what he is doing and his choice is made with eyes open.' The defendant should be especially aware of the rules promulgated in *Parker v. State* [556 P.2d 1298 (Okl.Cr. 1976)] . . . . as follows: that the trial court is not required to appoint standby counsel, that the defendant will waive any argument of incompetent counsel as a basis of appeal, and that the trial judge will not effectively operate as counsel or cocounsel [***5] for the defendant. It is noteworthy, however, that this Court maintains the position that the preferable choice for the trial court is that standby counsel be appointed.
>
> *Id.* at 246 (citations omitted).

As previously mentioned, it is incumbent upon the trial court to make a record of these proceedings, and all doubts concerning waiver of right to counsel must be resolved in the accused's favor. *United States v. Williamson,* 806 F.2d 216, 220 (10th Cir. 1986). *See also United States v. Harlan,* 696 F.2d 5, 7 (1st Cir. 1982).

Swanegan v. State, 1987 OK CR 180, P5-P6 [***Emphases added].***

Conclusion

The failure to report the proceedings and provide the Defendant counsel is a recognized privation of state and federal law. His plea was not the knowing, intelligent and voluntary plea these authorities guaranty. Consistent with *Swanegan*, Mr. Shakya respectfully urges the Court extend him the same outcome the identically situated Mr.

Subedi achieved in this honorable Court and vacate his guilty plea *instanter* and if not *instanter* then set hearing hereon.

TABLE OF AUTHORITIES

1. *Mahorney v. State,* 542 P.2d 965, 966 (Okl.Cr. 1975).
2. *Swanegan v. State*, 1987 OK CR 180, P5-P6
3. U.S. Constitution, Amendments V, VI and XIV.
4. Oklahoma Constitution Article II, Sections 7, 20 and 36.

Respectfully submitted,

___*/s/ G. Donald Haslam, Jr.*____
G. Donald Haslam, Jr., TBA # 24071792, OBA #17873
The Haslam Law Firm, PLLC
3839 McKinney Avenue, S 155 PMB 2522
Dallas, TX 75204
(214) 643-6193 Dallas
(918) 322-1400 Tulsa
(855) 221-7780 Toll Free
(214) 599-9192 FAX
dhaslam@uchicago.edu
Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that on April 3, 2023 a true and exact copy of the foregoing was delivered to the office of the Bryan County District Attorney.

/s/ G. Donald Haslam, Jr.
G. Donald Haslam, Jr.

FILED
BRYAN COUNTY, OKLAHOMA
DISTRICT COURT CLERK

OCT 20 2009

SANDY STROUD
COURT CLERK
BY: _____ Deputy

IN THE DISTRICT COURT OF THE NINETEENTH JUDICIAL DISTRICT OF THE STATE OF OKLAHOMA SITTING IN AND FOR BRYAN COUNTY

THE STATE OF OKLAHOMA,
Plaintiff,

vs.

PRASHAN SHAKYA

ADDR: 4530 W Pioneer Dr #464
Irving , TX 75038
SSN:
DOB: 12/31/87

Defendant(s),

Case No. CM-2009-941

INFORMATION

FOR:

COUNT 1: POSSESSION OF CONTROLLED SUBSTANCE, Marijuana~ 63 O.S. § 2-402 a MISDEMEANOR

COUNT 2: UNLAWFUL POSSESSION OF DRUG PARAPHERNALIA~ 63 O.S. § 2-405 a MISDEMEANOR

STATE OF OKLAHOMA, COUNTY OF BRYAN:

I, **Emily Redman**, the undersigned District Attorney of said County, in the name and by the authority, and on behalf of the State of Oklahoma, give information that in said County of Bryan and in the State of Oklahoma, **PRASHAN SHAKYA**, did then and there unlawfully, willfully, knowingly and wrongfully commit the crime(s) of:

COUNT 1 POSSESSION OF CONTROLLED SUBSTANCE, Marijuana ~ a MISDEMEANOR, on or about the 19th day of October, 2009, by knowingly and intentionally having in defendant's possession under defendant's control Marijuana said drug being classified as a controlled dangerous substance in Schedule I(c) of the Uniform Controlled Dangerous Substances Act of Oklahoma

This crime is punishable by imprisonment up to 1 year.

COUNT 2 UNLAWFUL POSSESSION OF DRUG PARAPHERNALIA~ a MISDEMEANOR, on or about the 19th day of October, 2009, by possessing *Rolling Papers* which is used by abusers of drugs classified as Controlled Dangerous Substances and without having any medical or other lawful need requiring possession of said paraphernalia.

The crime is punishable by imprisonment for up to 1 year or, a fine of up to $1,000 or both.

EMILY REDMAN
DISTRICT ATTORNEY

By: _____
Assistant District Attorney

Subscribe and sworn to before me this 20th day of October, 2009.

_____
NOTARY PUBLIC

KELLY BRASHIER NOTARY #08003462 PUBLIC STATE OF OKLAHOMA

My Commission expires: 03-25-2012
08003462

WITNESSES ENDORSED FOR THE STATE OF OKLAHOMA

Michael Graham, COLBERT POLICE DEPARTMENT
John Butler, COLBERT POLICE DEPARTMENT
O.S.B.I. Chemist, OSBI

FILED
BRYAN COUNTY, OKLAHOMA
DISTRICT COURT CLERK

IN THE DISTRICT COURT OF THE NINETEENTH JUDICIAL DISTRICT OF
THE STATE OF OKLAHOMA SITTING IN AND FOR BRYAN COUNTY

OCT 20 2009

SANDY STROUD
COURT CLERK
BY _____ Deputy

THE STATE OF OKLAHOMA,
Plaintiff,

vs.

JAMES SUBEDI

ADDR: 1305 Meadow creek Dr #310
Irving, TX 75038
SSN:
DOB: 05/19/87

Defendant(s),

Case No. CM-2009-940

INFORMATION

FOR:

COUNT 1: **POSSESSION OF CONTROLLED SUBSTANCE, Marijuana~ 63 O.S. § 2-402 a MISDEMEANOR**

COUNT 2: **UNLAWFUL POSSESSION OF DRUG PARAPHERNALIA~ 63 O.S. § 2-405 a MISDEMEANOR**

STATE OF OKLAHOMA, COUNTY OF BRYAN:

I, **Emily Redman**, the undersigned District Attorney of said County, in the name and by the authority, and on behalf of the State of Oklahoma, give information that in said County of Bryan and in the State of Oklahoma, **JAMES SUBEDI**, did then and there unlawfully, willfully, knowingly and wrongfully commit the crime(s) of:

COUNT 1 POSSESSION OF CONTROLLED SUBSTANCE, Marijuana~ a MISDEMEANOR, on or about the 19th day of October, 2009, by knowingly and intentionally having in defendant's possession under defendant's control Marijuana said drug being classified as a controlled dangerous substance in Schedule I(c) of the Uniform Controlled Dangerous Substances Act of Oklahoma

This crime is punishable by imprisonment up to 1 year.

COUNT 2 UNLAWFUL POSSESSION OF DRUG PARAPHERNALIA~ a MISDEMEANOR, on or about the 19th day of October, 2009, by possessing *Rolling Papers* which is used by abusers of drugs classified as Controlled Dangerous Substances and without having any medical or other lawful need requiring possession of said paraphernalia.

The crime is punishable by imprisonment for up to 1 year or, a fine of up to $1,000 or both.

EMILY REDMAN
DISTRICT ATTORNEY

By: _____
Assistant District Attorney

Subscribe and sworn to before me this 20th day of October, 2009.

_____
NOTARY PUBLIC

KELLY BRASHIER NOTARY #08003462 PUBLIC STATE OF OKLAHOMA

My Commission expires: 03-25-2012
08003462

WITNESSES ENDORSED FOR THE STATE OF OKLAHOMA

Michael Graham, COLBERT POLICE DEPARTMENT
John Butler, COLBERT POLICE DEPARTMENT
O.S.B.I. Chemist, OSBI

IN THE DISTRICT COURT OF BRYAN COUNTY, STATE OF OKLAHOMA

COURT MINUTE

STATE OF OKLAHOMA,
PLAINTIFF

VS. **CASE NO: CM-09-00941**

PRASHAN SHAKYA,
DEFENDANT

FILED
BRYAN COUNTY, OKLAHOMA
DISTRICT COURT CLERK
DEC 17 2009
SANDY STROUD
COURT CLERK
BY _____ Deputy

Date : December 17, 2009 Clerk: _____

Judge: TC Sherrill Court Reporter: _____

State appears by Matt Stubblefield.

Defendant appears: X pro se in open court.
____ w/attorney _____.

Case comes on for: ____disposition X plea..

____ Case set for plea _____ at _____.

____ _____.

____ Defendant called three times in court and corridor and fails to appear. Court orders bench warrant and bond forfeiture to issue. Bond set at $_____.

X Defendant advised of all rights, waives and enters a plea of Guilty.
Court finds defendant competent, factual basis and accepts plea,

X Upon recommendation of D. A., judgment and sentence is as follows: Ct. 1 - 1yr Deferred
Ct. 2 - 1yr Deferred

Conditioned upon: Ct. 1 - $150 lab fee, & Court Costs
Ct. 2 - $500 fine, $50 DTF assessment paid to DA's office w/in 30 days of Plea & Court Costs
1yr Supervised Probation by DA Office

Defendant to obey all laws and report to cost administrator _____ and comply with instructions.
Defendant advised of right to withdraw plea. Bond exonerated.

_____
Judge

cc: District Attorney
Defendant's attorney (if applicable)

IN THE DISTRICT COURT OF BRYAN COUNTY, STATE OF OKLAHOMA

COURT MINUTE

STATE OF OKLAHOMA,
PLAINTIFF

VS.

CASE NO: CM-09-00940

JAMES SUBEDI,
DEFENDANT

FILED
BRYAN COUNTY, OKLAHOMA
DISTRICT COURT CLERK
DEC 17 2009
SANDY STROUD
COURT CLERK
BY _____ Deputy

Date : December 17, 2009 Clerk: _____

Judge: TC Sherrill Court Reporter: _____

State appears by Matt Stubblefield.

Defendant appears: X pro se in open court.
____ w/attorney _____.

Case comes on for: ____disposition X plea..

____ Case set for plea _____ at _____.

____ _____.

____ Defendant called three times in court and corridor and fails to appear. Court orders bench warrant and bond forfeiture to issue. Bond set at $_____.

X Defendant advised of all rights, waives and enters a plea of Guilty.
Court finds defendant competent, factual basis and accepts plea,

X Upon recommendation of D. A., judgment and sentence is as follows: Ct. 1 - 1 yr Deferred
Ct. 2 - 1 yr Deferred

Conditioned upon: Ct. 1 - $150 Lab Fee & Court Costs
Ct. 2 - $500 fine, $50 DTF assessment paid to DA's office w/in 30 days of plea & Ct. Costs.
TR-09-2257 dismissed w/o costs due to Con plea
1 yr Supervised Probation by DA's office

Defendant to obey all laws and report to cost administrator _____ and comply with instructions.
Defendant advised of right to withdraw plea. Bond exonerated.

_____
Judge

cc: District Attorney
Defendant's attorney (if applicable)

IN THE DISTRICT COURT OF BRYAN COUNTY, STATE OF OKLAHOMA

STATE OF OKLAHOMA

Plaintiff(s)

Case No. CM-2009-00941

--vs--

PRASHAN SHAKYA

Defendant(s)

FILED
BRYAN COUNTY, OKLAHOMA
DISTRICT COURT CLERK

DEC 17 2010

SANDY STROUD
COURT CLERK

BY _____ Deputy

COURT MINUTE

DATE: 12/17/2010

CM: COURT FINDS DEF HAS COMPLETED CONDITIONS OF DEFERRED SENTENCE. COURT ORDERS CASE DISMISSED AND EXPUNGED. TS

Trace Sherrill

JUDGE

IN THE DISTRICT COURT OF BRYAN COUNTY, STATE OF OKLAHOMA

STATE OF OKLAHOMA

Plaintiff(s)

--vs--

JAMES SUBEDI

Defendant(s)

Case No. CM-2009-00940

FILED
BRYAN COUNTY, OKLAHOMA
DISTRICT COURT CLERK

APR 28 2011

SANDY STROUD
COURT CLERK
BY _____ Deputy

COURT MINUTE

DATE: 04/28/2011

CM: COURT FINDS DEF HAS COMPLETED CONDITIONS OF DEFERRED SENTENCE. COURT ORDERS CASE DISMISSED AND EXPUNGED. TS

Trace Sherrill

JUDGE

FILED
BRYAN COUNTY, OKLAHOMA
DISTRICT COURT CLERK

DEC 27 2018

DONNA ALEXANDER
COURT CLERK
BY _____ Deputy

IN THE DISTRICT COURT OF BRYAN COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CM-2009-940
	)	
JAMES SUBEDI,	)	
	)	
Defendant.	)	

ORDER VACATING PLEA

Now, on this 27 day of December, 2018, matter comes on for Motion to Vacate Plea, the Court considers the same and orders as follows:

Defendant's plea of guilty entered December 17, 2009, to the misdemeanor charges of Possession of Controlled Substance – Marijuana and Possession of Paraphernalia are hereby VACATED and set aside as the plea was unknowing and involuntary.

It is further ordered that the above charges are dismissed for insufficient factual basis and in the interests of justice.

IT IS SO ORDERED.

Tracy Sheriff
JUDGE OF THE DISTRICT COURT

Approved as to form:

Thomas Marcum
Attorney for Defendant

Emily Redman
District Attorney